

**CONFIRMATION HEARINGS ON FEDERAL  
APPOINTMENTS**

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**HEARINGS**

BEFORE THE

**COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE**

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

APRIL 30, MAY 7, MAY 22, JUNE 25, AND JULY 9, 2003

**Serial No. J-108-1**

**PART 3**

Printed for the use of the Committee on the Judiciary



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**NOMINATIONS OF JOHN G. ROBERTS, JR., OF MARYLAND, NOMINEE TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT; DAVID G. CAMPBELL, OF ARIZONA, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF ARIZONA; S. MAURICE HICKS, JR., OF LOUISIANA, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF LOUISIANA; AND WILLIAM EMIL MOSCHELLA, OF VIRGINIA, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AFFAIRS, DEPARTMENT OF JUSTICE**

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**WEDNESDAY, APRIL 30, 2003**

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

The Committee met, pursuant to notice, at 10:09 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Leahy, Kennedy, Feingold, Schumer, and Durbin.

Chairman HATCH. Good morning. I am happy to welcome to the Committee four outstanding nominees. We will consider three judicial nominees: John Roberts for the District of Columbia Circuit; David Campbell for the District of Arizona; and Maury Hicks for the Western District of Louisiana. We will also hear from Will Moschella, who has been nominated to be Assistant Attorney General for the Office of Legislative Affairs at the Department of Justice.

Now, I think if it is all right with you, Senator Leahy, why don't we defer our statements until our colleagues testify so we can save them time. I apologize for being just a little bit late, but I just couldn't get through with the meetings in my office this morning.

Senator LEAHY. Especially with such a distinguished trio, of course, we should do that.

Chairman HATCH. Well, all right. I think if we can, then, why don't we turn to Senator Warner first, then Senator Breaux, and

then Hon. Jim McCreery. We welcome you here as well. We welcome all three of you and appreciate having you here.

Senator Warner?

**PRESENTATION OF WILLIAM EMIL MOSCHELLA, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AFFAIRS, DEPARTMENT OF JUSTICE, AND JOHN G. ROBERTS, JR., NOMINEE TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA, BY HON. JOHN WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA**

Senator WARNER. Thank you, Mr. Chairman.

First, on behalf of my distinguished colleague, George Allen, I will ask that the record accept his statement. He is unavoidably detained this morning.

Chairman HATCH. Without objection.

Senator WARNER. So I shall proceed on behalf of both of us in expressing my privilege to be here to introduce William Moschella, who has been nominated to serve as Assistant Attorney General for Legislative Affairs at the Justice Department. He is joined today by his lovely family, including his wife Amy, his daughter Emily, his son Matthew, and his parents. They are right in the front row. If you all would stand and be recognized? Now is your chance. There we are.

Chairman HATCH. Well, we welcome all of you. We welcome you all, and we are grateful to have you here.

Senator WARNER. This candidate's distinguished background makes him highly qualified, I say to our distinguished Chairman and distinguished ranking member, to be in this position.

Subsequent to earning his law degree from George Mason University Law School, he served as a legislative assistant in the office of my fellow delegation colleague, Congressman Frank Wolf. After leaving the Congressman's office, he held positions in the House Government Reform Committee, House Rules Committee, and several positions in the House Judiciary Committee. At present, he serves as chief legislative counsel for the House Judiciary Committee.

Mr. Chairman, he is obviously a very accomplished individual, and he served a large portion of his career in public service, well qualified I am certain; therefore, he will serve in this position with distinction, reflecting credit upon our President and this institution, the Congress which he has served these many years.

Now, Mr. Chairman, I should like to say a few words on behalf of Mr. Roberts. This is my second appearance on behalf of this distinguished individual, and I must say in my 25 years in the Senate, I do not believe I have ever done this before. But at the invitation of the Chair, I will appear over and over again, be it necessary, on behalf of this individual because I personally and, if I may say, professionally feel very strongly about this nominee.

He has been nominated for a position on the United States Circuit Court of Appeals for the District of Columbia. If I may say, following my graduation from the University of Virginia Law School in 1953, I return this weekend for my 50th reunion, where I am privileged to address my class. But following that, I was privileged to be a law clerk to Judge E. Barrett Prettyman on the United

States Circuit Court of Appeals, the very circuit to which this nominee has been appointed by the President of the United States.

I have a strong knowledge of this circuit, having started my career there 48 years ago, and I feel that this candidate will measure up in every respect to the distinguished members of the circuit that have served in the past and who are serving today. And I urge in the strongest of terms that he be given fair consideration by this Committee and that he will be voted out favorably.

Mr. Chairman and Senator Leahy, we start with he graduated from Harvard College summa cum laude in 1976. Three years later, he graduated from Harvard Law School magna cum laude, where he served as managing editor of the Harvard Law Review. He served as law clerk to Judge Friendly on the United States Court of Appeals for the Second Circuit and worked as law clerk to the current Chief Justice of the Supreme Court of the United States, Hon. Judge Rehnquist.

Also, he has practiced law for over 20 years. He served as associate counsel to President Ronald Reagan, worked as the Principal Deputy Solicitor General of the United States, and has worked as a civil litigator in the firm of Hogan and Hartson, which, I must say, I also served in following my clerkship with Judge Prettyman.

So I do urge upon this Committee, Mr. Chairman, and all members, that the fair consideration that is the duty of the United States Senate under the Constitution under the advise and consent provisions be exercised on behalf of this distinguished nominee.

I thank you for the attention of the Committee, and I wish you well.

Chairman HATCH. Thank you so much, Senator Warner. We appreciate those very strong recommendations.

Senator LEAHY. I was impressed, the 50th reunion, so you graduated at the age of 10?

Senator WARNER. I beg your pardon?

Senator LEAHY. You graduated at the age of 10? I was very impressed, your 50th reunion.

Senator WARNER. No, I was not a child prodigy.

[Laughter.]

Senator WARNER. Nor am I a senior prodigy. I am just one of your fellow Senators.

Senator LEAHY. And a good friend and highly respected on both sides of the aisle, I might add.

Senator WARNER. I thank you.

Chairman HATCH. We are grateful to have you here, Senator Warner. We appreciate that.

Senator Breaux? We will turn to you, Senator Breaux.

**PRESENTATION OF S. MAURICE HICKS, JR., NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF LOUISIANA, BY HON. JOHN BREAUX, A U.S. SENATOR FROM THE STATE OF LOUISIANA**

Senator BREAUX. Thank you, Mr. Chairman and Senator Leahy and Senator Durbin. A tough act to follow our colleague from Virginia.

I am here on behalf of and to speak for Maury Hicks, our friend from Shreveport, Louisiana, who has been nominated to be the dis-

trict judge for the Western District of Louisiana, which is the Shreveport area and the area south of that area. I am joined in spirit by my colleague Senator Mary Landrieu, who will have a statement of support on behalf of Maury Hicks as well.

He is the type of person that I think we can recommend without hesitation. I have always felt that at the district level I would personally rather see a person who is not an author or a scholar or a professor of law in some university but, rather, someone who comes from the day-to-day activities of being a trial lawyer in the area, in the district in which we are nominating them to become a Federal district judge. And that is what we have in Maury Hicks, a person who knows the people as well as knowing the law.

He graduated from Texas Christian university but he later redeemed himself from that mistake by graduating from the LSU Law School, and I think that will overcome any Texas problems that he might have experienced.

[Laughter.]

Senator BREAU. But he has been engaged in the practice of law, like I said, dealing with all types of problems—local problems that go before both the State courts and the Federal courts—since 1977. That is the type of people I think do good jobs on the Federal district bench. They know the law, but they also know the people, and I think he brings that talent.

You might have noted that on the list as one of his organizations is the Mystic Crew of Louisiana. I would just point out to Senator Durbin and to others that might wonder if that is some subterranean terrorist organization from the State of Louisiana, it indeed is not. It is the organization that runs the Mardi Gras celebrations here in Washington for the last 50 years. I happen to serve as captain of the crew, which means Maury Hicks is part of our organization that runs the Mardi Gras. It is a wonderful organization that does great things and has a lot of fun doing it.

He is joined here by his wife, Glynda, and their children, who I am sure he will be introducing later. He is a good choice. I hope that you can vote him out as quickly as we possibly can.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator Breau. We appreciate your comments, and we really appreciate you taking time to come. I think it is an honor to the people that you have recommended. Thank you.

We will be happy to let you go. We know you have—

Senator BREAU. I want to hear if he is for him, too.

Chairman HATCH. Well, Congressman McCrery, we are honored to have you here. We look forward to taking your testimony.

**PRESENTATION OF S. MAURICE HICKS, JR., NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF LOUISIANA, BY HON. JIM MCCRERY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA**

Representative MCCRERY. Thank you, Mr. Chairman, Mr. Leahy, my old friend from the House Senator Durbin. It is nice to be here with you today.

I certainly want to second the comments of my friend and colleague from Louisiana, Senator Breau. I have known Maury Hicks



since Maury was a freshman in law school at LSU and have watched him practice law in my home town of Shreveport for a number of years. And I can tell you without reservation that Maury Hicks is a very well respected member of the bar in Shreveport. He has extensive experience at the bar in court. He is an accomplished litigator. He has with him today his family: his wife Glynda, his children Christy and Tyler. He also has with him some friends from the Shreveport area, and just to show you how well respected Maury is in the bar in Shreveport, he brought with him both defense attorneys and plaintiffs' attorneys, and they are all for him. So I think that will tell you how well respected Maury Hicks is.

Maury is smart. He is honest. He is a hard worker. He is everything I think we want in a Federal district judge. He will be welcomed by the bar in the Western District because I know that Maury will be the kind of judge that lawyers in any part of our country would appreciate. He will work hard. He will get the job done. He will be fair.

And so I recommend without hesitation Maury Hicks as the next Federal judge from the Western District of Louisiana.

Chairman HATCH. Well, thank you, Congressman. We appreciate that. Mr. Hicks certainly has to be very pleased to have both of you come and testify for him. Thank you for being here. We appreciate it.

Representative MCCRERY. Thank you.  
Senator BREAU. Thank you.

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

Chairman HATCH. We will make our statements now. Let me say a few words about our first nominee, John Roberts, who has quite a history as a judicial nominee. He was originally nominated for a seat on the D.C. Circuit more than 11 years ago by the first President Bush, but was never given a hearing and was never confirmed. He was renominated by the current President Bush on May 9, 2001, but he did not receive a hearing in the 107th Congress. He was then renominated for the third time this past January, and all told, he has been nominated by two different Presidents on three separate occasions for the Federal appellate bench over the last 12 years.

The Committee finally held a hearing on Mr. Roberts' nomination on January 29th of this year, and during that marathon hearing, which started at 9:30 a.m. and did not end until approximately 9:30 that night, he answered every question that he was asked in a precise and informative manner. He also answered a myriad written questions submitted to him after the hearing—more than 70, to be precise. The Committee favorably reported his nomination for consideration by the full Senate with bipartisan support. All ten Republican Members of the Committee voted for Mr. Roberts, along with four Democratic Members. However, pursuant to an agreement between the Republican and Democratic Senate leadership, I have asked Mr. Roberts to return for this hearing with the clear understanding that his nomination will move to the Senate floor for an up or down vote without undue delay. In fact, our agreement

was within a week after we finally move you out of Committee. Now, this means that, pursuant to our agreement, the Committee will vote on Mr. Roberts' nomination a week from tomorrow, which is Thursday—you will be put on tomorrow's markup, but literally I am putting you over until next Thursday so our colleagues will have enough time to submit any written questions they desire. Any written questions should accordingly be submitted to Mr. Roberts and the other nominees no later than 5:00 p.m. on Friday, May 2nd.

Now, Mr. Roberts is widely considered to be one of the premier appellate litigators of his generation. His legal accomplishments are superb, including a remarkable 29 arguments before the United States Supreme Court. His record leaves no doubt that he is mainstream and fair. During the course of his career, he has argued both sides of the same issue in different cases, demonstrating that he is indeed a lawyer's lawyer. He has also represented parties from all sides of the political spectrum. His clients have included large and small corporations, trade organizations, non-profit organizations, States, and individuals. So it is really an honor to have such a remarkable legal mind before this Committee.

Senator Warner did comment about some of Mr. Roberts' legal background. No question he had great academic credentials at Harvard College and later Harvard Law School. He served as law clerk for Second Circuit Judge Henry Friendly, one of the pillars of judicial matters throughout many years, and then for Supreme Court Justice William Rehnquist. His public service career included tenure as special assistant to Attorney General William French Smith, Associate White House Counsel, and Principal Deputy Solicitor General. Since 1993, he has been a partner with the prestigious D.C. law firm of Hogan and Hartson, where his practice has focused on Federal appellate litigation.

Now, there is no question that Mr. Roberts has the experience and intelligence to be an outstanding Federal appellate judge. And if the support for his nomination from his peers is any indication, he also has the requisite judicial temperament and unbiased fairness that are the hallmarks of truly great judges. One letter the Committee received is from 156 members of the D.C. Bar, all of whom urge Mr. Roberts' swift confirmation. The letter is signed by such legal luminaries as Lloyd Cutler, who was White House Counsel to both President Carter and President Clinton; Boyden Gray, who was White House Counsel to the first President Bush; and Seth Waxman, who was President Clinton's Solicitor General.

The letter states: "Although, as individuals, we reflect a wide spectrum of political party affiliation and ideology, we are united in our belief that John Roberts will be an outstanding Federal court of appeals judge and should be confirmed by the United States Senate. He is one of the very best and most highly respected appellate lawyers in the Nation, with a deserved reputation as a brilliant writer and oral advocate. He is also a wonderful professional colleague both because of his enormous skills and because of his unquestioned integrity and fair-mindedness. In short, John Roberts represents the best of the bar and, we have no doubt, would be a superb Federal court of appeals judge."

Another letter is from 13 of Mr. Roberts' former colleagues at the Solicitor General's Office. This letter states: "Although we are of diverse political parties and persuasions, each of us is firmly convinced that Mr. Roberts would be a truly superb addition to the Federal court of appeals. . . . Mr. Roberts was attentive and respectful of all views, and he represented the United States zealously but fairly. He had the deepest respect for legal principles and legal precedent—instincts that will serve him well as a court of appeals judge."

Now, others echo these sentiments. Clinton Solicitor General Seth Waxman called Mr. Roberts an "exceptionally well-qualified appellate advocate." Another Clinton Solicitor General, Walter Dellinger, said, "In my view. . . there is no better appellate advocate than John Roberts." And one Yale law professor provided this personal glimpse: ". . . I asked Mr. Roberts whether he would be comfortable taking me—a Democratic young lawyer—under his wing. His response: 'Not only would I be comfortable with it, I want you here because I want to learn what others who may at times see the world differently than I think.'"

In my view, Mr. Roberts is precisely the type of person we want to see confirmed as a Federal appellate judge, one who will be respectful of all sides of an argument and who will follow the law, not some personal agenda, in deciding which party should prevail. I personally have every confidence that John Roberts will make a sterling addition to the D.C. Circuit, and I look forward to hearing from him today.

I will reserve my remarks about the other nominees we are considering until they are called forward.

So, with that, we will turn to the ranking member, and then we will go to questions.

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

Senator LEAHY. Thank you, Mr. Chairman, and I also welcome John Roberts here again, having been nominated to the U.S. Court of Appeals for the District of Columbia Circuit. And I am pleased that in this hearing he can have the undivided attention that a lifetime nomination to this most important circuit deserves, and I look forward to hearing his answers to our questions.

When last he was here, he was flanked by two other circuit court candidates—Sixth Circuit nominees Jeffrey Sutton and Deborah Cook. Mr. Roberts will recall that on that long day which stretched way into the evening, the overwhelming majority of questions were not to him at all. They were directed to Mr. Sutton, with others to Judge Cook, and he sort of got barely—we barely had time to even talk to him. So today we are going to have a chance to focus on him in our effort to determine what kind of a judge he would be if he was confirmed. We regret that he was thrown into that most unusual hearing earlier this year. I think it was unfair to him and actually to the other nominees, but especially to the American public because the District of Columbia Circuit is a most important one. It is a circuit to which President Clinton nominated two outstanding individuals during his second term. They were not allowed to have votes by this Committee because the Republicans de-

cided they should not be allowed to have votes. So given its special jurisdictional responsibilities, the District of Columbia Circuit is a most important circuit. I wish that the obstruction of President Clinton's nominees could have been remedied in trying to get some balance in the courts, but the President has decided—and this is his right to decide who he wants to go forward with, but he has decided to divide, not unite, on this matter.

I do appreciate what the Chairman has done in having this hearing. It shows how quickly we can move things when we work together, just as the Chairman and I have been working together since I held a hearing last year on asbestos reform and he has held one this year on asbestos reform. And for some of you who are interested, I think the work of Senator Hatch, myself, and a number of other interested members on both sides are coming to fruition. For the first time in years on this complex subject, I actually think, Orrin, we are actually coming close to a solution, and it shows what can happen when we work together.

Then we are going to hear from district court nominees Maurice Hicks of Louisiana and David Campbell of Arizona. Both attorneys have the support of their home State Senators.

Then we have before us the nomination of William Moschella to be Assistant Attorney General in the Office of Legislative Affairs at the Department of Justice. It is an important office, especially as the Justice Department has been really less than responsive to both the House and the Senate in requests for information. Since September 11th, many of us have been calling for and working for appropriate oversight. I submitted many oversight letters to the Justice Department containing requests for information that have not been responded to, as have a number of Republican Senators. The Justice Department is required to respond to Congress' requirements for reports about various programs that it funds, and it has not done that. For example, they are required to report regarding the current and future use of technologies being developed by the Total Information Awareness project at the Defense Department.

So I look forward to hearing how Mr. Moschella works on this. Many of us have worked with him when he was at the House Judiciary Committee, and I know that both Chairman Sensenbrenner and Chairman Hyde, two friends of mine, two people I have a great deal of respect for, think the world of him. I know a lot of the members in the Committee, both Democrats and Republicans, respect his integrity, ability, and commitment. I might say that I share those feelings.

So I hope he won't forget his roots here. Obviously, his first responsibility has to—and I am going out on a limb here sort of predicting that he will get through okay. His first responsibility has to be to the administration that is appointing him, but I hope he realizes that there has been a lot of concern expressed by both Republicans and Democrats about the lack of responsiveness from the Department of Justice. And we are all counting on him to correct that. No difficult task there.

So, Mr. Chairman, I thank you for having these hearings. Again, I thank you for your work and cooperation on the asbestos thing, and I think that between the two of us we are finally going to—

I think we have a real opportunity to bring this perplexing matter to conclusion, to be a benefit to the victims, be a benefit to the companies, a benefit to the American economy, and I think that the court systems will probably breathe a huge sigh of relief if we are able to do that.

Chairman HATCH. Well, thank you, Senator.

Mr. Roberts, if you will stand and be sworn? Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Mr. ROBERTS. I do.

Chairman HATCH. Thank you. Mr. Roberts, we welcome you again to the Committee. We are honored to have you back, and do you have any statement you would care to make?

**STATEMENT OF JOHN G. ROBERTS, JR., NOMINEE TO BE  
CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Mr. ROBERTS. No, Mr. Chairman, other than to introduce my parents, Jack and Rosemary Roberts; my sister, Peggy; and my wife, Jane.

Chairman HATCH. Please stand up. We are really happy to welcome you all here once again. Okay.

[The biographical information of Mr. Roberts follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

John Glover Roberts, Jr.

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

Residence:

Bethesda, MD

Office:

Hogan & Hartson L.L.P.  
555 13th Street, N.W.  
Washington, D.C. 20004

3. Date and place of birth.

January 27, 1955  
Buffalo, New York

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

Married to Jane Sullivan Roberts, July 27, 1996.

Spouse's maiden name: Jane Marie Sullivan  
Spouse's occupation: Attorney  
Spouse's employer: Shaw Pittman  
2300 N Street, N.W.  
Washington, D.C. 20037

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

Attended Harvard College, 1973-1976 (entered with sophomore standing). Awarded A.B. summa cum laude June 17, 1976.

Attended Harvard Law School, 1976-1979. Awarded J.D. magna cum laude June 7, 1979.

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

Summer 1977: Law clerk, Ice, Miller, Donadio & Ryan, Indianapolis, Indiana.

Summer 1978: Law clerk, Carlsmith, Carlsmith, Wichman & Case (now Carlsmith, Ball, Wichman, Case & Ichiki), Honolulu, Hawaii.

June 1979 - June 1980: Law clerk to Judge Henry J. Friendly, United States Court of Appeals for the Second Circuit. At the time Judge Friendly also served as the Presiding Judge of the Special Railroad Reorganization Court, a three-judge district court.

July 1980 - August 1981: Law clerk to then-Associate Justice William H. Rehnquist, Supreme Court of the United States.

August 1981 - November 1982: Special Assistant to Attorney General William French Smith, United States Department of Justice.

November 1982 - May 1986: Associate Counsel to the President, White House Counsel's Office.

May 1986 - October 1989: Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004. I joined the firm as an associate and was elected a general partner of the firm in October 1987.

October 1989 - January 1993: Principal Deputy Solicitor General, United States Department of Justice.

January 1993 - Present: Partner, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004.

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

No.

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

Harvard College honors:

William Scott Ferguson Prize, 1974, for "the outstanding essay submitted by a Sophomore concentrating in History."

Edwards Whitaker Scholarship, 1974, awarded to first-year students who "show the most outstanding scholastic ability and intellectual promise as indicated by distinction in studies and general achievement."

John Harvard Scholarship, 1974, 1975, 1976, "in recognition of academic achievement of the highest distinction."

Detur Prize, 1976, based on cumulative academic record.

Election to Phi Beta Kappa, 1976.

Bowdoin Essay Prize, 1976, for "the best dissertation submitted in the English language."

A.B. degree awarded summa cum laude, 1976. Honors thesis on British domestic politics, 1900-1914.

Harvard Law School honors:

Editor, Harvard Law Review, volumes 91-92. Managing Editor, volume 92.

J.D. degree awarded magna cum laude, 1979.

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

I am a member of the following organizations:



United States Judicial Conference Advisory Committee on  
Appellate Rules  
D.C. Circuit Judicial Conference, 1991, 1992, 1998, 2000  
Fourth Circuit Judicial Conference, 1995  
American Law Institute (elected October 1990)  
American Academy of Appellate Lawyers (elected August 1998)  
Edward Coke Appellate Inn of Court  
State and Local Legal Center, Legal Advisory Board  
Georgetown University Law Center, Supreme Court Institute,  
Outside Advisory Board  
National Legal Center for the Public Interest, Legal  
Advisory Board  
Supreme Court Historical Society

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

I do not belong to any organizations that are active in lobbying before public bodies. Other organizations to which I belong:

Phi Beta Kappa  
Republican National Lawyers Association  
Lawyers Club  
Metropolitan Club  
Robert Trent Jones Golf Club

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

District of Columbia Court of Appeals, December 18, 1981.

United States Court of Federal Claims, December 3, 1982.

United States Court of Appeals for the Federal Circuit, December 3, 1982.

Supreme Court of the United States, March 2, 1987.

United States Court of Appeals for the District of Columbia Circuit, March 31, 1988.

United States Court of Appeals for the Ninth Circuit,  
October 17, 1988.

United States Court of Appeals for the Fifth Circuit,  
November 4, 1988.

United States Court of Appeals for the Eleventh Circuit,  
May 31, 1995.

United States Court of Appeals for the Third Circuit,  
November 3, 1995.

United States District Court for the District of Columbia,  
February 5, 1996.

United States Court of Appeals for the Tenth Circuit,  
April 10, 1996.

United States Court of Appeals for the Seventh Circuit,  
June 21, 1996.

United States Court of Appeals for the Fourth Circuit,  
November 24, 1997.

United States Court of Appeals for the Sixth Circuit,  
June 3, 1998.

United States Court of Appeals for the Eighth Circuit,  
February 5, 1999.

United States Court of Appeals for the Second Circuit,  
September 30, 1999.

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

Publications: "The Takings Clause," Developments in the Law -- Zoning, 91 Harvard Law Review 1462-1501 (1978) (unsigned student note).

Comment, "Contract Clause -- Legislative Alteration of Private Pension Agreements," 92 Harvard Law Review 86-99 (1978) (unsigned student note).

Comment, "First Amendment -- Media Right of Access," 92 Harvard Law Review 174-185 (1978) (unsigned student note).

"New Rules and Old Pose Stumbling Blocks in High Court Cases," The Legal Times, February 26, 1990 (also reprinted in various affiliated publications), co-authored with E. Barrett Prettyman, Jr.

"Article III Limits on Statutory Standing," 42 Duke Law Journal 1219 (1993).

"Riding the Coattails of the Solicitor General," The Legal Times, March 29, 1993.

"The New Solicitor General and the Power of the Amicus," The Wall Street Journal, May 5, 1993.

"The 1992-93 Supreme Court," 1994 Public Interest Law Review 107.

"Forfeitures: Does Innocence Matter?," The Legal Times, October 2, 1995.

"Thoughts on Presenting an Effective Oral Argument," School Law in Review (1997).

I have attached copies of the foregoing items.

Addresses: Brookings Institution, October 3, 1983, on Giving Legal Advice to the President.

Indiana University School of Law, 1984 Harriss Lecture series, January 20, 1984, on Federal Court Jurisdiction.

Maryland Association of County Attorneys, December 7, 1989, on Appellate Advocacy.

District of Columbia Bar Association,  
Section on Administrative Law, September 19,  
1990, on Supreme Court Environmental Cases.

American Bankruptcy Institute, December 7,  
1991, on Supreme Court Bankruptcy Cases.

American Academy of Appellate Lawyers,  
February 5, 1994, Kansas City, MO, on  
Supreme Court practice.

Elderhostel, Rockville, MD, November 14,  
1996, on Supreme Court oral arguments.

D.C. Copyright Law Society, March 16, 1998,  
on Feltner v. Columbia Pictures.

Bureau of National Affairs, Supreme Court  
Constitutional Law Seminar, Washington,  
D.C., September 11, 1998, on Supreme Court  
oral arguments.

D.C. Bar Administrative Law Section,  
September 24, 1998, on NCUA v. First  
National Bank & Trust Co.

Alabama Bar Institute for Continuing Legal  
Education, 36th Annual Southeastern  
Corporate Law Institute, Point Clear,  
Alabama, April 24, 1999, on recent Supreme  
Court cases.

Arizona Bar Appellate Practice Section, June  
25, 1999, on the certiorari process.

National Mining Association, Lake George,  
NY, September 10, 1999, on amicus briefs.

Republican National Lawyers Ass'n,  
Washington, D.C., April 3, 2000, on cases  
pending before the Supreme Court.

Cosmetics, Toiletries, and Fragrances Ass'n,  
Napa Valley, CA, April 26, 2000, on the  
First Amendment and commercial speech.

Symposium, Bicentennial Celebration of the Courts of the District of Columbia Circuit, Washington, D.C., March 9, 2001, panelist on Constitutional Confrontations in the District of Columbia Circuit Courts.

I also regularly participate in press briefings sponsored by the National Legal Center for the Public Interest and the Washington Legal Foundation upon the opening of a new Supreme Court term or the Court's rising for the summer.

I did not speak from a prepared text on any of the foregoing occasions, and am not aware of any press reports on these addresses.

In addition, on June 11, 1999, I appeared before the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee with former Senators George Mitchell and Robert Dole and former Solicitor General Drew Days to discuss the report of the Joint Project on the Independent Counsel Statute sponsored by the American Enterprise Institute and the Brookings Institution. A copy of the hearing transcript is attached.

I also recall appearing before a subcommittee of the House Judiciary Committee to discuss crime legislation sometime in 1993, but am advised that the hearing transcript was never published. I did not have prepared remarks on that occasion.

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

Excellent. March 26, 2001.

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

None.

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

Not applicable.

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

06/79 - 06/80	Law Clerk to Judge Henry J. Friendly. United States Court of Appeals for the Second Circuit. Appointed.
07/80 - 08/81	Law Clerk to Justice William H. Rehnquist. Supreme Court of the United States. Appointed.
08/81 - 11/82	Special Assistant to the Attorney General. United States Department of Justice. Appointed.
11/82 - 05/86	Associate Counsel to the President. White House Counsel's Office. Appointed.
10/89 - 01/93	Principal Deputy Solicitor General. United States Department of Justice. Appointed.

17. Legal Career:

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

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;
2. whether you practiced alone, and if so, the addresses and dates;
3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

After graduation from law school, I served as a law clerk to Judge Henry J. Friendly, United States Court of Appeals for the Second Circuit, 40 Foley Square, New York, NY 10007. At the time, Judge Friendly also served as Presiding Judge of the Special Railroad Reorganization Court, a three-judge district court. I clerked for Judge Friendly from June 1979 to June 1980.

I next served as a law clerk to then-Associate Justice William H. Rehnquist, Supreme Court of the United States, One First Street, N.E., Washington, D.C. 20543. I served in that capacity from July 1980 to August 1981.

After completing my clerkship with Justice Rehnquist, I accepted appointment as a Special Assistant to Attorney General William French Smith, United States Department of Justice, Tenth and Constitution Avenues, N.W., Washington, D.C. 20530. I served in that capacity from August 1981 to November 1982.

I left the Department of Justice in November 1982 to accept appointment as Associate Counsel to the President, White House Counsel's Office, 1600 Pennsylvania Avenue, N.W., Washington, D.C. 20500.

I left the White House Counsel's Office in May 1986 to join the Washington law firm of Hogan & Hartson as an associate. I was elected a general partner of the firm in October 1987. Hogan & Hartson is now located at 555 13th Street, N.W., Washington, D.C. 20004.

I resigned my partnership in the firm in October 1989 to accept appointment as Principal Deputy Solicitor General, United States Department of Justice, Tenth and Constitution Avenues, N.W., Washington, D.C. 20530.

I left the Solicitor General's Office in January 1993 to return to my present position as a partner at Hogan & Hartson.

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

For the past 15 years, in both the private and public sectors, I have had an intensive federal appellate litigation practice, with an emphasis on Supreme Court litigation. During that time I orally argued 33 cases before the Supreme Court, in addition to arguments before the United States Courts of Appeals for the District of Columbia, Federal, Second, Fourth, Fifth, Sixth, Ninth, and Tenth Circuits, as well as the District of Columbia and Maryland Courts of Appeals. The subject matter of these cases covered the full range of federal jurisdiction, including administrative law, admiralty, antitrust, arbitration, banking, bankruptcy, civil rights, constitutional law, environmental law, federal jurisdiction and procedure, First Amendment, health care law, Indian law, interstate commerce, labor law, and patent and trade dress law.

In addition to presenting oral argument and briefing the cases on the merits, the Supreme Court practice consists of seeking and opposing Supreme Court review, seeking and opposing stays pending such review, preparing amicus curiae briefs on behalf of clients interested in pending Supreme Court matters, helping to prepare other counsel to argue before the Court, and counseling clients on the impact of specific Supreme Court rulings.

The Court of Appeals aspect of my federal appellate practice has involved appearances in every federal circuit court of appeals, although the largest number of my Court of Appeals arguments has been before the Court of Appeals for the D.C. Circuit. I have not specialized in any particular substantive area, but instead in the preparation of appellate briefs and the presentation of appellate oral argument.

The nature of my practice was essentially the same during my time at Hogan & Hartson and when I served as Principal Deputy Solicitor General, although of course during the latter period my sole client was the United States. As Principal Deputy Solicitor General, my duties included presenting oral argument before the Supreme Court and preparing and filing briefs on the merits on behalf of the United States, its agencies and officers, subject to the supervision of the Solicitor General



and with the assistance of subordinates in the Office of the Solicitor General. I also supervised the preparation and filing of petitions for and briefs in opposition to certiorari, and engaged in an active motions practice seeking or opposing stays or other relief from the Supreme Court. In addition to this actual litigation before the Court, my duties included participating in the government's determination whether to appeal adverse decisions in the lower courts. Any such appeal, whether from a district court to an appellate court or from a circuit court to the Supreme Court, requires the approval of the Solicitor General.

Immediately prior to joining Hogan & Hartson for the first time in 1986, I served in counseling and advisory roles in the federal government. My duties as Associate Counsel to the President involved reviewing bills submitted to the President for signature or veto, drafting and reviewing executive orders and proclamations, and generally reviewing the full range of Presidential activities for potential legal problems. I participated in drafting and reviewed various documents embodying Presidential action under certain trade, aviation, asset control, and other laws. I played a role in the Presidential appointment process, reviewing the Federal Bureau of Investigation background reports and ethics disclosures of prospective appointees.

My duties as Special Assistant to Attorney General William French Smith were also of an advisory nature, focusing on particular matters of concern to the Attorney General. I also served as a speechwriter and represented the Attorney General throughout the Executive Branch and before state and local law enforcement officials.

I was fortunate to have two appellate clerkships immediately after law school. Judge Henry J. Friendly is justly remembered as one of this Nation's truly outstanding federal appellate judges. The clerkship on the Supreme Court for then-Associate Justice Rehnquist the following year was an intensive immersion in the federal appellate process at the highest level.

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

Clients of Hogan & Hartson for whom I rendered substantial legal services included large and small corporations, state and local governments, trade and professional organizations, nonprofit associations, and individuals. Some recent examples

are the States of Alaska and Hawaii, the National Collegiate Athletic Association, Litton Industries, Inc., the Credit Union National Association, Pulte Corporation, and Intergraph Corporation.

From October 1989 to January 1993, my sole client was the United States, its agencies and officers. With minor exceptions, the Office of the Solicitor General is the exclusive representative of the federal government before the Supreme Court. I accordingly represented a wide variety of departments, agencies, and other entities within the federal government. In doing so, I worked with each of the litigating divisions in the Department of Justice. Also included among my clients were individual officers of the United States or its agencies sued in Bivens actions.

My clients during my service as Associate Counsel to the President included the President of the United States and members of the White House staff. As Special Assistant to the Attorney General, my client was the Attorney General.

For the past 15 years, I have specialized in federal appellate litigation.

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

I have appeared in federal court frequently over the past 15 years, arguing over 55 cases before the Supreme Court of the United States, the Court of Appeals for the District of Columbia Circuit, and various other federal circuit courts of appeals. The public service positions I held prior to 1986 did not involve court appearances, although my two clerkships necessarily afforded intensive exposure to the appellate process.

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

Approximately 95 percent of my appearances have been in federal court, and approximately 5 percent in state courts of

record, including the District of Columbia Court of Appeals (the local court for the District of Columbia).

3. What percentage of your litigation was:

- (a) civil;
- (b) criminal.

Approximately 95 percent civil, 5 percent criminal.

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

As noted, my practice is primarily an appellate one, and my appearances in court have typically been to argue appeals. I have personally argued over 55 cases leading to a final appellate judgment. I have, however, also appeared on occasion in trial courts.

5. What percentage of these trials was:

- (a) jury;
- (b) non-jury.

One trial proceeding in which I served as an associate counsel was before a jury, although my participation in the case did not involve work before the jury itself.

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

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. United States v. Halper, 490 U.S. 435 (1989). While in private practice, I was appointed by the Supreme Court to file a brief and present oral argument in support of the judgment below in this case. See United States v. Halper, 488 U.S. 906 (1988) (order of appointment). Mr. Halper, the appellee, had proceeded pro se in the lower court; I was the only counsel briefing and arguing in the Supreme Court against the appellant, the United States. I handled the case on a pro bono basis.

The question presented was whether the Double Jeopardy Clause barred the imposition of civil penalties under federal law against an individual who had been convicted and punished under federal criminal law for the same conduct. Mr. Halper had been convicted of filing false Medicaid claims, had paid a fine, and served a sentence of imprisonment. The government thereafter sought to impose civil penalties under the False Claims Act for the same false Medicaid claims. It was at the time generally assumed that the Double Jeopardy Clause applied only to successive criminal prosecutions, and had no applicability in the civil context.

In briefing and arguing the case, I sought to distinguish the strong line of precedent holding that the Double Jeopardy Clause did not apply to civil cases. My argument distinguished that aspect of the Clause forbidding successive prosecutions -- which did not apply to civil cases -- from that aspect of the Clause forbidding successive punishments -- which, I argued, had no such limitation.

In a unanimous opinion authored by Justice Blackmun, the Court agreed with this analysis. 490 U.S. 435 (1989). The case was important in establishing that the protections of the Double Jeopardy Clause are not limited to the criminal context, and the decision had a significant effect on the government's imposition of sanctions in a wide range of areas. It was later sharply restricted, however, if not overruled, in Hudson v. United States, 522 U.S. 101 (1997).

I had no co-counsel assisting me. Arguing for the United States was Assistant to the Solicitor General Michael R. Dreeben, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

2. United States v. Kokinda, 497 U.S. 720 (1990). I participated in the briefing and presented argument before the

Supreme Court on behalf of the United States in this criminal case, which involved a challenge to Postal Service regulations making it a misdemeanor to solicit funds on "postal premises," defined to include the exterior walkways adjacent to and surrounding a suburban post office building, but not the public sidewalks alongside the street. The United States Court of Appeals for the Fourth Circuit had struck down the convictions of two individuals for soliciting contributions for their organization on the walkway, holding that such activities could not be banned consistent with the First Amendment.

The Supreme Court ruled in the government's favor and reversed. Writing for a plurality of four Justices, Justice O'Connor agreed with us that the postal walkway was not a public forum, but instead government property set aside to facilitate particular government business -- in this case, the handling of the mails. Since solicitation of contributions to organizations by private individuals would interfere with the conduct of postal business and since the regulation did not discriminate on the basis of viewpoint, Justice O'Connor concluded that the ban on solicitation was valid. Justice Kennedy concurred, relying on our alternative argument that the ban was a valid time, place, and manner restriction.

Other counsel on the brief with me were Solicitor General Kenneth W. Starr, Assistant Attorney General Edward S.G. Dennis, Jr., Assistant to the Solicitor General Amy L. Wax, and Thomas E. Booth, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Counsel for the opposing parties was Jay Alan Sekulow, American Center for Law & Justice, P.O. Box 64429, Virginia Beach, VA 23467, (757) 226-2489.

3. Luian v. National Wildlife Federation, 497 U.S. 871 (1990). The issue in this case concerned the limitations on standing for those who seek to challenge federal land use decisions. The Court of Appeals for the District of Columbia Circuit had allowed an organization to challenge over a thousand individual land use decisions affecting millions of acres of public land on the basis of the affidavits of two individuals asserting an interest in the decisions. As Acting Solicitor General, I authorized and participated in the preparation of a petition for certiorari seeking Supreme Court review on behalf of the Department of the Interior. The Court granted our petition, and I participated in the briefing on the merits and presented oral argument on behalf of the government.

We contended that the general allegations of injury that the two individuals had presented were not specific enough to entitle them to mount a broad-based challenge to the thousands of agency decisions affecting millions of acres about which they complained. The Court, in a 5-4 decision, agreed with our analysis. Justice Scalia, writing for the majority, held that vague and conclusory allegations of injury did not suffice to confer a right to challenge an entire agency program, and that the federal courts could not "presume" the specific facts necessary to establish adequate injury. Justice Blackmun, for the dissenters, argued that the affidavits should have sufficed at the summary judgment stage.

Co-counsel for the United States assisting me were Assistant Attorney General Richard Stewart, Deputy Solicitor General Lawrence G. Wallace, Assistant to the Solicitor General Lawrence Robbins, Peter Steenland, Anne Almy, Fred Disheroon, and Vicki Plaut, Department of Justice, Washington, D.C. 20530, (202) 514-2217. E. Barrett Prettyman, Jr., Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5685, argued the case for the respondent.

4. Interstate Commerce Commission v. Boston & Maine Corporation, 503 U.S. 407 (1992). This case involved Amtrak's Montrealer service between Washington, D.C. and Montreal, Canada. The question presented was whether the Interstate Commerce Commission could approve Amtrak's exercise of eminent domain authority under the Rail Passenger Service Act, when Amtrak intended to reconvey the subject property to another railroad, which had agreed to rehabilitate and maintain the line for Amtrak. The Commission construed the statute as authorizing such a transaction.

The D.C. Circuit reversed, concluding that the Commission had misconstrued the statute. In particular, the court reasoned that Amtrak did not have authority to condemn property it did not intend to keep, but rather intended to transfer to a third party. While the case was pending on rehearing, Congress acted to overturn the D.C. Circuit decision, amending the law to make clear that Amtrak may subsequently convey property it has condemned to a third party. Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, 104 Stat. 4658, § 9. The amendment specified that it was applicable to pending cases. The D.C. Circuit nonetheless denied rehearing.

As Acting Solicitor General, I authorized the filing and participated in the preparation of a petition for certiorari on

behalf of the Commission and the United States. After the Supreme Court granted our petition, I participated in the briefing on the merits, and orally argued the case before the Court. Our argument focused on the failure of the D.C. Circuit to give effect to the clearly expressed intent of Congress in the amendment of the statute.

The Supreme Court agreed with our position and reversed the D.C. Circuit, 6-3. Justice Kennedy's opinion for the majority relied on deference to the ICC's construction of the statute it has been charged with administering. Justice White, writing for the dissenters, criticized the majority for adopting a post hoc rationalization to fill a gap in the agency's reasoning and logic.

With me on the brief were Deputy Solicitor General Lawrence G. Wallace and Assistant to the Solicitor General Michael R. Dreeben, Department of Justice, Washington, D.C. 20530, (202) 514-2217, as well as General Counsel Robert S. Burk, Deputy General Counsel Henri F. Rush, and Attorney Charles A. Stark, Interstate Commerce Commission (now the Surface Transportation Board), 1925 K Street, N.W., Washington, D.C. 20423, (202) 565-1558. Arguing for the opposing party was Irwin Goldbloom, Latham & Watkins, 1001 Pennsylvania Avenue, N.W., Washington, D.C. 20004, (202) 637-2200.

5. National Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999). After the Court of Appeals for the Third Circuit ruled against the NCAA in this case, I was retained to seek Supreme Court review, and to brief and argue for the NCAA on the merits in the event the Court elected to hear the case. The Third Circuit had ruled that Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. -- which applies only to organizations that receive federal financial assistance -- applied to the NCAA, because it received dues payments from entities that receive federal financial assistance. We argued in our petition for certiorari that hinging coverage on such indirect receipt of financial assistance conflicted with Supreme Court precedent, and the Supreme Court granted review.

The issue on the merits was what it meant to "receiv[e] Federal financial assistance" under the terms of the statute. We argued in our briefs that the Supreme Court had developed a contract theory of coverage with respect to legislation, such as Title IX, enacted pursuant to Congress' Spending Clause powers. Under that theory, entities that knowingly and voluntarily accept federal funding are subject to the restrictions that come

with it. The necessary implication of this theory is that coverage under the statute is limited to direct recipients of the funding -- those who knowingly entered into a bargain by accepting the funding -- and does not "follow[] the aid past the recipient to those who merely benefit from the aid." United States Department of Transportation v. Paralyzed Veterans of America, 477 U.S. 597, 607 (1986). The NCAA, we argued, was accordingly not covered simply because its dues-paying members were.

In a unanimous opinion written by Justice Ginsburg, the Supreme Court agreed with our position. The Court explained that, at most, the NCAA's "receipt of dues demonstrates that it indirectly benefits from the federal assistance afforded its members. This showing, without more, is insufficient to trigger Title IX coverage." 525 U.S. at 468. The Court rejected the respondent's efforts to distinguish the controlling Supreme Court precedent, and vacated the Third Circuit's judgment.

Appearing on the briefs with me in this case were Martin Michaelson, Gregory G. Garre, and Lorane F. Hebert of Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, John J. Kitchin and Robert W. McKinley of Swanson, Midgley, Gangwere, Kitchin & McLarney, 922 Walnut Street, Suite 1500, Kansas City, MO 64106, (816) 842-6100, and Elsa Kircher Cole, General Counsel, National Collegiate Athletic Association, One NCAA Plaza, 700 West Washington Street, Indianapolis, IN 46204, (317) 917-6222. Representing the respondent was Carter Phillips, Sidley & Austin, 1722 Eye Street, N.W., Washington, D.C. 20006, (202) 736-8000.

6. Rice v. Cavetano, 528 U.S. 495 (2000). I was retained by the State of Hawaii to brief and argue this case after a petition for certiorari was granted to review what for the State had been a favorable decision by the Court of Appeals for the Ninth Circuit. That court had upheld a Hawaiian statute providing that only Native Hawaiians could vote for the trustees who administered certain trusts established to benefit Native Hawaiians. The issue before the Supreme Court was whether such a restriction violated the Fourteenth and Fifteenth Amendments as racial discrimination.

On behalf of the State, we defended the state law and favorable Court of Appeals decision by arguing that the classification drawn by the statute was not drawn on the basis of race. Instead, the statute simply restricted the franchise to beneficiaries of the underlying trusts. The petitioner had



not challenged those trusts, and it was rational to limit voting to those most directly affected by how the trusts were administered.

We also argued that the classification was not based on race but instead on the congressionally-recognized political status of Native Hawaiians as an indigenous people. This ground had been relied on by the Supreme Court and other courts to uphold classifications involving Native Americans in the lower 48 states and Native Alaskans, and we argued that the same rationale should apply to the indigenous people of the Hawaiian Islands.

The Court rejected our arguments, 7-2. Justice Kennedy, writing for the majority, rejected our attempted analogy between Native Hawaiians and other Native Americans, reasoning that Congress had not dealt with Native Hawaiians as members of politically-organized tribes, as was the case with respect to other Native Americans. The majority also rejected our argument that the classification should be regarded as being based on beneficiary status rather than race. Justice Breyer, joined by Justice Souter, concurred in the result, also rejecting the analogy to Native American classifications on the ground that Native Hawaiians were not organized into tribes. Justice Stevens, joined by Justice Ginsburg, dissented, arguing that the Hawaiian statute should be upheld in light of the unique history of Hawaii and the analogy to principles of American Indian law.

On the brief with me were Gregory G. Garre and Lorane F. Hebert of Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Attorney General Earl I. Anzai and Deputy Attorneys General Girard D. Lau, Dorothy Sellers, and Charleen M. Aina of the State of Hawaii, 425 Queen Street, Honolulu, Hawaii 96813, (808) 586-1360. Counsel for petitioner was Theodore B. Olson, Gibson, Dunn & Crutcher, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

7. TraFFix Devices, Inc. v. Marketing Displays, Inc., 121 S. Ct. 1255 (2001). The issue in this patent and trade dress case was whether the subject matter of a utility patent can be protected as trade dress after the patent expires. Marketing Displays had patented a dual-spring base design that made road signs more resistant to wind. Traffix Devices copied and improved upon the design after Marketing Displays' patent expired. The Sixth Circuit Court of Appeals concluded that the distinctive appearance of the Marketing Displays sign stand design could be protected from such copying as trade dress. I

was retained by Traffix Devices to seek Supreme Court review and brief and argue the case on the merits if review were granted. We argued in our petition for certiorari that the Sixth Circuit decision conflicted with other circuit court decisions and Supreme Court precedent, and the Supreme Court granted review.

In our briefs on the merits and in oral argument before the Court, I argued that the ruling below was inconsistent with the basic "patent bargain" recognized by the Supreme Court: society grants a patent holder the exclusive rights to his invention for a limited period of time, on the condition that the right to practice the invention becomes public property when the patent expires. Allowing the patent holder to extend the period of exclusive use after the expiration of the patent, under the guise of trade dress, would deprive the public of the benefit of this bargain. We also explained that this was the basis for the trade dress "functionality" doctrine, barring protection for functional features.

The Supreme Court agreed with our position in a unanimous opinion authored by Justice Kennedy. The Court explained that the sign stand design was functional, as evidenced by the fact that it had qualified for and enjoyed patent protection. Because the design was functional, the Court ruled, it could not qualify for trade dress protection.

Co-counsel with me on our briefs were Gregory G. Garre, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Jeanne-Marie Marshall and Richard W. Hoffmann, Reising, Ethington, Barnes, Kisselle, Learman & McCulloch, P.C., 201 W. Big Beaver, Suite 400, Troy, Michigan 48084, (248) 689-3500. John A. Artz, Artz & Artz, P.C., 28333 Telegraph Road, Suite 250, Smithfield, Michigan 48034, (248) 223-9500, argued for the respondent.

8. United States v. Chrysler Corporation, 158 F.3d 1350 (D.C. Cir. 1998). I was retained by Chrysler in this case to appeal a district court decision requiring it to conduct an automobile recall. The main issue on appeal was whether the National Highway Traffic Safety Administration ("NHTSA") had provided automobile manufacturers with adequate notice of what was required by a motor vehicle safety standard before seeking a recall on the ground that the manufacturer had failed to comply with the standard.

I participated in the briefing and presented oral argument before the D.C. Circuit. We first had to address the

government's argument that the case was moot, because Chrysler had acquiesced in the recall while pursuing its appeal. We contended that Chrysler's continuing reporting obligations under the terms of the recall sufficed to establish an ongoing legal controversy. On the merits, we argued that a regulated entity must receive "fair notice" of the standards it must meet, as a matter of both administrative regularity and constitutional due process, before an agency can penalize the regulated party for failure to comply. We then explained why, on the specific facts of this case, NHTSA had failed to give adequate notice of how certain testing procedures were to be conducted to test compliance with agency standards.

In a published opinion authored by Chief Judge Edwards and joined by Judges Silberman and Randolph, the court rejected the government's mootness argument, agreed with our contentions on the merits, reversed the district court, and held that Chrysler was not subject to the recall order.

I was assisted by Gregory G. Garre of Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Erika Z. Jones, Mayer, Brown & Platt, 1909 K Street, N.W., Washington, D.C. 20006, (202) 263-3000. Irene M. Solet, U.S. Department of Justice, Washington, D.C. 20530, (202) 514-3542, argued the case for the United States.

9. KenAmerican Resources, Inc. v. International Union, UMW, 99 F.3d 1161 (D.C. Cir. 1996). The issue in this case concerned the scope of an agreement to arbitrate. An arbitrator had ruled that certain coal companies owned by an individual stockholder were subject to arbitration because another company also owned by that same individual had subscribed to an arbitration agreement purporting to bind nonsignatory parents, subsidiaries, and affiliates. I was retained by the companies to overturn that result. I argued the case before the district court, lost on summary judgment, and appealed to the D.C. Circuit.

I participated in the briefing on appeal and presented oral argument before the Court of Appeals. We contended that the district court erred in deferring to the arbitrator on the issue of arbitrability and that the court should decide that issue de novo. On the merits, we relied heavily on the agreement documents and explained that the company that had signed the arbitration agreement had carefully limited the scope of its agreement in a manner that did not include the other companies owned by the common sole shareholder.

In a published opinion authored by Judge Silberman and joined by Judges Ginsburg and Rogers, the D.C. Circuit agreed with our arguments and reversed the district court decision enforcing the arbitration award. The Court of Appeals agreed that the lower court had erred in deferring to the arbitrator on the issue of arbitrability, and agreed with our construction of the agreements limiting the scope of the arbitration clause. The court not only reversed the grant of summary judgment in favor of the Union but directed that summary judgment be entered in favor of our clients.

Co-counsel in the case were Daniel F. Attridge, Donald Kempf, John S. Irving, Jr., and Gary Brown of Kirkland & Ellis, 655 Fifteenth Street, N.W., Suite 1200, Washington, D.C. 20005, (202) 879-5000, and Jonathan Franklin, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5766. John R. Mooney, Mooney, Green, Gleason, Baker, Gibson & Saindon, P.C., 1920 L Street, N.W., Suite 400, Washington, D.C. 20036, (202) 783-0010, argued the appeal for the Union.

10. Litton Systems, Inc. v. Honeywell, Inc., 238 F.3d 1376 (Fed. Cir. 2001). This case was the third published opinion in a long-running, multi-billion dollar patent and state law dispute between Litton and Honeywell over proprietary interests in laser gyroscope navigational systems for aircraft. Litton had won a \$1.2 billion jury verdict on patent and state tort grounds, but the district court entered judgment for Honeywell notwithstanding the verdict. The Federal Circuit reversed and remanded for a new trial. The district court did not hold a new trial but instead once again entered judgment for Honeywell. I was retained to overturn that result.

I participated in the briefing and presented oral argument before the Federal Circuit. The patent law issue concerned whether Litton was estopped from arguing that Honeywell's technology infringed by equivalents, because Litton had amended its patent claims allegedly to exclude all but its precise embodiment of the invention. The answer turned on technical questions involving the operation of the respective ion guns used by Litton and Honeywell to create the perfectly-reflective mirrors employed in ring laser gyroscopes. The state law issues turned on whether there was sufficient evidence in the record to support the jury's finding that Honeywell had interfered with Litton's agreements with the inventor of the pertinent technology.

Our patent claims became moot after oral argument, when the Federal Circuit issued an en banc opinion in another case holding that the doctrine of equivalents was not available at all to a patentee who had amended his claims. The Federal Circuit, however, issued a published opinion agreeing with our position on the state law claims. The opinion was authored by Chief Judge Mayer and joined by Judge Rader. Judge Bryson concurred in part and dissented in part. The Court reversed the district court's grant of judgment for Honeywell, concluding that the lower court had erred in resolving disputed issues of fact. The case was remanded for a new trial on the state law claims.

I was assisted by Catherine Stetson of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5491, Frederick Lorig and Sidford Brown, Bright & Lorig, 633 West 5th Street, Los Angeles, California 90071, (213) 627-7774, and Rory Radding, Stanton Lawrence, and Carl Bretscher, Pennie & Edmonds LLP, 1667 K Street, N.W., Washington, D.C. 20006, (202) 496-4400. Richard G. Taranto, Farr & Taranto, 1220 19th Street, N.W., Suite 800, Washington, D.C. 20036, (202) 775-0184, argued for appellee Honeywell.

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

Prior to first joining Hogan & Hartson in 1986, the significant legal activities I pursued generally did not involve litigation. My duties as Associate Counsel to the President and Special Assistant to Attorney General William French Smith are discussed in the response to question 17b. Among the more significant of those activities were the review of legislation submitted to the President, as well as the drafting and review of executive orders, Presidential proclamations, and other Presidential documents.

Significant non-litigation legal activities since 1986 have focused on improving the quality of appellate practice before the Courts of Appeals and the Supreme Court. In addition to involvement with the American Academy of Appellate Lawyers and the recently-established Edward Coke Appellate Inn of Court, I regularly participate in moot court programs designed to improve

the advocacy of those presenting cases before the Supreme Court, in particular the programs sponsored by the State and Local Legal Center and the Georgetown University Law Center Supreme Court Institute. I have also assisted the American Bar Association in presenting its programs on appellate advocacy, appearing as an advocate in its programs, and I write and speak regularly on the subject.

I have also been active in the area of legal reform. I have participated in the work of the American Law Institute, and currently serve on the United States Judicial Conference Advisory Committee on Appellate Rules. Another example of such activity was my work on the bipartisan Joint Project on the Independent Counsel Statute sponsored by the American Enterprise Institute and the Brookings Institution, co-chaired by former Senators Robert Dole and George J. Mitchell.

JOHN G. ROBERTS, JR.

SENATE QUESTIONNAIRE UPDATE -- PUBLIC

Part I, Question 12: Add to the list of addresses the following:

Environmental Law Seminar, Harvard Law School, Cambridge, Massachusetts, January 17, 2002, on Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, S. Ct. No. 00-1167.

John F. Kennedy School of Government, Masters Program visit to Washington, D.C., January 24, 2002, on Supreme Court practice.

American Academy of Appellate Lawyers, New Orleans, Louisiana, February 8, 2002, on Supreme Court practice, with E. Barrett Prettyman, Jr., and Seth Waxman.

Georgetown University Law School, Supreme Court Institute, May 16, 2002, 1992 Supreme Court law clerk program, on the 1992 Supreme Court term.

Brigham Young University and J. Reuben Clark Law School, Rex E. Lee Conference on the Office of the Solicitor General of the United States, Provo, Utah, September 12-13, 2002, with 19 other alumni of the Office.

I did not speak from a prepared text on any of these occasions and am not aware of any press reports on my remarks. I understand that the proceedings of the Rex E. Lee Conference are to be but have not yet been transcribed.

In addition, the proceedings of the D.C. Circuit Bicentennial Symposium have now been reported at 204 F.R.D. 499-638.

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

I will be entitled under the Hogan & Hartson partnership agreement to an amount reflecting my interest in matters pending at the firm at the time of my departure. That amount is calculated based on a set formula specified in the agreement. It is based on percentage ownership interest in the firm and is a set amount at time of departure. I also participate in a fully-vested, defined contribution retirement plan and 401(k) plan at Hogan & Hartson. These plans are administered by an independent trustee, and funds are invested in a range of broadly diversified mutual funds at the election of the individual.

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

I will resolve any conflict of interest by recusing myself from the matter presenting the conflict, following the Judicial Conference Guidelines relating to recusal. I will recuse myself from any matter involving my law firm or former clients for whom I did work, for the periods specified in the Guidelines.

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

No.



FD-10 Rev. 1/2001		FINANCIAL DISCLOSURE REPORT FOR NOMINEES		Report Required by the Ethics in Government Act of 1975 (5 U.S.C. App., §§101-111)	
1. Person Reporting (Last name, first, middle initial) <b>ROBERTS, JOHN G., JR.</b>	2. Court or Organization <b>U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT</b>	3. Date of Report <b>5/13/01</b>			
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) <b>U.S. CIRCUIT JUDGE - NOMINEE</b>	5. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date <b>5/9/01</b> <input type="checkbox"/> Initial <input type="checkbox"/> Annual <input type="checkbox"/> Final	6. Reporting Period <b>1/1/00 - 5/13/01</b>			
7. Chambers or Office Address <b>HOGAN &amp; HARTSON L.L.P. 555 13TH STREET N.W. WASHINGTON, D.C. 20004</b>	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations. Reviewing Officer _____ Date _____				
IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.					

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

POSITION	NAME OF ORGANIZATION/ENTITY
<input type="checkbox"/> NONE (No reportable positions.)	
1 PARTNER	HOGAN & HARTSON L.L.P.
2 ADVISORY BOARD	STATE & LOCAL LEGAL CENTER, GEORGETOWN UNIV.
3	LAW CENTER SUPREME COURT INSTITUTE, NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST (ALL UNPAID FOR NONPROFIT ORGS.)

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

DATE	PARTIES AND TERMS
<input type="checkbox"/> NONE (No reportable agreements.)	
1 2001	HOGAN & HARTSON PARTNERSHIP AGREEMENT SETS FORMULA FOR PAYOUT TO DEPARTING LAWYER FOR HIS OWNERSHIP INTEREST IN FIRM. RETIREMENT AND 401(K) PLANS ARE DEFINED CONTRIBUTION FULLY VESTED, AND INVESTED IN MUTUAL FUNDS SELECTED BY INDIVIDUAL

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

DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
<input type="checkbox"/> NONE (No reportable non-investment income.)		
1999	HOGAN & HARTSON L.L.P.	\$715,598
2000	HOGAN & HARTSON L.L.P.	\$766,416
2001	HOGAN & HARTSON L.L.P.	\$11,111.57
1999, 2000, 2001	SHAW PITTMAN (WIFE'S LAW FIRM)	\$

FINANCIAL DISCLOSURE REPORT

JOHN G. ROBERTS, JR.

5/13/01

VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions (Includes those of spouse and dependent children. See pp. 34-37 of Instructions.)

A. Description of Assets (including trust assets)  <i>Place "(2)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1)	(2)	(1)	(2)	(1)	If not exempt from disclosure			
	Amt. Code <sup>1</sup> (A-H)	Type (e.g., div., rent or int.)	Value Code <sup>2</sup> (J-P)	Value Method Code <sup>3</sup> (Q-W)	Type (e.g., buy, sell, merges, redemption)	(2) Date: Month- Day	(3) Value Code <sup>2</sup> (J-P)	(4) Gain Code <sup>1</sup> (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets).					EXEMPT				
1 AGILENT		NONE	J	T					
2 AOL		NONE	O	T					
3 ASTRARENEGA	A	DIV	J	T					
4 AT & T	A	DIV	J	T					
5 BECTON DICKINSON	A	DIV	J	T					
6 BLOCKBUSTER	A	DIV	K	T					
7 BOEING	A	DIV	J	T					
8 CISCO		NONE	K	T					
9 CITIGROUP	A	DIV	K	T					
10 COCA COLA	A	DIV	J	T					
11 CORVIS		NONE	J	T					
12 CP	A	DIV	J	T					
13 DELL		NONE	M	T					
14 DISNEY	A	DIV	K	T					
15 FIRST VA BANKS	A	DIV	J	T					
16 FREDDIE MAC	A	DIV	K	T					
17 GILLETTE	A	DIV	J	T					

1 Income/Gain Codes: A=\$1,000 or less; B=\$1,001-\$2,500; C=\$2,501-\$5,000; D=\$5,001-\$15,000; E=\$15,001-\$50,000; F=\$50,001-\$100,000; G=\$100,001-\$1,000,000; H=\$1,000,001-\$5,000,000; I=\$5,000,001-\$25,000,000; J=\$25,000,001-\$50,000,000; K=\$50,000,001-\$1,000,000,000; L=\$1,000,001-\$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: A=\$1,000 or less; B=\$1,001-\$50,000; C=\$50,001-\$100,000; D=\$100,001-\$250,000; E=\$250,001-\$500,000; F=\$500,001-\$1,000,000; G=\$1,000,001-\$5,000,000; H=\$5,000,001-\$25,000,000; I=\$25,000,001-\$50,000,000; J=More than \$50,000,000

3 Value Method Codes: Q=Appraisal; R=Cost (real estate only); S=Assessment; T=Cash/Market; O=Book value; V=Other; W=Estimated

FINANCIAL DISCLOSURE REPORT Name of Person Reporting JOHN G. ROBERTS, JR. Date of Report 5/13/01

VII. Page 3 INVESTMENTS and TRUSTS -- income, value, transactions (Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)

A. Description of Assets (including trust assets)  Place "X" after each asset exempt from prior disclosure.	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amt. Code1 (A-H)	(2) Type (e.g., div., rent or int.)	(1) Value Code2 (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure			
						(2) Date: Month- Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)									
36 PFIZER	A	DIV	J	T					
37 PROCTOR GAMBLE	A	DIV	J	T					
38 PSNRY		NONE	J	T					
39 SCHLUMBERGER	A	DIV	J	T					
40 SCIENTIFIC ATLANTA	A	DIV	K	T					
41 STATE STREET	A	DIV	K	T					
42 TEXAS INSTRUMENTS	A	DIV	M	T					
43 TMO		NONE	K	T					
44 WCOM		NONE	J	T					
45 XMSR		NONE	L	T					
46 WASHINGTON REIT	A	DIV	K	T					
47 PARADIM INC PED	A	DIV	J	W					
48 AMER CENT GR FUND	B	DIV	J	T					
49 DAVIS SEX REAL EST FUND	A	DIV	J	T					
50 FIDELITY CONTRAFUND	C	DIV	K	T					
51 FIDELITY FREEDOM 2010	A	DIV	J	T					
52 FIDELITY LOW PRICED	D	DIV	M	T					
53 FIDELITY MAGELLAN	D	DIV	N	T					

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

2 Value Codes: J=\$13,000 or less (See Col. C1, D3) K=\$13,001-\$50,000 L=\$50,001-\$100,000 M=\$100,001-\$250,000 N=\$250,001-\$500,000 O=\$500,001-\$1,000,000 P1=\$1,000,001-\$5,000,000 P2=\$5,000,001-\$25,000,000 P3=\$25,000,001-\$50,000,000 P4=More than \$50,000,000

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

FINANCIAL DISCLOSURE REPORT

JOHN G. ROBERTS, JR.

5/13/01

VII. Page 5 INVESTMENTS and TRUSTS -- income, value, transactions (Includes those of spouse and dependent children. See pp 34-57 of Instructions.)

A. Description of Assets (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amt. Code1 (A-H)	(2) Type (e.g., div., rent or int.)	(1) Value Code2 (J-P)	(2) Value Method Code3 (Q-W)	(1) Type (e.g., buy, sell, merges, redemption)	If not exempt from disclosure			
						(2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-F)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets.)									
71 VANQUARD INT'L GR	C	DIV	K	T					
72 VANQUARD SM CAP INDEX	D	DIV	L	T					
73 PILGRIM WW EM FUND		NONE	J	T					
74 ALLFIRST BANK M. MKT	E	INT	O	T					
75 ARK MONEY MKT	A	DIV	J	T					
76 CMA MONEY FUND	C	DIV	L	T					
77 C. SCHWAB MONEY MKT	A	DIV	J	T					
78 C. SCHWAB MUNI M FUND	C	DIV	L	T					
79 FIRST UNION CHECKING	A	INT	J	T					
80 CHEVY CHASE BANK	A	INT	J	T					
81 1/8 INTEREST IN COTTAGE, KNOCKLOUS, LIMOLICK, IRE.	A	RENT	J	W					
82 HOKAN & HARTIGAN L.L.P. INVESTMENT FUND	A	INT	J	W					
83 SHAW PITTMAN INVESTORS-2000 L.L.C.	A	INT	J	W					
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1 Income/Gain Codes: A=\$1,000 or less; B=\$1,001-\$2,500; C=\$2,501-\$5,000; D=\$5,001-\$15,000; E=\$15,001-\$50,000; F=\$50,001-\$100,000; G=\$100,001-\$1,000,000; H=\$1,000,001-\$5,000,000; I=\$5,000,001-\$25,000,000; J=\$25,000,001-\$50,000,000; K=\$50,001-\$100,000; L=\$100,001-\$250,000; M=\$250,001-\$500,000; N=\$500,001-\$1,000,000; O=\$1,000,001-\$5,000,000; P=\$5,000,001-\$25,000,000; Q=\$25,000,001-\$50,000,000; R=More than \$50,000,000

2 Value Codes: J=\$15,000 or less; K=\$15,001-\$50,000; L=\$50,001-\$100,000; M=\$100,001-\$250,000; N=\$250,001-\$500,000; O=\$500,001-\$1,000,000; P=\$1,000,001-\$5,000,000; Q=\$5,000,001-\$25,000,000; R=More than \$25,000,000

3 Value Method Codes: Q=Appraisal; R=Book value; S=Assessment; T=Cash/Market; U=Other; V=Cost (real estate only); W=Estimated

## 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	700	000	00	Notes payable to banks—secured		0
U.S. Government securities—add schedule		0		Notes payable to banks—unsecured		0
Listed securities—add schedule	2,107	021	21	Notes payable to relatives		0
Unlisted securities—add schedule	2	000	00	Notes payable to others		0
Accounts and notes receivable:		0		Accounts and bills due		0
Due from relatives and friends		0		Unpaid income tax		0
Due from others		0		Other unpaid tax and interest		0
Doubtful		0		Real estate mortgages payable—add schedule	270	272 27
Real estate owned—add schedule	435	000	00	Chattel mortgages and other liens payable		0
Real estate mortgages receivable		0		Other debts—itemize:		0
Autos and other personal property	18	000	00			
Cash value—life insurance	11	911	06			
Other assets—itemize:	778	615	76			
SEE SCHEDULE						
				Total liabilities	270	272 27
				Net Worth	3,782	275 76
Total Assets	4,052	548	03	Total liabilities and net worth	4,052	548 03
CONTINGENT LIABILITIES				GENERAL INFORMATION		
As endorser, cosmaker or guarantor		0		Are any assets pledged? (Add schedule.)		NO
On leases or contracts		0		Are you defendant in any suits or legal actions?		NO
Legal Claims		0		Have you ever taken bankruptcy?		NO
Provision for Federal Income Tax		0				
Other special debt		0				

Real Estate Mortgage Payable

On personal residence: Fleet Mortgage  
 \$270,272.27 balance  
 30-yr. fixed, 8.125%

Other Assets

<u>Mutual Fund</u>	<u>Value</u>
Fidelity Contrafund	\$32,560.97
Fidelity Freedom 2010	2,038.06
Fidelity Low-Priced	109,959.55
Fidelity Magellan	278,718.32
Fidelity OTC	37,417.88
Fidelity Overseas	29,209.21
Janus Fund	16,455.27
Janus Enterprise	15,617.88
Janus Worldwide	28,900.57
Pilgrim Worldwide Emerging	5,390.49
American Century Growth	10,988.95
Davis Series Real Estate Fund	12,394.00
Franklin Mutual Discovery Z	5,622.00
Franklin Mutual Beacon Z	11,324.00
GAM Global C	8,579.00
Lord Abbett Dev Growth	16,525.00
Fidelity Select Energy	14,749.86
Seligman Comm A	13,519.00
TR Price European Stock	8,220.20
TR Price Sci & Tech	7,916.49
Putnam Voyager	6,214.48
Putnam New Opportunities	5,696.58
CMA Money Fund	86,848.00
Hogan & Hartson L.L.P. Investment Fund	3,750.00
Shaw Pittman Investors- 2000 L.L.C.	10,000.00

Description	Quote Symbol	Total Market Value
JDS UNIPHASE CORPORATION(M)	JDSU	\$ 2,139.00
JOHNSON & JOHNSON(M)	JNJ	9,848.00
LORAL SPACE & COMMUN LTD(M)	LOR	2,370.00
LUCENT TECHNOLOGIES INC(M)	LU	4,004.00
MERCK & CO INC(M)	MRK	15,194.00
MICROSOFT CORP(M)	MSFT	271,000.00
MOTOROLA INCORPORATED(M)	MOT	13,995.00
NIKE INC CLASS B(M)	NIKE	4,181.00
NOKIA CORP SPON ADR F(M)	NOK	54,704.00
1 ADR REP 1 NOKIA CORPS		
NOVELLUS SYSTEMS INC(M)	NVLS	16,545.00
P M G SIERRA INC(M)	PMCS	4,160.00
PAC CENTY CYBERWKS ADR F(M)	PCW	778.80
SPONSORED ADR		
1 ADR REP 10 ORD		
PETRO GEO SVCS A/S ADR F(M)	PGO	2,174.00
1 ADR REP 1 ORD		
PFIZER INCORPORATED(M)	PFE	12,990.00
PROCTER & GAMBLE CO(M)	PG	6,005.00
PT PASIFIK SATELIT ADR F(M)	PSNRY	3,000.00
NUSANTARA SPONSORED ADR		
1 ADR REP 3 ORD		
SCHLUMBERGER LTD F(M)	SLB	6,630.00
SCIENTIFIC ATLANTA INC(M)	SEA	23,082.00
SYNGENTA AG ADR F(M)	SYT	353.96
SPONSORED ADR		
1 ADR REP 1/5 ORD		

(M) Assets held in margin account

2802-013591 315421  
3155 04-2656

Chairman HATCH. Then we will just start with questions, if it all right with you. Senator Leahy, I will turn to you.

Senator LEAHY. Well, thank you.

Mr. Roberts, over the last decade, the Supreme Court has issued a series of 5–4 decisions. These struck down legislation on federalism grounds. And some see this as a federalism crusade and a very activist Court. It has included—those who have seen laws to protect them struck down have included people with disabilities, older workers, children in gun-infested schools, intellectual property owners, and victims of violence motivated by gender. I am talking about such cases as *Alden v. Maine*, *Florida Prepaid*, *Garrison*, *Morrison*, *Lopez*, *Kimmel*. You are familiar with all those, I know. You have commented publicly on some of these decisions that have overruled Congressional enactments as unconstitutional.

My questions are these: Do you believe that they represent a departure or a continuing trend? And what has contributed to this dramatic shift, mostly in the past decade, in the Supreme Court's interpretations of the powers of Congress?

Mr. ROBERTS. Well, I think the first of the series of those cases, to limit myself to the State sovereign immunity cases, the *Seminole Tribe* case, the question whether it was a departure or a continuation was one of the issues that the Court addressed at some length, both the majority and the dissent. There was a particular prior precedent that seemed to have addressed the question of whether Congress under the Commerce Clause could override State sovereign immunity, and the majority explained why they didn't read the case that way; and if it was going to be read that way, it would be no longer controlling. And the dissent, of course, joined issue on that.

So the Court has addressed in that first case the question of whether it was a departure or a continuation, and I think recognized that, at least to some extent, to the extent they were moving away from that prior arguable precedent that the majority and the dissent read differently, it certainly can be regarded as a departure.

The cases since then have addressed different refinements on that issue, and that certainly is a continuation of the lead *Seminole Tribe* case. These cases construe the 11th Amendment, and this is not the first time in our history that the 11th Amendment has been a cause of some division. When the Supreme Court early in its existence decided *Chisholm v. Georgia* and held that a citizen of another State could sue the State of Georgia, that prompted a reaction in the country that led to the 11th Amendment. And then I think perhaps the key departure, if you will, came in the case of *Hans v. Louisiana*, where the Court held that although the 11th Amendment addressed only the issue of a citizen of another State suing a State, its reasoning, its principle applied when a citizen of the same State sued.

Senator LEAHY. Mr. Roberts, I hesitate to interrupt but—and I appreciate the history and I don't disagree with that. But I am wondering why so many in the past few years. Do you see this as a basic shift? Do you see this as a reaction to Congress? Do you see this as a trend that is going to continue?



Mr. ROBERTS. Well, I think there's—so many in the last few years is because, given that *Seminole Tribe* was sort of the first of the decisions—again, this is the debate, whether it's a departure or continuation. But it was the first of them, and the ones you've had following in the wake of it are kind of fleshing out that principle, the application of the 11th Amendment and the question whether it can be abrogated under the Commerce Clause, which was the issue in *Seminole Tribe* or some of the other principles.

Others cases I think may well follow, which is in a reaction to the sovereign immunity decisions, because the Court has recognized there are ways for the Federal Government to—I don't want to say get around the 11th Amendment, but address this issue without running afoul of it. Section 5 of the 14th Amendment—

Senator LEAHY. It seems that some of the cases coming down in the last few years are finding less and less ways—again, we are even going to intellectual property cases and copyright.

Mr. ROBERTS. Well, what you have—

Senator LEAHY. It is almost as though copyright was something new even though it is in our Constitution.

Mr. ROBERTS. Well, the patent and copyright clause, you know, in *Seminole Tribe* the issue was: Does the Commerce Clause allow the Federal Government to overrule it? Then you're sort of going down each of the different provisions. Does the Intellectual Property Clause allow Congress to overrule it? And they're addressing those.

But the Court has—

Senator LEAHY. Well, don't *Lopez* and *Morrison*—would you agree with Judge Noonan's contention that the ones most likely to overturn Congressional statutes are conservative judges?

He uses, I believe, *Morrison* and *Lopez* as an example of that.

Mr. ROBERTS. Well, I do not know that conservative or liberal justices are more likely to overturn laws. Certainly, in the Warren Court era, for example, I would suppose it would be the justices you would consider more liberal who were overturning laws.

Senator LEAHY. So you do not agree with Judge Noonan, then.

Mr. ROBERTS. I have not read his book. I know it is there.

Senator LEAHY. I would recommend it to you. It is not a beach book, by any means, but it is one where when it came out, I got it and read it. And I am not one who has always agreed with Judge Noonan, but the book is well worthwhile.

I do not, let me quickly add, Mr. Chairman, I do not get any percentage of the profits on the books, and I am not a noted author like you are, but I thought this was a—I also read his book.

But what worries me on it, on this whole issue of federalism, it seems to me the Court is going more and more to saying they would superimpose their views, an unelected court, on the views of an elected representative form of Government, the Congress, in disability areas, and intellectual property and others, and I worry about that, and I worry about that trend.

Now, I realize, on the court you are going on, of course you are restricted to stare decisis, but you know you are not going to have too many cases that fit on all fours, and there is a great deal of flexibility. It is very easy for somebody up for either a district or

a circuit court judgeship to say, “Well, I have to follow the dictates of the next higher court.”

But usually when they get to the Circuit Court of Appeals for the District of Columbia, you do not have many cases that get all of the way up to you guys that they are on all fours, on something that the Supreme Court has ruled on. There is hardly any use for it.

You mentioned, in your earlier hearing, that in certain situations the Constitution is very clear. Then, you said there are certain areas where literalism obviously does not work. If you are dealing with the Fourth Amendment, something on unreasonable search and seizure, the text is only going to get you so far, well, then what does guide you? Take the Commerce Clause, take the spending power, what does guide you? Obviously, the text is not enough by itself, but I agree with you on that. You cannot go by the literal words on a number of these things in a changing economic world, but what does guide you? What is your lodestone?

Mr. ROBERTS. Well, certainly, as a circuit judge, of course, my lodestar would be the Supreme Court precedence, and they have volumes of them on how to interpret the Commerce Clause, fewer precedents on how to interpret the Spending Clause. I think there are going to be more important cases in that area in the future.

But starting with *McCullough v. Maryland*, Chief Justice Marshall gave a very broad and expansive reading to the powers of the Federal Government and explained that—and I don’t remember the exact quote—but if the ends be legitimate, then any means chosen to achieve them are within the power of the Federal Government, and cases interpreting that, throughout the years, have come down.

Certainly, by the time *Lopez* was decided, many of us had learned in law school that it was just sort of a formality to say that interstate commerce was affected and that cases weren’t going to be thrown out that way. *Lopez* certainly breathed new life into the Commerce Clause.

I think it remains to be seen, in subsequent decisions, how rigorous a showing, and in many cases, it is just a showing. It’s not a question of an abstract fact, does this affect interstate commerce or not, but has this body, the Congress, demonstrated the impact on interstate commerce that drove them to legislate? That’s a very important factor. It wasn’t present in *Lopez* at all. I think the members of Congress had heard the same thing I had heard in law school, that this is an important—and they hadn’t gone through the process of establishing a record in that case.

Other cases are different. But, again, as a circuit judge—

Senator LEAHY. We have got some cases, like the Disability Act, where we have had hundreds and hundreds of hearings around the country, thousands of pages of testimony, and the Court says, of course, we have not established a record. You sometimes think that there is picking and choosing.

For example, in your NPR interview, you talked about an originalist approach to Constitution interpretation, but how do you do that? Does a judge pick and choose, based on his or her own predilections, whether they are going to use the context of the 18th century or the context of the 21st century? Obviously, there are some things that it would be impossible, although Justice Scalia

said that the Constitution means today what it meant when it was written, and he even uses an 18th century dictionary to understand what the 1789 words meant.

Do you believe judges pick and choose? I mean, how do you do a literal interpretation?

Mr. ROBERTS. Well, we talked about this some at the first hearing. Again, the Supreme Court has given some guidance on particular areas and said that when you're interpreting this particular provision, this is the kind of approach you should use. The example I like to give is the Seventh Amendment. The Court has said: We take a very historical approach to deciding whether you have a right to a jury trial because of the way the Seventh Amendment is worded.

So even if I decided I am going to be a textualist or an originalist or whatever, I do not have the flexibility, when I get to a Seventh Amendment case. The approach, not just the particular results, but the approach is laid out as well there.

Now, when you get to the Eleventh Amendment, the one thing we know from the Supreme Court's decision is that strict adherence to a text doesn't give you what the Supreme Court says are the right answers. You have to look at the historical context a little more, and it varies with provisions, as we've said. There's a provision in the Constitution that says a two-thirds vote of the Senate is required. Well, even if you think provisions should be interpreted in light of evolving standards, that doesn't mean two-thirds can become three-fifths.

Unreasonable searches and seizures, that's a little more difficult to say just based on the text I know what's unreasonable and what's not. You have to look beyond the text in interpreting that.

Senator LEAHY. Thank you. I will have further questions. I will submit some for the record, and I know that the distinguished Chairman intends to have a Committee vote next week, and I would urge you to get answers back in time so that we can have a chance to review them in case there are follow-ups.

Mr. ROBERTS. Thank you, Senator.

Senator LEAHY. It is good to see you again.

Mr. ROBERTS. Thank you.

Chairman HATCH. Thank you, Senator.

We will turn to Senator Kennedy. Senator Kennedy?

Senator KENNEDY. Thank you, Mr. Chairman.

Welcome back.

Mr. ROBERTS. Senator Kennedy, thank you.

**STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR  
FROM THE STATE OF MASSACHUSETTS**

Senator KENNEDY. We welcome the nominee back to the Committee to continue the hearing which began 3 months ago.

The advice and consent function assigned to us by the Framers of the Constitution is vital to the proper functioning of our Government. It was a major feature of the structure of the Framers' design, not only for themselves, but for all future generations, and we do not sit here today merely to express our individual preferences about particular judges or even to express the preference of our constituents. We act today as inheritors of a great tradition and a

great responsibility to balance the powers of the Executive Branch in selecting the members of the Judicial Branch.

We were given the advice and consent power over judicial appointments so that the two elected branches—the Executive and the Legislative—would share coordinate and co-equal responsibility for the third branch, the undemocratic branch, in which the judges are insulated from us, and from the President and from the electorate by lifetime appointments.

But the Framers gave us insulation, too, so that we could exercise our functions, including the advice and consent function, fearlessly and freely, even when required to consider the actions of a popular President. We were given 6-year terms, longer the House, longer the President. We were given staggered terms so no more than a third of us would be elected at one time, and we were given the authority to set our own rules for the way we exercise our responsibilities, including advice and consent.

We had the constitutional obligation to assure the Judicial Branch remains free and independent, is not a political tool of the Executive, that its obligation is to the constitutional principles, constitutional rights which lie at the heart of our democracy. Our role is positive and proactive, not passive and reactive, regardless of whether the President shares our political or philosophical views.

And we, on the Judiciary Committee, have a unique role which we cannot fulfill unless we have ample opportunity in Committee to question the nominee and to discuss in detail how we think the advice and consent power should be exercised with respect to each nominee, and that process resumes today with respect to Mr. Roberts.

His nomination is a special one because he has been nominated for a special court. The D.C. Circuit makes the decision with national impact on the lives of all of the American people.

Its decisions govern the scope and the effectiveness of our Occupational Health and Safety laws, of our consumer protection laws, of Federal labor laws, of fair employment laws, including race, gender, disability and discrimination cases, of workers' rights to organize, Clean Air Act rules, Freedom of Information rules, First Amendment rights in broadcast media and many other rights of individuals under the Constitution laws enacted by Congress, and so we must take special care with this and all other appointments to this court.

No one has the right to be appointed to any Federal appellate court. The burden is on the President and the nominee to demonstrate that the nomination should have our consent. The less weight the President places on the Senate's advice role, the more weight must be placed on our consent role. Because the District of Columbia has no Senators of its own, the usual prenomination consultation has not occurred, leaving an even heavier burden on the process that we conduct today. So let us approach it with the seriousness of purpose and deliberation it deserves.

Mr. Roberts, you responded to questions, the written questions, for which I am grateful. I would like to pick up on some of these.

You describe your judicial philosophy as insisting that judges confine themselves to adjudication of the cases before them and not legislate. You want judges to show an essential humility, grounded

in the limited role of an undemocratic judiciary, reflected in deference to legislative policy judgments and judicial restraint, not shaping policy.

Now, as you are well aware, in the recent years, we in Congress have made bipartisan legislative judgments about policy on issues vital to the public, based on extensive hearings and findings, yet we have had our policy discussion second-guessed by appellate judges.

How would you describe the presumption of validity that should attach to our actions, and what do you think we can do to insulate ourselves from this second-guessing on policy issues by judges who do not adhere to the humility and deference standard you prescribe?

And what in your writings, in your professional record, should demonstrate and reassure us that, as a judge, you would, in fact, act with the humility and deference to Congressional judgments which you claim is your philosophy?

Mr. ROBERTS. Well, the Supreme Court has, throughout its history, on many occasions described the deference that is due to legislative judgments. Justice Holmes described assessing the constitutionality of an act of Congress as the gravest duty that the Supreme Court is called upon to perform.

I'm familiar with those quotations because I've used them in briefs many times when I was in the Justice Department representing the United States and defending acts of Congress before the Supreme Court, and it's a principle that is easily stated and needs to be observed in practice, as well as in theory.

Now, the Court, of course, has the obligation, and has been recognized since *Marbury v. Madison*, to assess the constitutionality of acts of Congress, and when those acts are challenged, it is the obligation of the Court to say what the law is.

The determination of when deference to legislative policy judgments goes too far and becomes abdication of the judicial responsibility, and when scrutiny of those judgments goes too far on the part of the judges and becomes what I think is properly called judicial activism, that is certainly the central dilemma of having an unelected, as you describe it correctly, undemocratic judiciary in a democratic republic. And certainly the most gifted commentators we've had have struggled with that.

I think the doctrines of deference that have developed over the years, when you're assessing a legislative classification and an area that doesn't implicate a protected class like race or gender, disability, then all you have to show is a rational basis, and that shouldn't be too hard.

If you're in one of those other areas, the Court has developed a stricter scrutiny because they think in those areas there is more reason to probe a lot more deeply. But you asked what in my work sort of shows that, I guess I would look to the job I did when I was deputy solicitor general and was defending acts of Congress before the Supreme Court.

Senator KENNEDY. I am going to come back to the judicial deference in a minute. We had, in your exchanges with Senator Leahy about the power of the Congress, we have seen that the Supreme

Court has limited the ability to legislate under the Commerce Clause, the *Lopez* case.

And under Section 5 of the Fourteenth Amendment—that is the ADA case and the RFRA case—we had extensive hearings, listened to Republican and Democrat Attorneys General. There is no even suggestion at that time that we were not going to meet the constitutional requirement.

For some of us, the last great authority is the spending power, and the concern that many of us have is where you are going to be on this issue, further limitation of the power of the Congress in using the spending power. The Supreme Court has ruled on this, as you well know, that in the *Dole* case involving Congress, could, under the Spending Clause, condition Federal highway funds on States, raise the minimum drinking age. Rehnquist authored the opinion. White, Marshall, Blackmun, Powell, Stevens, even Scalia, agreed with that.

What is your own view about the authority in the Spending Clause and the power of Congress to use the Spending Clause to achieve its objectives? Is there anything, in terms of your own view, that would, in any way, find that that Spending Clause would be compromised to permit to—to undermine the *Dole* case?

Mr. ROBERTS. Well, first of all, of course, if I were to be confirmed, my own personal views would not be relevant. I would follow the Supreme Court precedent.

There is not a lot of precedent in this area.

Senator KENNEDY. The only problem is we have seen the changes and the difference in the interpretation by the Court in the Commerce Clause and in Section 5 of the Fourteenth Amendment. I mean, I was the Chairman of the Committee when we had those, and we listened, and there was not going to be a problem on that. And, of course, there were decisions that were made that reinterpreted past history on it.

I want to know whether we are taking a chance with you on the Spending Clause. That is the last real authority for us.

Mr. ROBERTS. You discussed the *Dole* case, *South Dakota v. Dole*, and in that case, the justices you listed reaffirmed Congress's power to say: If you're going to accept Federal funds, here's what you've got to do.

Senator KENNEDY. You are not troubled by that?

Mr. ROBERTS. No, it's a basic principle, and I would just point out, as an aside, you listed the justices who agreed with that, the justices who disagreed and dissented in *South Dakota v. Dole* were Justices Brennan and O'Connor. It is not necessarily the sort of division, sort of the typical conservative/liberal lines at all.

In *South Dakota v. Dole*, the Court referred to a prior precedent. I think it is the *Stewart Machine* case. And the argument has been made, well, aren't—the issue that I think the Court will address is are there limits on that; is it if you accept one dime of Federal money you have to do all sorts of things, even if they're not germane or proportional? Those are the two standards that had been developed in the prior cases. It wasn't an issue in *South Dakota v. Dole*.

If you didn't lower the drinking age, you lost highway funds. There was certainly a relationship between underage drinking and

highway accidents. So the Court ruled in that case that that was an appropriate proportional and germane response.

I worked on a brief in that case with my—I was an associate at that time—

Senator KENNEDY. You understand this is the law, and this would be the precedent that you would follow.

Mr. ROBERTS. The South Dakota case.

Senator KENNEDY. Yes, the Dole.

Mr. ROBERTS. Yes.

Senator KENNEDY. Let me move on, if I could. I do not mean to cut you off.

You talked about the judicial activism. Would you agree that activism can come from both sides of the ideological spectrum?

Mr. ROBERTS. Certainly.

Senator KENNEDY. Could you give us some examples of any of the appellate cases you believe that show impermissible activism on each side.

Mr. ROBERTS. Well, I cited in my written responses a case from California, an old case from the California Supreme Court, because I thought it was important to avoid criticizing binding Supreme Court precedent, in which the California Supreme Court—it was a Lochner era-type case—struck down, on substantive due process grounds, a California law that required employers to pay employees at certain intervals. Their reasoning was that employees are free to negotiate whatever agreements they want, and if they don't negotiate that, you shouldn't interfere with their liberty of contract.

Several Supreme Court cases follow the same principle in what people loosely call the Lochner era. I think that's an example of judicial activism. A policy judgment had been made by the State legislature in that case to address a real problem, the inequity in negotiating positions, the fact that employers were frequently not paying employees. I think there were a lot in the mining industry that were directly affected when wages were due, but many months later, and that was a policy judgment. I don't think that was a constitutional evaluation.

Senator KENNEDY. How about on the other side of the philosophical spectrum, do you see other examples? I mean, conservative/liberal, how would you find? Do you think there has been activism on both sides of the spectrum? And, if so, how would you define that?

Mr. ROBERTS. Well, I do think there has been activism on both sides. I haven't given any thought to a particular Supreme Court case that I thought exhibited liberal judicial activism. Again, I feel reluctant to criticize pending or binding—

Senator KENNEDY. Well, I can understand that, but we are trying to give life to your words. You talk about your professed philosophy of deference and humility as real and not just words. That is what I am trying to see from your own kind of experience, in response to those questions, whether you had examples that would give light to those words.

President Bush ran on a platform of selecting judges who will be like Justice Scalia and Justice Thomas. We all understand that meant judges who will be activists in reducing the power of Congress to protect people's rights. You must understand, as everyone

else does, that you were selected because those at the White House and the Justice Department knew your record and assured the President your decisions would please President Bush.

What can you tell us which will reassure us that you will not necessarily follow the lead of Justice Scalia and Thomas?

Mr. ROBERTS. Well, I will follow the lead of the Supreme Court majority in any precedents that are applicable there. And if Justices Scalia and Thomas are in dissent in those cases, I am not going to follow the dissent. I'm going to follow the majority.

Senator KENNEDY. Are there any cases which you believe that either one of them showed insufficient deference to Congress and became judicial activists?

Mr. ROBERTS. No, I haven't gone through and looked for particular occasions. If they were majority opinions by either of those justices, I would not feel it appropriate for me to criticize those because I would have to apply that majority opinion, whether I agree with it or not.

And I think it's important for the Committee to understand I have been asked questions in some areas I think because people wonder whether I'm going to follow a particular precedent or because they're concerned I might not, and in other areas the concern seems to be that I might, depending on whether a particular questioner is critical or supportive of those decisions.

I am going to follow both the decisions I agree with and the decisions that I don't agree with, regardless of any personal view.

Senator KENNEDY. Well, as you understand, I am not trying to get the outcome of your judgment on a particular fact situation, but I have listened for 40 years nominees say that they are going to follow the precedent and interpret the law, and yet every single day on just about every single court, they come out in different directions. Some are in the majority and some are in the minority, and they have sat here and given similar kind of answers.

And what I am trying to find out is what is behind those answers so that we can give some light to it. Because, as you understand, every single day people are applying what they understand is the law and applying what the President—and there is, in many, many instances, a wide difference. Certainly, there is even in the courts.

So our ability for—you give words about, particularly on the authority and responsibility of Congress, you are talking you would be a nonjudicial activist, and we are trying to find out what these words mean in terms of your own kind of life experience, either by your writings, your statements or your opinions about this, and that I think we are entitled to find out.

Mr. ROBERTS. I guess what I would point to, Senator—I'm obviously not a sitting judge. I don't have decisions—but I do have a history of litigating cases, and when you talk about the ability to set aside personal views and apply precedent without regard to personal ideology or personal views, that's something I've been able to do in my practice.

My practice has not been ideological in any sense. My clients and their positions are liberal and conservative across the board. I have argued in favor of environmental restrictions and against takings claims. I've argued in favor of affirmative action. I've argued in



favor of prisoners' rights under the Eighth Amendment. I've argued in favor of antitrust enforcement.

At the same time, I've represented defendants charged with anti-trust cases. I've argued cases against affirmative action. And what I've been able to do in each of those cases is set aside any personal views and discharge the professional obligation of an advocate.

And I would urge you to look at cases on both sides. Look at the brief, look at the argument where I was arguing the pro environmental position. Take a brief and an argument where I was arguing against environmental enforcement on behalf of a client. See if the professional skills applied, the zealous advocacy is any different in either of those cases. I would respectfully submit that you'll find that it was not.

Now, that's not judging, I understand that, but it is the same skill, setting aside personal views, taking the precedents and applying them either as an advocate or as a judge.

Senator KENNEDY. Well, now, I hear you on this. But, every day, responsible disagree with one another, and there is an implicit band of discretion in the decisions before them. In many cases, there is an explicit role for judicial discretion. That is what I am interested in. That is what I am interested in.

Do you really believe that the judge's sensitivity to the purpose and the result of the laws they interpret is irrelevant to the way they will exercise their discretionary review of other judges or review other judge's exercise of discretion. I am interested in what in your background or expertise demonstrate you will be sensitive to the human impact of your decisions.

You are going to be a judge that is going to be making judgments and decisions on these range of issues—health and safety, consumer protection, the labor laws, fair employment, gender, race, disability, Clean Air, workers' rights, Freedom of Information, a whole range, a whole range, a whole range.

What can you tell us, in your own experience, would reflect on your judgment in being sensitive to the human conditions that are going to be involved in the great numbers of cases there are going to be for that?

Mr. ROBERTS. I don't know if this is responsive or not because, of course, when you are an advocate, you're advocating a client's position, and you're concerned about a particular human impact and not others. Certainly, when you're a judge, you want to apply the law and, yes, you have to be sensitive to the impact of your decision, but at the same time apply the law fairly without regard—what the judicial oath says—without regard to persons.

At the same time, I appreciate the fact that the law has impact on people in society, and I think it's, for example, an important obligation of a lawyer to do pro bono work, to address the situation of people impacted by the law who don't have the resources to respond.

Senator KENNEDY. Maybe you can tell us. Talk about that.

Mr. ROBERTS. One of the cases I handled before the D.C. Court of Appeals was *Little v. Barry*. I represented a class of general public welfare recipients in the District who had had their welfare benefits terminated, and we argued, and argued on the basis of *Goldberg v. Kelly*, a landmark civil rights case, that those individuals

were entitled to individualized hearings before their welfare benefits were terminated. I argued that before the court of appeals on a pro bono basis. And that was a case where the law had a very real and direct impact on the most needy citizens in our country, and I was happy to take that case on behalf of that class of welfare recipients.

Senator KENNEDY. If there are others, I would be interested in it.

Mr. ROBERTS. Well, there are other—

Senator KENNEDY. We can talk now, but there is going to be this band of discretion. You are going to apply the law, as you have outlined. You can be on the pro and con. You have answered that kind of question, but there is that band of discretion which judges are exercising, and this court makes judgments on matters that have enormous impact in terms of the quality of life and rights of individuals. And I am looking for that ingredient in your kind of life experience that would help to show that the human element that is being considered in this is something that you both understand, appreciate and would be concerned with.

Mr. ROBERTS. Senator, there are other examples. The first case I argued in the Supreme Court was on a pro bono basis on behalf of an individual facing the almighty might of the U.S. Government, going after him criminally and civilly.

I regularly participate, our firm has a Community Services Department that does pro bono work. Whenever there is an appeal involved, I and members of our appellate group help prepare. We have recently done issues involving termination of parental rights. I can't imagine a more direct impact on an individual. Minority voting rights is another case we participated in, in which we prepare the people arguing pro bono for the appeals.

I do a street law program that I think is important.

Senator KENNEDY. With the law school or with—

Mr. ROBERTS. It's done in conjunction with the Supreme Court Historical Society. Every summer high school teachers who are teaching about the courts come to learn a little bit about it, and I talk to them about how the Supreme Court functions, and it's a very, I've always found it very rewarding to sit with the high school teachers and hear what they, the difficulties they have in communicating with their students about the justice system.

Senator KENNEDY. That is very, I am interested in it, and I appreciate your response to these questions and anything else on this would be useful.

I just had one final. I know I am out of time, but I have one final question, Chairman.

In your answers to the committee's questions, you indicate your understanding the Framers insulated the judges from the public pressures. Do you also understand and agree that in keeping the Senate small and giving us the staggered terms, letting us make our own rules for exercising the key responsibility of the advice and consent also intended to insulate us to exercise our authority to prevent the Executive Branch from going too far in the assertion of their powers and the exertion of the Executive Branch powers?

Mr. ROBERTS. Well, I don't know about in particular reference to advice and consent, but certainly, as I understand the structure of

the Constitution, the Senate was, as you indicated earlier, given a longer term, given staggered terms because it was supposed to exercise something of a restraining influence on the more popularly responsive branches of government.

Senator KENNEDY. This is a well-rooted responsibility, as I understand. I mean, we have seen at times when you can take—the most obvious historic would be the court-packing by President Roosevelt, when there would be an important responsibility by the Congress to stand up to a President, actions of the Executive Branch. And as someone who is a constitutional authority, such as yourself, where of that historic responsibility and role and thought about it, if there is anything you can tell—

Mr. ROBERTS. Well, I don't claim to be a constitutional authority, but certainly the Senate obviously has a critical responsibility in this area. My memory may not be correct, but I believe original drafts of the Constitution provided that the Senate would actually be appointing the judges.

[Laughter.]

Senator KENNEDY. There you go. Did you hear that, Orrin?

Chairman HATCH. That is what they think they are doing now.

[Laughter.]

Mr. ROBERTS. Cooler heads prevailed before the end.

Chairman HATCH. I am glad you added that last part.

Mr. ROBERTS. But I am happy to be scrutinized under whatever standard the Committee or the Senate wishes to apply.

Senator KENNEDY. Thank you very much.

Chairman HATCH. We will turn to Senator Durbin now.

**STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR  
FROM THE STATE OF ILLINOIS**

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

Mr. Roberts, thank you for coming back. I am glad we had a chance for this hearing, and I thank the Chairman. I think we have reached an accommodation here that may be helpful in moving this Committee forward in a better environment.

I understand my fate in life as a back-bencher in the minority in the Senate with a Republican President, that nominees that come before us are not likely to share my political philosophy. That is a fact of life.

I also understand that I have a responsibility under the Constitution to ask questions of those nominees to satisfy my judgment that they would be well-suited to serve on the Federal bench. Many of the nominees have been forthcoming, and open, and candid in their answers, others have not. As a politician, I can certainly identify with that. I have danced around questions in my life, Waltz steps, Polka steps, Samba steps, I try them all when I do not want to answer a question.

And now I am going to ask you a question, just a limited number of questions relating to some dance steps I see in your answers here.

So, in 1991, you are in the Solicitor General's Office, and in *Rust v. Sullivan*, you end up signing on to a brief which calls for overturning *Roe v. Wade*, one of the more controversial Supreme Court cases of my lifetime. When we asked repeatedly in questions of you

what your position is on *Roe v. Wade*, you have basically danced away and said, “No, no, my personal views mean nothing. I am just going to apply the law.”

This, in my mind, is evasive. I need to hear something more definitive from you. Was the statement in that brief an expression of your personal and legal feelings about *Roe v. Wade*, that it should be repealed?

What is your position today, in terms of that decision?

Mr. ROBERTS. The statement in the brief was my position as an advocate for a client. We were defending a Health and Human Services program in which the allegation was that the regulations issued by the Department of Health and Human Services burdened the constitutional right to an abortion recognized in *Roe v. Wade*.

At that time, it was the position of the administration, articulated in four different briefs filed with the Supreme Court, briefs that I hadn’t worked on, that *Roe v. Wade* should be overturned.

Now, if *Roe v. Wade* were to be overturned, the challenge to the regulations that we were tasked with defending would fail, and so it was appropriate in that case to include that argument. I think it was all of one or two sentences. The bulk of the brief was addressed to why the regulations were valid, in any event.

But since that was the administration position, and the administration was my client, I reiterated that position in the brief because it was my responsibility to defend that HHS program.

Senator DURBIN. Understood. I have been an attorney, represented a client, sometimes argued a position that I did not necessarily buy, personally. And so I am asking you today what is your position on *Roe v. Wade*?

Mr. ROBERTS. I don’t—*Roe v. Wade* is the settled law of the land. It is not—it’s a little more than settled. It was reaffirmed in the face of a challenge that it should be overruled in the *Casey* decision. Accordingly, it’s the settled law of the land. There’s nothing in my personal views that would prevent me from fully and faithfully applying that precedent, as well as *Casey*.

Senator DURBIN. Then, let me ask you this question. You make a painful analogy, from my point of view, when you suggest that calling for the overturn of *Roe v. Wade* was not any different than the Government calling for overturning *Plessy v. Ferguson* and *Brown v. Board of Education*. *Plessy v. Ferguson*, separate, but equal, was really the basis for racial discrimination and segregation in America for decades.

I hope that that is just a strict legal analogy and does not reflect your opinion of *Roe v. Wade* policy compared to *Plessy v. Ferguson* policy.

Mr. ROBERTS. Senator, the question I was asked, were there other occasions in which the Department—if I am remembering correctly—if there were other occasions in which the Solicitor General had urged that a Supreme Court precedent be overturned, and that is just—*Brown v. Board of Education* is the most prominent one. The answer wasn’t meant to draw a particular substantive analogy.

Senator DURBIN. And I will not push any further because I was hoping that is what your response would be.

So in the panel that you were on the last time before us, Justice Deborah Cook of the Ohio Supreme Court was one of the members of the panel, and I sent a written question to her, which I sent to you. And the basic question goes into the cliches we use in this Committee about strict construction, and where are you, and how do you compare yourself to Justice Scalia and Justice Thomas, and then try to draw some conclusions.

Now, as oblique as those questions may be, that is as good as it gets in this Committee. That is as close as we can get to trying to find out what is really ticking in your heart when it comes to your judicial philosophy.

And her answers were, as I have said, painful, but painfully honest. She said she was not a strict constructionist, but she conceded in answers to question that if the Supreme Court had a majority of strict constructionists, it is not likely they would have reached the same conclusion in *Brown v. Board of Education*, the *Miranda* decision or *Roe v. Wade*. I thought that was the most honest answer we have been given by a Bush nominee, and I have used it as kind of a standard ever since to just see how far other nominees would go in their candor and honesty.

I found your answer evasive. When I look at what you had to say about your philosophy, you said, "In short, I do not think beginning with an all-encompassing approach to constitutional interpretation is the best way to faithfully construe the document," and then you went on to say I am not going to draw any conclusions on the Supreme Court decisions.

I need more. I need to hear more from you about where you are coming from and, at least hypothetically, if you agree that those who call themselves strict constructionists would not likely be in the vanguard of the socially important Supreme Court decisions that we have seen in *Brown v. Board*, *Miranda* or *Roe v. Wade*.

Mr. ROBERTS. Well, Senator, I don't know if that's a flaw for a judicial nominee or not, not to have a comprehensive philosophy about constitutional interpretation, to be able to say, "I'm an originalist, I'm a textualist, I'm a literalist or this or that." I just don't feel comfortable with any of those particular labels. One reason is that as the Constitution uses the term "inferior court judge," I'll be bound to follow the Supreme Court precedent regardless of what type of constructionist I, personally, might be.

The other thing is, in my review over the years and looking at Supreme Court constitutional decisions, I don't necessarily think that it's the best approach to have an all-encompassing philosophy. The Supreme Court certainly doesn't. There are some areas where they apply what you might think of as a strict construction; there are other areas where they don't. And I don't accept the proposition that a strict constructionist is necessarily hostile to civil rights.

For example, Justice Black thought he was a strict constructionist of the First Amendment. No law means no law. Well, that's a very sympathetic view to people who have First Amendment claims. I can see the argument that someone who is going to be a strict constructionist on the Eleventh Amendment might result, come forward with decisions that are more acceptable to some of the questions Senator Leahy was raising earlier. The Eleventh Amendment says the citizen of another State, so how does it apply

with citizen of the same State if you are going to be a strict constructionist?

The Supreme Court doesn't apply a uniform and consistent approach. I certainly don't feel comfortable with any uniform or consistent approach because the constitutional provisions are very different. You have a very different approach in saying how are you going to give content to the Fourth Amendment prohibition on unreasonable searches and seizures. That's one thing. It doesn't mean that you apply the same approach to a far more specific provision like the Seventh Amendment.

Senator DURBIN. That is a reasonable answer. It is also a safe answer, and I am not going to question your motive in that answer. I accept it at face value as being an honest answer, but it raises the question that comes up time and again. If this job is so automatic, if the role of a judge is strictly to apply the precedent, then, frankly, I think we would have as many Democrats being proposed by the Bush White House as we do Republicans, but we do not. They understand that it is not automatic, it is not mechanical.

There are going to be discretionary and subjective elements in decisions, and that is why we have people coming from major law firms who have made a living representing rather wealthy clients. We have people who are conservative in their philosophy. We have many, many members of the vaunted Federalist Society, which my Chairman is so proud to be part of, all of these people come before us because I think, when it gets beyond the obvious, we understand that there is subjectivity here.

The last question I will ask you is a quote, and you better take care when you get quoted, but you were asked about the Rehnquist Supreme Court in 2000, for your opinion.

Now, many people had characterized it as a very conservative Court, but you said, "I don't know how you can call the Rehnquist Court conservative."

When asked specifically about the 1999–2000 Supreme Court term, a term in which the Court rendered numerous, highly controversial decisions, you said, "Taking this term as a whole, the most important thing it did was to make a compelling case that we do not have a very conservative Supreme Court."

What were you talking about?

Mr. ROBERTS. Well, that was the labels that people had been tossing about, and I thought that it didn't help public understanding of what the Court does to not look beyond that label. In that particular term, 1999 to 2000, some of the things the Supreme Court did was reaffirm the constitutional basis of the *Miranda* rule; strike down a restriction on partial-birth, late-term abortions in the case out of Nebraska; strike down, as violating the First Amendment, the giving of an invocation at school. In other words, reinforced *Miranda*, reinforced *Roe*, reinforced the ban on school prayer.

It issued the *Apprendi* decision, a great benefit to criminal defendants in sentencing. If there is going to be an enhancement of your sentence, you have all of the constitutional rights before that enhancement can be applied.

In the Nixon case out of Missouri, it even upheld constitutional limits on campaign contributions. In the Playboy Enterprises case,

it struck down an act of this body, this Congress, trying to regulate indecent speech. And I'm thinking, sitting there, well, there are six cases, every one of which—again, the labels are not helpful—but every one of which you would describe not as a conservative Court. It's a conservative Court giving criminal defendants a big break, reaffirming *Miranda*, reaffirming *Roe*, striking down regulation of indecent broadcasts, striking down school prayer.

Now, you can tell, if you're being interviewed for public consumption, you can say it's a conservative Court, it's a liberal Court. I think if you want to educate a little bit about what the Court does, they need to know that even when other people would say this is a conservative Court, there are those decisions. It's much more complicated than those labels.

Senator DURBIN. Thank you, Mr. Roberts.

Mr. ROBERTS. Thank you, Senator.

Senator DURBIN. Thank you, Mr. Chairman.

Chairman HATCH. Senator Feingold?

**STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR  
FROM THE STATE OF WISCONSIN**

Senator FEINGOLD. Thank you, Mr. Chairman.

I would like to welcome Mr. Roberts. Many of us wanted to have you back before the Committee for quite some time. So I want to thank the Chairman for scheduling this hearing. I hope this is a first step toward restoring some measure of regular order to our consideration of judicial nominations, and I do think, Mr. Chairman, if we work together in good faith it will be possible to bridge some of the differences we have on the issues.

Mr. Roberts, I enjoyed your reference to the Missouri Shrink case, which I agree is an important case.

Let me ask you something else. You were interviewed on the radio in 1999 and said, "We have gotten to the point these days where we think the only way we can show we're serious about a problem is if we pass a Federal law, whether it is the Violence Against Women Act or anything else. The fact of the matter is conditions are different in different States, and State laws can be more relevant is I think exactly the right term, more attune to the different situations in New York, as opposed to Minnesota, and that is what the Federal system is based on."

That is your quote, and I certainly do not disagree with some of the sentiments of it, but could you elaborate a little bit on the statement. Were you referring there simply to the constitutional limits on Congress's power that were being asserted in the case that challenged VAWA or were you saying that Congress was going too far in trying to address Violence Against Women, even if the Court were to hold that it could constitutionally take the action that it did?

Mr. ROBERTS. I didn't have any particular reference. I think that it was the VAWA case that had come up, if I am remembering the interview correctly, and I didn't mean to be passing either a policy or a legal judgment on the general policy question. I just wanted to make the basic point, and I'm sure it is a judgment that Senators deal with every day, that simply because you have a problem

that needs addressing, it's not necessarily the case that Federal legislation is the best way to address it.

I do think that's correct. And it's a proposition, for example, I know the Annual Report on the Judiciary the point was made at one time that you've got to keep in mind what the impact of these types of cases are going to be on the Federal courts every time you have a new Federal remedy, a new Federal right that has an impact on the Federal courts.

Obviously, there are many areas where the Federal response is not only appropriate, but required because of a variety of circumstances. You don't want different rules in different States, but I was just making the point that every problem doesn't necessarily need a Federal solution.

Senator FEINGOLD. So it is not a situation where you think the constitutional limitation has to do with whether State laws can be more attune to local conditions.

Mr. ROBERTS. Oh, no. No, of course, not. I mean the constitutional limitation doesn't turn on whether it's a good idea. There is not a "good idea" clause in the Constitution. It can be a bad idea, but certainly still satisfy the constitutional requirements.

Senator FEINGOLD. Let me switch to another subject. I supported the National AMBER Alert Act, which I am pleased will become law today as a part of a larger bill. It became part of the Child Abduction Prevention Act. I, and others, were troubled that the final bill also included new and separate departure procedures for sentencing of child-related and sex offenses.

These new rules will take sentencing discretion away from judges, and it was never even debated in the Senate Judiciary Committee before being inserted in the bill. In fact, Chief Justice Rehnquist, who rarely comments on pending legislation, spoke out against the original House version of the new rules. He wrote that the legislation "would do serious harm to the basic structure of the sentencing guideline system and would seriously impair the ability of courts to impose just and responsible sentences."

We have heard complaints about these new rules from a diverse group of organizations and individuals about the final bill, including the Judicial Conference, distinguished judges from around the country, the entire current Sentencing Commission, all living former chairpersons of the Sentencing Commission, the American Bar Association, the Washington Legal Foundation, the Leadership Conference on Civil Rights and the Cato Institute.

You may soon become a Federal judge. I would like to know what you think of the efforts of some in Congress to reduce the already limited sentencing discretion of Federal judges. And more specifically what is your impression of the provisions inserted into the Child Abduction Prevention Act during conference that take away or severely hamper the ability of judges to depart downwards when imposing a sentence, but do nothing to limit the ability of judges to depart in the other direction?

Mr. ROBERTS. I haven't looked at those provisions, Senator, so I don't want to comment on those specifically. I do know that under Supreme Court precedent, the determination of appropriate sentences and how they're to be applied is a quintessential legislative



function. It is for the legislature to decide an appropriate sentence and how it's to be administered.

I know judges have strong views on sentencing guidelines, and I think the debate about whether the guidelines are good or bad is carried forward in the debate about how you should review departures and enhancements. I did handle one case challenging a departure under the sentencing guidelines, and we went up to the Supreme Court several times. And each time it would go back, the district judge would find another way to impose the same sentence. It would go back, it would get thrown out again.

So I know it's a system on which judges have strong views. From my own point of view, the only thing that I feel comfortable opining on is that it is in an area that is quintessentially, as I said, for the Congress to decide what the sentence should be and how it should be administered.

Senator FEINGOLD. I am somewhat struck by that answer because the Chief Justice of the United States felt comfortable commenting, in fact, in a critical manner, on these new provisions, obviously believing that it is appropriate for him to indicate that going too far in limiting judges' discretion is not a good idea.

I would be interested, given the life term that you will shortly I think probably receive, what are your views on that fundamental question, which is—

Mr. ROBERTS. Well, I—

Senator FEINGOLD. And if your view is that Congress gets to decide the whole thing, so be it, but it is a big deal in terms of what our judges do, I think.

Mr. ROBERTS. Well, again, subject to constitutional limitations, you obviously can't have different sentencing schemes based on different racial impacts and things like that, but it is a Congressional legislative decision to determine the sentence.

Now, I'm sure that the Chief Justice is appropriately commenting on what he thinks about it as head of the Federal judiciary because it will have an impact on the Federal courts.

The debate goes back, of course. I mean, I understand the value of discretion, and before the imposition of the guidelines you had a situation that troubled Congress sufficiently to put the guidelines in. Where you do the same crime in one place and you do the same crime in another, and somebody's getting 30 years, and the other person is getting 2 years, and you can't see any distinction, that type of inequity I think does call for a legislative response, and that's what the guidelines were all about.

I know a lot of district judges didn't like it. They're used to sitting there and making more of a Solomonian decision about what this particular defendant deserves or whatnot, but there is a value in ensuring some uniformity across the country. That's why the guidelines were imposed.

I know the rules for departure and enhancement were intended to accommodate the discretion. But, again, beyond the judgment that that's for the legislature to make, I don't feel comfortable commenting.

Chairman HATCH. I suspect when you become a judge, you won't like it either.

[Laughter.]

Senator FEINGOLD. Well, and that's why, Mr. Chairman, I want to just follow for a second, not ask another question, but just comment. I certainly agree with you that the notion of uniformity, to the extent that a legislature can help make that happen, has tremendous value, but it is also the case that justice often can only be served with judicial discretion.

And I again repeat the words of the Chief Justice, Chief Justice Rehnquist, that this series of provisions, at least in the form they were in the House, would, in his words "seriously impair the ability of courts to impose just and responsible sentences." That, to me, is a countervailing value that has to be balanced, and I appreciate your attempt to answer the question.

Chairman HATCH. Would the Senator yield on that point just for a second?

As you know, I brought about a compromise where we changed that greatly, but I have agreed to hold hearings on the whole sentencing.

Senator FEINGOLD. Pardon me, Mr. Chairman?

Chairman HATCH. I have agreed to hold hearings on the whole sentencing matter. I have my own qualms about some of these things, as I know you do. As an intelligent member of this Committee, you are certainly not going to be ignored with regard to those issues.

Senator FEINGOLD. I appreciate that. I have heard from sitting judges, many of whom are very conservative judges, about how pained they are at the lack of discretion in a number of these cases, but let me go to the last subject because I know Senator Shumer would like to ask some questions.

In response to a written question from Senator Durbin, you stated that you have assisted your colleagues at Hogan & Hartson in the firm's representation of an inmate on Florida's death row. Could you tell me more about that case, and your involvement and what was the outcome?

Mr. ROBERTS. Well, he is still alive. That is sort of the goal in representing inmates facing the death penalty. I'm certainly not—don't have lead responsibility in the case.

What happened, and this was some years ago, a motion was being made in connection with one of his many sentences, and I was asked to assist in reviewing the motion. It had moved up to an appellate stage, and that was my specialty, and I looked at that and worked on that motion. I think it actually was not successful, but the long-term representation, as I said, he's still with us.

Senator FEINGOLD. Well, I congratulate you on your involvement in this. You and your firm represented the Florida death row inmate pro bono. Hogan & Hartson, of course, has enormous resources and is one of the best law firms in the Nation. Of course, not all death row inmates are lucky enough to secure such talented, well-resourced representation, especially at the trial stages of a capital prosecution. And I understand that law firms like yours typically don't get involved in capital cases until the appellate stage.

Given your experience with that case, do you believe that all capital defendants receive adequate legal representation in the current death penalty system, and are you concerned that poor defendants

may not receive adequate legal representation, especially at the trial level of a capital case?

Mr. ROBERTS. I don't know sufficiently what the situation is with respect to appointed counsel. I have certainly seen the cases where the counsel, whether attained or appointed, has been inadequate. I mean, some of them, you know, where the counsel was asleep or not present or the type of conduct, even apart from whether particular motions were made or not.

So the answer to your question is, no, it certainly can't be the case that in all cases they receive adequate representation. I have—

Senator FEINGOLD. Does it rise to a level where you have concerns?

Mr. ROBERTS. Well, certainly. If you're in a capital case and the lawyer is asleep, of course.

I have long been of the view that whether you're in favor of the death penalty or opposed to it, the system would work a lot better, to the extent that defendants have adequate representation from the beginning. The reason a lot of these cases drag out so long is because you spend decades scrutinizing the conduct of the lawyer in the initial case. If you make sure that there is adequate representation in the beginning, that should obviate the necessity for that, in most cases.

Senator FEINGOLD. Finally, on this issue, and my last question, as you may know our Nation last year reached a troubling milestone. Over 100 death row inmates have now been exonerated in the modern death penalty era—people who were actually on death row, having been sentenced to death.

What is your sense of the fairness of the administration of the death penalty in our Nation today? Do you think that the current system is fair or do you agree with an ever-increasing number of Americans that it risks executing the innocent?

Mr. ROBERTS. I think one thing that is unfair about the system is that it is not, and I believe this is one of the Supreme Court cases saying that it would be applied this way, it's not certain, it's not definite, and there doesn't seem to be any reasonable time limitation. The effectiveness, if you believe in capital punishment, the effectiveness of capital punishment diminishes if the crime was committed 30 years ago. And if it takes that long to get through the system, it's not working, whether you're in favor of the death penalty or opposed to it.

Senator FEINGOLD. But what about the fact that 100 people have been exonerated, who were already sentenced to death, how do you feel about that?

Mr. ROBERTS. Well, obviously, the first reaction is that the system worked in exonerating them. I don't know the details of the particular cases, but if they've been exonerated, that's how it's supposed to work.

Senator FEINGOLD. Is it your guess that we've gotten all the ones that are innocent on death row?

Mr. ROBERTS. Of course, it causes concern whenever somebody gets to that stage. It would be important to know at what stage it is. If it's on direct review, you feel a little more comfortable about it. If it is something coming out years later that should have come

out before, that does cause some degree of discomfort. Because, of course, when you're talking about capital punishment, it is the ultimate sanction, and sort of getting it right in most cases isn't good enough. I agree with that.

Senator FEINGOLD. Thank you, Mr. Chairman. Thank you, Mr. Roberts.

Chairman HATCH. Thank you.

Senator Schumer, you will be our last questioner.

**STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR  
FROM THE STATE OF NEW YORK**

Senator SCHUMER. Thank you, Mr. Chairman. I want to thank you for holding this hearing. I want to thank Mr. Roberts for returning to the hearing today. I know it wasn't your choice to be scheduled the same day we had hearings for two other controversial nominees, and I for one am sorry you didn't get your own hearing earlier, but I am glad you are here today.

Now, after your hearing, I sent you several written questions. For all intents and purposes, you refused to answer three of them. I know you had your reasons for refusing to answer, but to be frank, I don't find the reasons compelling, I don't find them fair, and I don't find them really in accord with your responsibility to let this Committee know as part of the advise and consent process your views.

The Senate has a duty, as you know, to thoroughly vet individuals nominated to the Federal courts, but that duty is especially sacred when it comes to the most important courts, and there is no question that the D.C. Circuit, the court to which you have been nominated, qualifies on that score. I have called it in the past "the second most important court in the land." I was at the naming of our courthouse for Thurgood Marshall in New York City, and my friends from New York on the Second Circuit took a little umbrage, but it is true. The D.C. Circuit I think is the second most important court in the land.

But when I say we have a sacred duty in this process, I mean it. That is not just verbiage for me. The Founding Fathers worked long and hard to achieve balance in our system of Government. They struggled to ensure that no one branch would dominate the others. And an essential part of that balance is the advise and consent clause. It is true at any time in our history, but it is especially the case in an era when the President seems to have an ideological prism with whom he nominates. Clearly, the nominees that have come from the White House, if you sprinkled them throughout the political spectrum, wouldn't land evenly throughout.

And that is a President's prerogative. I have nothing against the President doing it. But I truly do object to the idea that we shouldn't ask and you shouldn't answer questions, particularly at a time when the President is seeing things through an ideological prism, when he has stated, to his credit, he wants to appoint Justices in the mold of Scalia and Thomas, who are not moderate mainstream judges, but whatever your views of their views, they tend to be way over to the right side, and every one—not every one, but most of their decisions show that.

So I think we have a duty to ask questions, and assuming that the questions are not improper, the nominees have a duty to answer them. I don't think it is enough for a nominee to tell us or for you to tell us you will be fair and impartial. I do not believe it is sufficient to say, "I will follow the law." Every nominee says that.

We have the right to know the responsibility how you will approach the difficult and important legal questions that come before the D.C. Circuit, not to know how you will rule in a specific case but generally your way of thinking.

The law, as you know from your extensive experience as an appellate litigator, is not something that a judge divines or that is handed down from above. Law and truth are not always one and the same. Judges disagree because there is a degree of subjectivity of the law. You can't avoid it. If there weren't, there wouldn't be dissenting opinions. There wouldn't be legal debate. We could put black robes on computers and put them on the bench instead of going through this process.

So I think the questions that I asked you were fair and proper. Now, you disagree and that is your right, but I have to tell you that you will have a hard time winning my vote if you don't answer these questions. I don't think it is the way a nominee should come before this Committee.

So I want to discuss the questions you have refused to answer, and I first want to focus on Question 5 from the written questions I sent you. I asked you to identify three Supreme Court cases of which you are critical, and I asked you to limit your answers to cases that haven't been reversed and that have not been criticized publicly previously by you. In not responding, you cited Lloyd Cutler's remark that, "Candidates should decline to reply when efforts are made to find out how they would decide a particular case." Fair enough. And you relied on Canon 5 of the ABA Model of Judicial Conduct.

But I want to be very clear with you here. I am not trying to make any effort to find out how you would decide a particular case. I agree it would be inappropriate for me to ask you about a particular case. If I were to say what is your view on what Enron did and how you might rule on it, for instance, you should decline. If I ask you what are your views on corporate ethics and what are your views of a certain holding of the Court, that is a different situation altogether. I am not even asking you about a hypothetical case.

So while I think engaging in discussions of hypothetical scenarios are useful in certain circumstances, those questions are closer to the line and I am not willing to pursue them.

The question I have asked is as narrowly drawn as it can be to achieve my goal of learning how you approach the law while protecting you from announcing how you will rule on a given case. And just because I am hardly an expert here, I contacted the Nation's leading legal ethics expert, Stephen Gillers, the Vice Dean at NYU Law School, and asked him to tell us whether there is any ethical problem with a nominee answering the question I posed to you, Question 5. He said, emphatically and unequivocally, that there is no problem.

In fact, Mr. Chairman, I have a letter from Vice Dean Gillers to me on this, and I would ask unanimous consent to submit to the record.

Chairman HATCH. Without objection.

Senator SCHUMER. I don't know if the folks at DOJ showed you the letter that Dean Gillers sent. We tried to contact you and your DOJ handlers yesterday to make sure you knew we would be asking this question. But I hope you will read it now because he makes a compelling argument.

I promise you you will have a full chance to respond to that. But before I do, I would note that other judicial nominees have answered this question. Miguel Estrada clearly did not. But he was the apotheosis of avoiding any questions asked by this Committee. And I hope you won't follow in that direction.

Linda Reade, who is now a judge on the district court, was particularly forthcoming when we considered her the same day we considered Miguel Estrada. And no one has even thought remotely of saying she violated Canon 5.

I have made it my practice to ask the question of people I consider for judgeships in New York. Every one of them has answered the question.

Just recently, Dora Irizarry, the President's most recent nominee in New York, came to meet me, and she answered the question forthrightly, naming and discussing some very recent cases. She wasn't violating Canon 5. That is a ruse. And it was used as a ruse by Miguel Estrada. I hope you won't follow in those footsteps. Let me repeat that.

And just in case people think this issue is partisan, several Republican Senators agree that these questions are proper because they asked them, nearly identical questions of President Clinton's nominees. Again, no one—no one—said there was any violation of the canons.

So, first, let me ask you: Will you reconsider and answer the question? If not, in light of Dean Gillers' letter, in light of the inapplicability of Canon 5, and in light of the answers given by other nominees, in light of the fact that several Republican Senators believe the questions are proper, and in light of the importance of the process in which we are participating, why won't you? And how do you differentiate you from all the others who have been willing to ask or answer this question? And I just hope that you will give us some insight on how you approach questions like this? They are important for me to make up my mind fairly about whether to support you or not.

So now I have spoken for a while. Please answer.

Mr. ROBERTS. Thank you, Senator, and I appreciate the opportunity to address the question again. I want to be responsive, but at the same time, I think it is important that I avoid doing anything that is going to be harmful to the Federal courts as an institution.

I did get a copy of Professor Gillers' letter just before the start of the hearing and looked at it, and I think it is important you said that other Senators have asked these kinds of questions. One of the things I did in preparing for this hearing was go back and look at Justice Ginsburg's hearings. And she on numerous occasions said

it would not be proper for her to comment on particular Supreme Court precedents. She was asked by Senators on both sides of the aisle, and she said she was religiously adhering to that guidance because she thought it would be harmful to the Supreme Court for nominees to answer those kinds of questions.

Now, let me just explain briefly why I answered—

Senator SCHUMER. Give me an example of one of the questions that she refused to answer. Are they similar to these or were they more specific?

Mr. ROBERTS. They were more specific in that they identified particular cases.

Senator SCHUMER. Exactly.

Mr. ROBERTS. I don't see a principled distinction. It seemed to me if you are able to say I disagree with this binding Supreme Court precedent and here is why, I don't see how that would prevent anybody from then saying, all right, well, what about this one? And you are going to have your list of ten cases you want to know about, and Chairman Hatch is going to have his list of ten cases. And the reason Justice Ginsburg gave for—I don't know about technically whether it violates an ethical standard or not, but the reason that she thought it was inappropriate to answer that question is because it is an effort to obtain a forecast or a hint about how a judge will rule on a particular case.

If I were to tell you here's a case I disagree with, the *Lopez* case, I think that's wrong, that gives you a hint of forecast about how I would apply the Commerce Clause in a particular case related to *Lopez*. And another reason, it certainly raises very serious appearance problems. Let's say I tell you I disagree with the Smith case and we get into a discussion and here's why the Smith case was wrongly decided, and I'm confirmed and a case comes before me and the lawyer's saying this is governed by the Smith case, you should apply that, and I don't. That lawyer—that party is going to feel like he got a raw deal, and it's because I disagreed with the Smith case, because, look, at the confirmation hearing they asked you about that and you said you disagreed with it.

Certainly—

Senator SCHUMER. How is this different—let me just interrupt you. How is this different than us examining the precedents of judges who have written, you know, pages and pages of cases? And how does that—is that any different—

Mr. ROBERTS. Yes.

Senator SCHUMER. —in terms of jeopardizing their futures and their future impartiality than your asking a case that you didn't happen—answering the same situation of cases you didn't judge? You are making this an absurd process, sir, when you are saying that you can't answer even broad questions about specific jurisprudence, when you can't say how you feel about previous court cases. I am not asking you a specific fact situation. That is what Gillers says Canon 5 is all about. And when you say you can't answer any of those, although countless judges have through the decades, I think you are making—you are rendering the advise and consent process useless from my point of view.

Let me ask you this: Did they ask you any of these questions at the White House?

Mr. ROBERTS. No.

Senator SCHUMER. They didn't ask you how you felt on any issue at all?

Mr. ROBERTS. No, and they certainly didn't ask about any particular cases. I—

Senator SCHUMER. How about the types of questions that you refused to answer here, they didn't ask you those?

Mr. ROBERTS. No, Senator. I'm trying to adhere to the line that I understand Justice Ginsburg—and she drew a distinction between cases that she had decided. She thought that was an appropriate line of inquiry. But when asked about particular Supreme Court cases, she said it would not be proper for her to answer those.

Now, in Professor Gillers' letter, he talks about the Republican Party case. With respect, a very different question of whether—that was a First Amendment case. I'm not saying, you know, just because it wouldn't violate—or it would violate the First Amendment to restrict people from talking means it's a good idea. And, second of all, it involved the election of judges in State campaigns, and I certainly hope that's not the type of process. The Framers in the Constitution didn't provide for elected judges, and I don't want to get into that type of process.

Senator SCHUMER. The Framers, let me ask, when they had John Rutledge, the first nominee before the Senate—and I believe it was 12 of the 22 Senators were actual Framers—they talked about—you know, they talked about his views on the Jay Treaty. They clearly intended specific issues and specific cases to be discussed.

Mr. ROBERTS. Well, Senator, all I can say is that my understanding of the practices of the Committee—and I'm happy to talk more generally. You said I have declined to answer broad questions. I don't think that's accurate. I've answered broad questions about judicial philosophy, about my approach to judging. It is when you get to particular binding Supreme Court precedents. I will be bound, if I am confirmed, to apply those precedents whether I agree with them or not. And I think it would distort the process for nominees to be subject to questioning about those precedents. As a lawyer practicing—

Senator SCHUMER. Let me just—go ahead, please.

Mr. ROBERTS. I was just going to say, as a lawyer practicing before the court, I look at precedents that have been decided. But if it's now the case that judges are going to be quizzed about their personal views about particular precedents, I'll have to start researching the confirmation hearings of the judges on the panel.

Senator SCHUMER. Let me ask you one more question. Did the people you worked with in the Justice Department tell you not to answer any of these questions? Did you discuss it with them? Because here is what I worry about. I think you are a fine guy. I mean, I have seen your record. My guess is it is possible that because Miguel Estrada didn't answer those questions, they didn't want you to.

Mr. ROBERTS. Oh, well—

Senator SCHUMER. That is my guess. Now, you don't have to speculate on that, but I do want to ask you: Did you discuss with



them whether you should answer the specific questions I asked you? You can answer that yes or no.

Mr. ROBERTS. Well, I would like to do a little more than yes or on. The answer is I wrote the answers to the questions—

Senator SCHUMER. I understand that, but that was not my question.

Mr. ROBERTS. —and I sent them—the second part of my answer is that I sent those to the Justice Department for their review before they were—before they were finalized, before I finalized them. I don't recall them making changes in any of these.

Senator SCHUMER. Did you discuss it with them before you wrote the answers?

Mr. ROBERTS. I asked—I did ask if they had access to prior hearing transcripts so I could see how other judges had answered them, and I got a lot of different transcripts that I went through.

Senator SCHUMER. So you did discuss some aspects of this with them.

Mr. ROBERTS. To that extent.

Senator SCHUMER. Okay. That is fair enough. I mean, that is not dispositive to me, but I think we ought to know because I think knowing who you are and knowing some people who know you well—and, again, I think you are a fine person. I think something is going on here when you don't answer this question, which so many others have done. But let me go on.

You said you didn't want to discuss philosophies, so let's move on to Question 3. You were willing to discuss philosophies. I asked you in Question 3—here is my question to you: What two Supreme Court Justices do you believe have the most divergent judicial philosophies? It is a discussion about philosophy. How would you characterize the judicial philosophies or each—these are my questions, I am just quoting—e.g., strict constructionist, originalist?

Of the two you name in terms of judicial philosophy, which Justice do you anticipate you will more closely approximate and why? You responded by saying that you “do not believe that a nominee should, as part of the confirmation process, compare and critique the judicial philosophies of sitting Justices.”

You also expressed concern that answering the question would violate your ethical obligations to clients with matters before the court. I have to say, again, I am somewhat baffled by your reasons for not answering. I am not asking you who is the worst Supreme Court Justice. I am not asking you to insult or criticize any of them. There is a rich tradition of Supreme Court litigators in debate, in commentary, discussing not only the jurisprudence of but even the personalities—I didn't ask you that—of sitting Supreme Court Justices before whom they practice. They don't see this as a problem, and I am wondering why you do, and even if you do. You are being asked by this Committee—you are being nominated to a very important position, and it seems to me, even if you wouldn't want to answer the question because maybe one of your clients might take some umbrage in one way or another—I don't know; I don't know your clients—that you should, anyway. But this was a question about philosophy, and you did actually, in response to Senator Durbin's written questions, you discussed at length the ju-

dicial philosophies of Justices Scalia and Thomas. And for your purposes, that was Question 10 answered on page 10.

So why did you refuse to answer my question?

Mr. ROBERTS. Well, Senator Durbin's question specifically asked what is Justice Scalia's originalist approach, what is Justice Thomas', and since they had given addresses and written articles on that particular point, I was able to draw from those and answer as best as I could what they had said their approach and philosophy was.

I guess I did think it was inappropriate for someone who is going to be sitting on a circuit court to criticize the judicial philosophy and approach of—

Senator SCHUMER. I didn't ask you to criticize it—

Mr. ROBERTS. —the Justices.

Senator SCHUMER. —any more than it is called criticism—

Mr. ROBERTS. Well, you said who has—the question—

Senator SCHUMER. The most divergent. That is not—that is a neutral word.

Mr. ROBERTS. Well—

Senator SCHUMER. Some people would like divergent. In fact, I think a Supreme Court would be best if it had one Brennan and one Scalia, not five of either.

Mr. ROBERTS. I think it—I guess maybe part of the reluctance to answer is that I'm not sure that I could give an intelligent answer because I do think the philosophies of the Justices are pretty hard to pin down. When they're articulating them in articles and addresses, you can look at it and see if you think they're living up to those standards. But to go back and analyze all of the cases and see was this Justice adopting this philosophy in this case or this one that philosophy in another case, I guess I just didn't feel capable of doing that because I think certainly the case probably for all nine of them would tell you—and I think it's true to a large extent—they begin with the case. They don't begin with the philosophy. And in some cases, looking at the case drives them to a particular result, and you can look, easily see decisions where you think this is not an originalist approach, and yet that Justice might describe himself in that particular way.

And so when you get down to the way the question was presented of who has the most divergent, I just didn't see how I could—

Senator SCHUMER. Okay. That is not how you answered the question when I asked you. You said it was—and I quoted your answer a minute ago, but you said it was—you didn't think you should comment on their philosophies, not that you couldn't answer the question. And then you did talk about philosophies with Senator Durbin—

Mr. ROBERTS. And I'm happy—well, and he asked what the—those two Justices had written about their philosophies.

Senator SCHUMER. And I don't feel left out. He's my roommate. I mean, I just think that it's not—there is not a consistency here.

Mr. ROBERTS. I'm happy to talk, and I have discussed at length with some of the other questioners my approach to judicial philosophy and the fact—and this may reflect—my answer may reflect this more than anything else, that I don't feel that I bring a coherent, universal approach that applies across the board to all the pro-

visions of the Constitution. Again, I don't know if you regard that as a flaw or as a positive thing, but that is the case.

Senator SCHUMER. I don't think that is relevant to whether you can answer my question or not. Most people probably don't have a divergent thing.

Chairman HATCH. Senator—

Senator SCHUMER. I have one more question, Mr. Chairman.

Chairman HATCH. If you will wind up, because I have given you double the time.

Senator SCHUMER. You have, which I appreciate, although this is an important—

Chairman HATCH. One more question, and then I would like to finish.

Senator SCHUMER. This is an important nomination, and we have been here for 3 hours, I guess, 2 and a half. I don't think it is too much to ask.

Chairman HATCH. No, you can go ahead.

Senator SCHUMER. Thank you.

Chairman HATCH. But I would like to end with this last question.

Senator SCHUMER. Okay. One of my questions that you did answer, which was Question 4 on mine, was a question regarding how you define judicial activism. You also at my request named one case, albeit a California State case from 1899, of judicial activism.

So I want to ask how your definition applies to some more recent and higher profile matters. Was *Brown v. Board* an instance of judicial activism?

Mr. ROBERTS. The Court in that case, of course, overruled a prior decision. I don't think that constitutes judicial activism because obviously if the decision is wrong, it should be overruled. That's not activism. That's applying the law correctly. So if that's the aspect of it, the overruling, I don't think I would characterize it in that way.

The Court had a concrete—my definition of judicial activism is when the Court moves beyond the role of deciding a concrete case or controversy and begins to either legislate or execute the laws rather than decide the case and say what the law is. And I don't see that there's anything about *Brown*, obviously, a momentous decision with dramatic impact on society, but what the Court was doing in that case was deciding and telling what the law was, that the Equal Protection Clause properly interpreted does not mean you can have separate but equal, because that is inherently unequal. So I—that would not—

Senator SCHUMER. How about *Miranda*, was that—*Miranda v. Arizona*, was that—

Mr. ROBERTS. Well, we have some guidance from the Supreme Court in the *Dickerson* case recently in which the Court explained that the rules it articulated in that case were constitutionally based. If that's correct—and the Supreme Court has said it, so as a matter of law it is correct—that is an interpretation, an application of the Constitution. That, again, strikes me as being within *Marbury v. Madison* framework of saying what the law is.

I guess what *Dickerson* was about is really whether *Miranda* was an instance of improper judicial activism or not. If the Court had

determined that was not constitutionally based, then I think the argument would have been the other way.

Senator SCHUMER. All right. How about *Roe v. Wade*?

Mr. ROBERTS. *Roe v. Wade* is an interpretation of the Court's prior precedents. You can read the opinion beginning not just with *Griswold*, which is the case everybody begins with, but going even further back in other areas involving the right to privacy, *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, cases involving education. And what the Court explained in that case was the basis for the recognition of that right.

Now, that case and these others—certainly *Brown* was subjected to criticism at the time as an example of judicial activism. *Miranda* was as well. But, again, all I can do as a nominee is look to the rationale that the Supreme Court has articulated.

Senator SCHUMER. So you don't think *Roe v. Wade* was judicial activism as you defined it in your—

Mr. ROBERTS. The Court explained in its opinion the legal basis, and because the Court has done that, I don't think it's appropriate for me to criticize it as judicial activism. The dissent certainly thought it was and explained why, but the Court has explained what it saw as the constitutional basis for its decision.

My definition of judicial activism is when the Court departs from applying the rule of law and undertakes legislative or executive decisions. Now—

Senator SCHUMER. Well, can you—since you seem to make the argument if the Court rules that it is not judicial activism, that would not be true of many people who write and comment and everything else, can you give me a Supreme Court case that you think was judicial activism?

Mr. ROBERTS. Senator, again, you are sort of getting back into the area where following Justice Ginsburg's—

Senator SCHUMER. Getting back into the area of a hard question, that is all.

Mr. ROBERTS. No. With respect, Senator, you're getting back in the area of asking me to criticize particular Supreme Court precedents. Justice Ginsburg thought that was inappropriate because it would be harmful to the Supreme Court. I think it's inappropriate because it would be harmful to the independence and integrity of the Federal judiciary. The reason I think key to the independence and strength of the Federal judiciary is that judges come to the cases before them, unencumbered by prior commitments, beyond the commitment to apply the rule of law and the oath that they take. I think that is essential. And if you get into the business where hints, forecasts are being required of a nominee because you need to know what he thinks about this case or that case, that will be very harmful to the judiciary.

Senator SCHUMER. Then you are getting us into the absurd position that we cannot ask questions about just about anything that will matter once you get on the court.

Mr. ROBERTS. No. With respect—

Senator SCHUMER. Just one final one, and then I will let you—what about *Morrison*, you know, the VAWA case, was that judicial activism?

Mr. ROBERTS. Again, Senator, you're asking me—the Court articulated the basis for its decision in the rule of law, and I don't think it's appropriate to criticize that by characterizing it in a particular way. The legal basis for the decision—

Senator SCHUMER. So are you saying that the four Justices who dissented in *Morrison* were—I mean, I don't even get where this goes, that they were being inappropriate?

Mr. ROBERTS. I guess where it goes, Senator, is I will be, if I'm confirmed, called upon to apply the *Morrison* case, among others. And I think it is a distortion—

Senator SCHUMER. The dissent was strong. I mean, it was—

Mr. ROBERTS. I think there's a distortion of the process if I have been compelled to give personal views about the propriety of that decision.

Senator SCHUMER. Why is that? Could you just explain that to me again? I don't understand. I think—

Mr. ROBERTS. Sure—

Senator SCHUMER. —it far more damages the process when you don't. But tell me why. Is this because people will think you are unfair or people will think you are biased?

Mr. ROBERTS. If you are a litigant—let's just say that, you know, the Smith case, and you want to know my views on that, and I tell you personal views on it, yes, I will be bound to apply it, but, by the way, I think it was a horrible decision, I think it was wrongly decided, I think it was judicially active, or whatever. And then I am confirmed and a case comes along and one of the litigants says this case is controlled by the Smith case or the Smith case should be extended to cover this case, and I rule no, I think that party will walk away saying, well, that's because he disagrees with the Smith case.

Chairman HATCH. They might move to recuse you to begin with, just because you had made some comment.

Senator SCHUMER. Well, let me ask you this: Then why doesn't every person who is involved in federalism or violence against women who goes before the Court think that the four Justices who dissented are biased and the process is damaged? I mean, this is an absurd argument, in all due respect. Justices on the bench dissent. They criticize opinions that, by definition they are in dissent, that become part of the law. And that would mean on a whole variety of different instances every one of the nine Supreme Court Justices would be held not to be fair, not to be unbiased. People have their opinions. We all know that.

So the first time you dissent, if you get to the D.C. Circuit, you will be—you are saying that on that particular area of law, anyone who comes before you will think that you are not going to be fair to them.

Mr. ROBERTS. I think there is a difference between the exercise of the judicial function. And again I am adhering to the line that Justice Ginsburg applied—I don't think it was absurd when she said it—and that is that it does cast a cloud of unfairness if, as part of the confirmation process—and that is what is most troubling, Senator. It is not part of the judicial process where you are deciding a particular case and stating your reasons in a dissent. It is part of the confirmation process. So the concern is that you are

giving commitments, forecasts, hints, even at the extreme, bargains, for confirmation and that carries forward.

Senator SCHUMER. One final question. Is it better or worse if, in fact, you have opinions, which clearly you must, but these opinions aren't revealed? How does it make it any different?

Mr. ROBERTS. I don't know if it is better or worse.

Senator SCHUMER. So you are saying that people will think you are biased if you reveal the opinion. Won't people think you are biased if you have an opinion? And that again gets to the absurd argument that every one of us then who might be a judge is biased because we all have opinions.

Mr. ROBERTS. The problem, Senator, is that, if confirmed as a judge, I will be called upon to apply the rule of law. And, of course, I have opinions about particular decisions. Probably every decision I read, I have an opinion whether I think it is good, bad or—

Senator SCHUMER. You are saying when you offer those opinions, people will think you are biased here, right here.

Mr. ROBERTS. When you offer those opinions, it will distort the process. It is either an effort to obtain a prior commitment for someone as a nominee about how they will decide the case, and I think that is very inappropriate, or it will have a distorted effect on how that judge will appear to parties appearing before him.

I think it will distort the process because people will now go back to Committee hearing transcripts to find out what judges thought about precedents that they are litigating about rather than the rule of law as established in those precedents.

And it also forces the nominee to make a decision not in the judicial context in a manner that could be premature. I think of the *Dickerson* case a couple of years ago. The Chief Justice issued the opinion saying that *Miranda* is constitutionally based. I don't know if that is what he would have said if he were forced at his nomination to say "do you think *Miranda* is constitutionally based?" But when he got to the decisional process and saw the briefs and the arguments and the cases, he was able to make a decision in that instance.

Senator SCHUMER. So your argument now has sort of shifted. Instead of worrying that other people will think you are biased, it will lock you into thinking, or at least pre-dispose you to thinking a different way about the case because you have told us something that you think.

Mr. ROBERTS. The argument hasn't shifted. There are a number of reasons why my answering such questions, I think, is inappropriate. The last one was one that Justice Kennedy recently discussed in his address at the University of Virginia Law School.

He says because as a judge when you are called upon to make a decision, you go through an entirely different process. I think that is one reason nominees should be put in that position.

The other reason, because it is an effort to obtain a forecast or a hint about how they are going to rule, and that, President Lincoln said long ago, is not something nominees should answer. And that is a line, as I said, that Justice Ginsburg followed. And another reason is, as I said, it distorts the process.

Senator SCHUMER. So every nominee who has been here before us and answered questions more directly and forthrightly than you

on these things has contributed to distorting the process, including some of your potential future colleagues who will sit on the bench in the D.C. Circuit, including some Supreme Court nominees?

Chairman HATCH. Senator, with all due respect, I don't know anybody who has answered these questions that has come before the Committee in 27 years. What you are asking is way beyond—I mean, you have a right to ask whatever you want to.

Senator SCHUMER. Your own colleagues, sir, asked those same questions of Paez, Berzon and others.

Chairman HATCH. And I made the comment to my colleagues that any Senator on this Committee can ask any question he wants, no matter how stupid it is.

Now, to make a long story short, I have given you more time than anybody else on this Committee and frankly I don't think we are getting anywhere. I don't blame him. I would find fault if he did answer those questions, and I think so would a whole bunch of others.

I found fault with people on our side who tried to ask the same type of questions. In fact, I criticized one Senator, in particular, and it was embarrassing to do it. I didn't like doing it, but I just felt it was way out of line.

Now, look, you have a right to ask these questions. He has given, I think, very articulate answers that I would respect in anybody because he is nominated for one of the most important courts in the country. And I don't blame any nominee that comes before this Committee for not wanting to put themselves in a position where somebody can misconstrue what they have said here in Committee, when they have to make decisions later.

I don't know anybody, including Democrat nominees for the Supreme Court and other Democrat nominees, who have had to answer these types of questions other than the way he has answered them, and I think that he has answered them fairly.

But, Senator, you have now had 35 minutes and I think you are beating it to death, is my point.

Senator SCHUMER. May I say this, Mr. Chairman?

Chairman HATCH. Yes. I respect you and I don't want to mischaracterize, but I think you are beating it to death.

Senator SCHUMER. What I would say is this: If you are correct, then we ought not have these hearings.

Chairman HATCH. Heavens, no. There have been all kinds of revelations in this—

Senator SCHUMER. We ought to find out the resumes of each person. We ought to then have some detectives and see if they have broken little rules here and there, but we ought not have these hearings because—

Chairman HATCH. Senator, if you are right, then we ought to get the secret police to examine every aspect of everybody's lives that come before the Committee.

Senator SCHUMER. No, no, just the opposite, just the opposite.

Chairman HATCH. That is what you seem to be saying.

Senator SCHUMER. Orrin, what I am saying is those things shouldn't matter, and they have mattered in the past because they were a kabuki game for what people really wanted to know, which is the questions that I am asking. And I would just say to you—

Chairman HATCH. Senator—

Senator SCHUMER. I would like to finish.

Chairman HATCH. Go ahead.

Senator SCHUMER. I would like to say to you that if refusal to answer questions like this will become the norm, then we have done real damage to the advise and consent process and to the Constitution. And I know you disagree.

Chairman HATCH. I do violently disagree.

Senator SCHUMER. But that is the bottom line.

Mr. Roberts, I just want to conclude. I think you are a fine person. I think you are a good lawyer, an excellent lawyer, far better than I would ever be. But I guess my hope is that you are in a difficult position right here, given the circumstances as things have occurred, because I think you should have been more direct in answer to these questions for the good of the process.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator Schumer.

I think Senator Schumer has the right to say whatever he says and ask any questions he wants. And you have certainly the right to answer them the way you want to, as well, and I think you have answered them very appropriately. In fact, you have gone beyond the pale.

Now, let me just also say that I would like to note that we on the Republican side did not receive a copy of Professor Gillers' letter until 9:30 this morning. So we have only just read over it, and very cursorily at that. But let me say that I don't personally—and I don't think anybody on our side—consider Professor Gillers the definitive word on this, especially when you consider the nominees whom this Committee has confirmed who refused to answer similar questions.

Senator SCHUMER. Mr. Chairman, we gave you that letter.

Chairman HATCH. I am not griping about it. I am just saying we didn't have enough time to really look at it. But I certainly would not call him the definitive last word. I have seen him give letters; whatever you want, he gives them to you. I am not talking about you, in particular, but on the Democrat side.

Senator SCHUMER. I just want the record to show that the minority was given this letter on the last day we voted on the Roberts nomination, which was about 2 months ago.

Chairman HATCH. Not that I know of. My understanding is that Mr. Roberts got this letter via voice mail, left for you around 8:00 p.m. last night.

Now, let me give you some examples. I think it is important to set this record straight.

In 1967, during his confirmation hearing for the Supreme Court, Justice Thurgood Marshall responded to a question about the Fifth Amendment by stating, "I do not think you want me to be in a position of giving you a statement on the Fifth Amendment and then, if I am confirmed, sit on the Court and when a Fifth Amendment case comes up, I will have to disqualify myself."

Now, you have said it more articulately than that. But, in essence, that is what your answers have been, at least some of them.

During Justice Sandra Day O'Connor's confirmation hearing, the Senator from Massachusetts, Senator Kennedy, the former Chair-



man of the Judiciary Committee, defended her refusal to discuss her views on abortion. He said, quote, “It is offensive”—this is Senator Kennedy—“for a Republican nominee”—he said “It is offensive to suggest that a potential Justice of the Supreme Court must pass some presumed test of judicial philosophy. It is even more offensive to suggest that a potential Justice must pass the litmus test of any single-issue interest group,” unquote. Now, that is Senator Kennedy.

Likewise, Justice John Paul Stevens testified during his confirmation hearing, quote, “I really don’t think I should discuss this subject generally, Senator. I don’t mean to be unresponsive, but in all candor I must say that there have been many times in my experience in the last 5 years where I found that my first reaction to a problem was not the same as the reaction I had when I had the responsibility of decisions. And I think that if I were to make comments that were not carefully thought through, they might be given significance they really did not merit,” unquote.

Pretty much what you have said, because until you get the briefs and the arguments and you see everything involved, it is pretty hard to give opinions in advance, no matter how good you are, and you are good. And I think anybody with brains would say you are one of the best people that has ever come before this Committee.

Justice Ruth Bader Ginsburg also declined to answer certain questions, stating—I am just giving you a few illustrations; I could give you hundreds of them—quote, “Because I am and hope to continue to be a judge, it would be wrong for me to say or to preview in this legislative chamber how I would cast my vote on questions the Supreme Court may be called upon to decide. Were I to rehearse here what I would say and how I would reason on such questions, I would act injudiciously.”

I would have trouble with you if you answered some of those questions.

In addition, Justice Ginsburg just last year said in dissent in the case of *Republican Party of Minnesota v. White*, which is cited by Professor Gillers, by the way, quote, “In the context of the Federal system, how a prospective nominee for the bench would resolve particular contentious issues would certainly be”—quote within a quote—“of interest”—unquote within a quote—“to the President and the Senate. But in accord with a longstanding norm, every member of this Court declined to furnish such information to the Senate, and presumably to the President as well,” precisely what you have said here.

Now, all of these questions have one thing in common. They are designed to force the nominee to disclose his personal views on hot-button social or other issues. This is inappropriate, in my view, at least, and I think has always been, in this Committee’s view, as evidenced by Senator Kennedy’s remarks in protecting Sandra Day O’Connor, a Republican nominee, something for which he deserves credit.

I think it is inappropriate because a good judge will follow the law, regardless of his or her personal views. And you have made that very clear throughout your testimony not only today, but in the 12-hour marathon we had before, where I admit you weren’t asked an awful lot of questions. You were asked plenty, but not as

much as our colleagues wanted. That is why we are having this second hearing.

Discussion of a nominee's personal views, I think, can lead to an appearance of bias and I think that is improper. It is just another attempt in my book to change the ground rules of the confirmation process.

Now, look, I have a lot of respect for Senator Schumer. We are good friends. He is a smart lawyer. He is very sincere. He comes to these meetings and he asks questions. Most of them, I believe, are very intelligent questions. Some, I totally disagree with. Some, I think, are dumb-ass questions, between you and me. I am not kidding you.

[Laughter.]

Chairman HATCH. I mean, as much as I love and respect you, I just think that is true.

Senator SCHUMER. Would the Senator like to revise and extend his remarks?

Chairman HATCH. No. I am going to keep it exactly the way it is. I mean, I hate to say it. I feel badly saying it, between you and me, but I do know dumb-ass questions when I see dumb-ass questions.

[Laughter.]

Chairman HATCH. I do want to note that Professor Gillers' letter is dated February 26 of this year. So I was wrong in my comments earlier as well, so I want to make that point.

Senator SCHUMER. I would say you were acting in a DA way by doing that.

Chairman HATCH. Senator Schumer and I are going to be friends, no matter what, because I am going to force him to like me, I just want you to know.

Senator SCHUMER. You have done a very good job this morning, Mr. Chairman.

Chairman HATCH. Just like he tried to force you to screw up here and make a terrible mistake.

I do care for him and I care for everybody on this Committee. I have to admit I get very disturbed by some of the things that go on here. This Committee is one of the most partisan committees, one of the most partisan institutions I have ever belonged to. I would like it to be less partisan; I would like it to work. I would like us to be fair to witnesses.

Admittedly, some on my side were unfair, not many, but some were unfair from time to time. I didn't like it any better than I do now and I am doing my best to do something about it.

Let me just say, in conclusion on this hearing, I have seen an awful lot of witnesses who have been nominees for Federal judgeships come before this Committee and I venture to say that I am not sure I have ever seen one who has been any better than you.

I understand why you are held in such high esteem by I think every Justice on the Supreme Court. I have chatted with a number of them. Some have ventured to say to me that you are one of the two top appellate advocates in the country. That is high praise indeed. I have had other judges say what a fine person you are and what a terrific lawyer you are.

I expect you, when you get on the Circuit Court of Appeals for the District of Columbia—and I think you will have bipartisan support to get there; I would hope so. But I expect you to become one of the premiere judges in this country. You have what it takes to do it. You have tremendous capacity and ability, and anybody with any brains can recognize it.

Anybody with any sense of fairness is going to vote for you, and I intend to see that votes occur in accordance with our agreement. So we will put you on the Committee markup tomorrow morning. You will not come up in Committee tomorrow because I have agreed to at least put you over until the next Thursday, and we will vote on you Thursday from tomorrow.

Then, assuming you come out of the Committee—and I think that is a given; you had bipartisan support last time and I expect it to even increase—then within a week, according to my friends on the other side, you should have a vote on the floor.

I want to accommodate my friends as much as I can, and I want to compliment them for agreeing to this and agreeing to Justice Cook's vote up and down on the floor and for agreeing to Jeffrey Sutton's vote. It wasn't easy for some on the other side who really feel very deeply about these issues, as does my friend from New York. But I am grateful to them.

And I am grateful to you for the patience that you have had during this hearing and during the other hearing, because you sat there for 12 solid hours. Frankly, I have to just show tremendous respect for you. You deserve it, and I hope that we can have this all work out just the way I have announced it, the way we have agreed.

I think the Circuit Court of Appeals for the District of Columbia, and perhaps many, many other courts in this country will benefit from having a person of your stature and your ability on the court.

So with that, we are grateful that we have had this second hearing. I want you to get your written answers back as soon as you possibly can. We expect all questions to be in by Friday. We would love you to have them back as soon as you can because next Thursday you are going to be voted upon and I would like my colleagues to have the benefit of having your answers to their questions.

With that, we are going to allow you and your family to go. We really appreciate your being here for so long and your patience in being before the Committee.

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

Chairman HATCH. Thank you.

Now, I am supposed to be at another meeting at 12:30, but I think what we will do is try to conclude with the other three witnesses. If you will all come forward, we will conclude.

If you three will raise your hands, do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Mr. CAMPBELL. I do.

Mr. HICKS. Yes.

Mr. MOSCHELLA. I do.

Chairman HATCH. We are sorry you had to wait until now, but as you can see, we go by the various courts involved. We are grate-

ful to have all three of you here. We are grateful to have your families here.

I think what we will do is we will start with you, Mr. Campbell. Do you care to make any statement? We would like you to introduce your family. I know a lot about you. I had a very high regard for you even before you got here. The distinguished Senators from Arizona have certainly spoken very highly of you, as well. Senator Kyl is a strong supporter and I am sure Senator McCain is as well.

Would you like to introduce your family or make any statement you would care to make?

**STATEMENT OF DAVID G. CAMPBELL, NOMINEE TO BE  
DISTRICT JUDGE FOR THE DISTRICT OF ARIZONA**

Mr. CAMPBELL. I have no opening statement, Mr. Chairman, but I would extend my thanks to you for holding the hearing today. I would like to introduce my wife, Stacey Sweet Campbell, of 25 years, who is here.

Chairman HATCH. If you would stand?

[Ms. Campbell stood.]

Mr. CAMPBELL. My daughter, Jenny, one of our five children who was able to make it with us.

Chairman HATCH. Jenny.

Mr. CAMPBELL. We also have with us today Chief Judge Stephen M. McNamee, of the United States District Court for the District of Arizona.

Chairman HATCH. We are honored to have you here, Judge.

Mr. CAMPBELL. We appreciate having him here.

[The biographical information of Mr. Campbell follows:]

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

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

**David Grant Campbell**

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

**United States District Judge, U.S. District Court, District of Arizona**

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

**Osborn Maledon, P.A.  
2929 North Central Avenue  
21st Floor  
Phoenix, AZ 85012-2794  
(602) 640-9306**

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

**Salt Lake City, Utah  
December 6, 1952**

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

**Married to Stacey Sweet for 25 years  
Mother and homemaker (registered nurse, but currently not practicing)  
Four dependent children**

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

**University of Utah College of Law  
1976-1979  
Juris Doctor received June 1979**

**University of Utah**  
**1971-1972, 1974-1976**  
**Bachelor of Science (Business Finance Degree, Magna Cum Laude), June 1976**

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

**Osborn Maledon, P.A.**  
**1995-Present**  
**Member (partner)**  
**2929 North Central Avenue**  
**21st Floor**  
**Phoenix, AZ 85012-2794**

**Meyer, Hendricks, Victor, Osborn & Maledon**  
**(formerly Martori, Meyer, Hendricks & Victor)**  
**1982-1995**  
**Associate (1982-1986), Member (1986-1995)**  
**2929 North Central Avenue**  
**21st Floor**  
**Phoenix, AZ 85012-2794**  
**(previous address 2700 North Third Street, Phoenix AZ)**

**J. Reuben Clark Law School**  
**Brigham Young University**  
**Provo, UT**  
**Visiting Professor, Civil Procedure, Fall Semester 1990**

**Arizona State University Law School**  
**Tempe, AZ**  
**Co-adjunct Professor, Seminar on Presidential Powers, 1988, 1986, 1985**

**Supreme Court of the United States**  
**1981-1982**  
**Law Clerk to Associate Justice William H. Rehnquist**  
**Washington, D.C. 20543**

O'Melveny & Myers  
1980-1981  
Associate  
555 13th Street, N.W.  
Washington, D.C. 20004  
and  
400 South Hope Street  
Los Angeles, CA 90071

United States Court of Appeals for the Ninth Circuit  
1979-1980  
Law clerk to Judge J. Clifford Wallace  
940 Front Street, Suite 4192  
San Diego, CA 92101

Sullivan & Cromwell  
1978  
Summer Associate  
125 Broad Street  
New York, NY 10004

I worked for a small life insurance company during the summer of 1977 (I cannot recall its name) and for Scott Thornton, a home builder, during the summer of 1976.

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

None

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

Law Clerk, Justice William H. Rehnquist, Supreme Court of the United States,  
October Term 1981

Law Clerk, Judge J. Clifford Wallace, Ninth Circuit Court of Appeals, 1979-1980

Professor of the Year, 1990-1991  
J. Reuben Clark Law School  
Brigham Young University, Provo UT

Best Lawyers in America, 1995-2002

Order of the Coif, 1979

**Note Editor, University of Utah Law Review, 1978-1979**

**Beta Gamma Sigma, 1976**

**Magna Cum Laude, 1976**

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

**Member, American Bar Association**

**Member, Arizona Bar Association**

**Instructor, State Bar of Arizona Course on Professionalism,  
October 2002**

**Member, State Bar of Arizona Task Force on the Multi-Jurisdictional  
Practice of Law, 2002**

**Member, State Bar Committee on Rules of Professional Responsibility,  
1990-1996**

**Member and Chairman, State Bar Disciplinary Commission Hearing  
Committee, 1985-1988**

**Co-Bar Counsel in false advertising litigation against Phoenix-area law firm,  
1983-1985**

**Member, California Bar Association (inactive status)**

**Member, American Judicature Society**

**Member, Supreme Court Historical Society**

**Member, Federal Bar Association**

**Chairman of Lawyer Representatives for District of Arizona  
Ninth Circuit Judicial Conference, 2002-2003**

**Lawyer Representative for District of Arizona,  
Ninth Circuit Judicial Conference, 2001-2003**



**Review panel member, Arizona Commission on Judicial Performance Review,  
2000, 2002**

**Sandra Day O'Connor Inn of Court**

**President, 1995-1996  
Program Chair, 1994-1995  
Barrister and Master of the Bench, 1989-1996**

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

**United States Court of Appeals for the Ninth Circuit, 7/9/84**

**United States District Court for the District of Arizona, 11/2/82**

**United States District Court for the Southern District of California, 11/29/79**

**Arizona Bar, 11/2/82**

**California Bar, 11/29/79 (currently on inactive status).  
I chose inactive status after joining my Arizona law firm because my practice does not require me to be an active member of the California bar.**

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

**Member, Phoenix Art Museum**

**Member, Phoenix Zoo**

**To my knowledge, these organizations do not discriminate on the basis of race, sex, or religion.**

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

**Ethical Issues in Environmental Law, Arizona Environmental Law Manual, 1995, 1999, 2001 (co-author with Mark I. Harrison)**

**A Legislative Response to Samaritan – Arizona’s Restive Attorney-Client Privilege for Corporations, Arizona Attorney, December 1994**

**Good or Bad Samaritan? Arizona’s New Attorney-Client Privilege for Corporations, Arizona Attorney, February 1994**

**Satisfaction in the Law, Clark Memorandum (published by the J. Reuben Clark Law School, Brigham Young University), Fall 1993**

**Christianity and the Mad Dog Litigator, Clark Memorandum, Spring 1991**

**Note, *Salt Lake City v. International Association of Firefighter*: A Responsive Analysis and Proposal for Public Sector Bargaining in Utah, 1977 Utah Law Review 457**

**Report and Recommendations of the State Bar of Arizona Multijurisdictional Practice Task Force, dated March 12, 2002 (this was a consensus report of the Task Force; I authored the Proposed Response at pages 5-9)**

**State Bar Committee on Rules of Professional Responsibility, selected ethics opinions (95-03, 94-09, 91-05) (these are consensus opinions of the Committee that I recall authoring)**

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

**None**

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

**My health is good, with no illnesses or significant risk factors. My last physical exam was on June 11, 2001.**

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

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

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

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

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

**Not Applicable**

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

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

**None**

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

**No**

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

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

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

1979-1980: **Law clerk to Judge J. Clifford Wallace of the Ninth Circuit Court of Appeals**

1981-1982: **Law clerk to Justice William H. Rehnquist of the Supreme Court of the United States**

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

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

- 1978: Sullivan & Cromwell  
25 Broad Street  
New York, NY 10004  
Summer associate
- 1980-1981: O'Melveny & Myers  
555 13th Street, N.W.  
Washington, D.C.  
and  
400 South Hope Street  
Los Angeles, CA 90071  
Associate
- 1982-1995: Meyer, Hendricks, Victor, Osborn & Maledon  
(formerly Martori, Meyer, Hendricks & Victor)  
2929 North Central Avenue  
21st Floor  
Phoenix, AZ 85012  
(former address 2700 North Third Street, Phoenix AZ)  
Associate and partner
- 1995-present: Osborn Maledon, P.A.  
2929 North Central Avenue  
21st Floor  
Phoenix, AZ 85012  
Member (partner)

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

**Before moving to Arizona in 1982, I worked as a law clerk and as an associate at O'Melveny & Myers. Since 1982, I have practiced in the area of general civil litigation, usually in the defense of complex cases.**

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

**I have represented corporations in environmental litigation, including CERCLA claims among potentially responsible parties, CERCLA claims brought by the government, and mass-tort claims based on groundwater contamination. I have represented law firms in malpractice cases and in claims brought by the Resolution Trust Corporation. I have**

**also defended corporate clients in class actions, including mass tort and securities fraud class actions, and have handled a variety of other civil and business cases.**

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

**I have appeared in court as frequently as one would expect in a complex litigation practice, primarily in pretrial and motion proceedings. Virtually all of my cases have been resolved through motions or pre-trial settlement. I have also appeared in courts of appeals.**

(2) Indicate the percentage of these appearances in

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

**My best estimate is that 40% of my practice has been in federal court, 60% in state court.**

(3) Indicate the percentage of these appearances in:

- (A) civil proceedings;
- (B) criminal proceedings.

**With only two exceptions, all of my cases have been civil.**

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

**I have tried four cases to verdict or judgment, two as co-counsel and two as chief counsel. I have tried additional matters in administrative and arbitration proceedings, including a confidential multi-million dollar arbitration in which I was lead counsel.**

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

**One (25%).**

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

**I have not practiced before the Supreme Court.**

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

**I served as co-bar counsel in a pro bono case for the Arizona State Bar, pursuing disciplinary action against Arizona lawyers for misleading advertising. (*In re Zang*, 154 Ariz. 134, 741 P.2d 267 (1987).) As I recall, I devoted approximately 600 hours to this case. Our law firm maintains an active pro bono docket, which I have supported as a member. I have also handled small pro bono matters for individuals on a personal basis and through the Volunteer Lawyers Program.**

**My volunteer service through my church has included between 500 to 1,000 hours of unpaid time per year for each of the last ten years. Service to disadvantaged persons has included planning and implementing projects such as building small homes for the homeless in Mexico, painting homes in south Phoenix, providing labor for Phoenix-area homeless shelters, providing Christmas to crisis nurseries and needy families, providing back-to-school clothing and supplies for disadvantaged children, and assisting other individuals and families in need.**

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

- (a) the citations, if the cases were reported, and the docket number and date if unreported;
- (b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;
- (c) the party or parties whom you represented; and
- (d) describe in detail the nature of your participation in the litigation and the final disposition of the case.

**1. Long v. Napolitano, et al.**

- a. **My client:** Arizona Tourism and Sports Authority
- b. **Dates:** September 2001-November 2002
- c. **Courts:** Maricopa County Superior Court  
Arizona Court of Appeals  
Arizona Supreme Court
- d. **Judges:** Hon. Mark Santana (Superior Court)  
Hon. Ann Scott Timmer (Court of Appeals)  
Hon. Jefferson Lankford (Court of Appeals)

Hon. William Garbarino (Court of Appeals)

e. **Citation:** Long v. Napolitano, et al., 203 Ariz. 247, 53 P.3d 172 (App. 2002)

f. **Summary:** The Tourism and Sports Authority ("TSA") was created by the Arizona legislature to construct a state-of-the-art stadium to host the Arizona Cardinals professional football team, the Fiesta Bowl, and possible future Super Bowls. The stadium will cost more than \$350 million. The TSA is also charged with improving Cactus League Spring training facilities, promoting tourism, and constructing youth sports facilities. Funding for the TSA was approved by the voters of Maricopa County in the Fall election of 2000. In late 2001, Phoenix developer John F. Long sued to have the TSA declared unconstitutional. Following expedited discovery, motion practice and a hearing on the merits, the trial court upheld the constitutionality of the TSA legislation. A unanimous panel of the Court of Appeals affirmed, and the Arizona Supreme Court denied review.

g. **My role:** I took the lead in drafting all trial court pleadings, the court of appeals brief, and pleadings in the Arizona Supreme Court. I argued all motions in the trial court and the appeal before the Court of Appeals. During the trial court merits hearing, I argued the constitutional issues and my partner, Bill Maledon, argued laches issues. There was no oral argument in the Arizona Supreme Court.

h. **Other counsel:**

Ronald Jay Cohen  
Cohen Kennedy Dowd & Quigley PC  
2425 E. Camelback Road, Suite 1100  
Phoenix, AZ 86016-9207  
(602) 252-8400  
Opposing counsel

Paul F. Eckstein  
Joel W. Nomkin  
Brown & Bain, P.A.  
2901 North Central Avenue  
P.O. Box 400  
Phoenix, Arizona 85001  
(602) 351-8000  
Opposing counsel

Neil Vincent Wake  
Law Offices of Neil Vincent Wake  
3030 North Third Street, Suite 1200  
Phoenix, Arizona 85012  
(602) 532-5944  
Opposing counsel

Mary O'Grady  
Assistant Attorney General  
1275 West Washington  
Phoenix, Arizona 85007  
(602) 254-8986  
Attorney for the Attorney General and  
for Carol Springer, State Treasurer

Scott Bales  
Lewis and Roca  
40 North Central Avenue  
Phoenix, Arizona 85004  
(602) 262-5365  
Attorney for Texas Rangers Baseball Partners  
and the Valley Hotel and Resort Association

Bruce White  
Deputy County Attorney  
Maricopa County Attorney's Office  
222 North Central, Suite 1100  
Phoenix, Arizona 85004-2206  
(602) 506-8541  
Attorney for the County Attorney

Grant Woods  
Grant Woods, P.C.  
1700 North Seventh Street  
Suite 3  
Phoenix, Arizona 85006-2200  
(602) 258-5749  
Attorney for City of Tempe

Michael K. Kennedy  
Gallagher & Kennedy  
2575 East Camelback Road  
Phoenix, Arizona 85016-9225  
(602) 530-8504  
Attorney for B&B Holdings, Inc.

Bruce C. Smith  
Deputy City Attorney  
12425 West Bell Road, Suite D-100  
Surprise, Arizona 85374-9704  
(623) 583-3135  
Attorney for City of Surprise



Patrick G. Byrne  
 Todd Feltus  
 Snell & Wilmer LLP  
 One Arizona Center  
 400 East Van Buren  
 Phoenix, Arizona 85004-2202  
 (602) 382-6225  
 Attorneys for Fiesta Bowl

2. **Baker v. Motorola, et al.**

- a. **My clients:** Corning Incorporated and Allied Signal Inc.
- b. **Dates:** 1992-2000
- c. **Courts:** Maricopa County Superior Court
- d. **Judges:** Hon. Steven Sheldon  
 Hon. Alan Kamin  
 Hon. Jeffrey Cates
- e. **Citation:** CV 92-02603

f. **Summary:** Property owners in the Phoenix area sued several corporations for property damage allegedly caused by TCE groundwater contamination. The suit was brought on behalf of a class of approximately 700,000 residential and commercial property owners and alleged more than \$700,000,000 in damages. Three separate subclasses were certified by the trial court and discovery and motion practice lasted for several years. My clients obtained a favorable pretrial settlement.

g. **My role:** I was lead counsel for two of the four largest defendants in the litigation. I took the lead on several pre-trial motions and procedures, including defense arguments on class certification. I negotiated a favorable settlement between the plaintiff class and most of the defendants in the litigation.

h. **Other counsel:**

Philip A. Robbins  
 Robbins & Green, P.A.  
 3300 North Central, Suite 1800  
 Phoenix, AZ 85012  
 (602) 248-7601  
 Opposing counsel

Tony Lucia  
 Treon, Strick, Lucia & Aguirre, P.A.  
 2700 N. Central Avenue, Suite 1400  
 Phoenix, AZ 85004-1133  
 (602) 285-4406  
 Opposing counsel

Leo R. Beus  
Beus, Gilbert & Morrill  
3200 North Central Avenue  
Suite 1000  
Phoenix, AZ 85012  
(602) 234-5807  
Opposing counsel

Terrence P. Woods  
Broening Oberg Woods  
Wilson & Cass  
1122 E. Jefferson  
Phoenix, AZ 85036  
(602) 271-7705  
Co-defense counsel

Ernest J. Getto  
Latham & Watkins  
633 West Fifth Street, Suite 4000  
Los Angeles, CA 90071  
(213) 891-8228  
Co-defense counsel

Garrett B. Johnson  
Helen Witt  
Kirkland & Ellis  
200 East Randolph Drive  
Chicago, IL 60601  
(312) 861-2000  
Co-defense counsel

Shane Swindle  
Brown & Bain  
2901 North Central Avenue  
20th Floor  
Phoenix, AZ 85012  
(602) 381-8384  
Co-defense counsel

Christopher L. Callahan  
Fennemore, Craig, P.C.  
3003 North Central Avenue, Suite 2600  
Phoenix, AZ 85012  
(602) 916-5310  
Co-defense counsel

Richard W. Shapiro  
 2415 East Camelback Road  
 Suite 700  
 Phoenix, AZ 85016  
 (602) 508-6100  
 Co-defense counsel

Thomas M. Klein  
 Bowman & Brooke  
 2929 North Central Avenue  
 Suite 1700  
 Phoenix, AZ 85012  
 (602) 351-2406  
 Co-defense counsel

M. Byron Lewis, Esq.  
 Mark A. McGinnis  
 Salmon, Lewis & Weldon  
 2850 East Camelback Road  
 Suite 200  
 Phoenix, AZ 85016  
 (602) 801-9062  
 Co-defense counsel

Craig Reece (deceased)  
 City of Phoenix  
 200 W. Washington Street, 13th Fl.  
 Phoenix, AZ 85003-1611  
 (602) 262-6761  
 Co-defense counsel

David J. Damron  
 Sanders & Parks  
 3030 North Third Street  
 Suite 1300  
 Phoenix, AZ 85012  
 (602) 532-5763  
 Co-defense counsel

3. **RTC v. Gary H. Driggs, et al.**

- a. **My client:** A Phoenix-area law firm
- b. **Dates:** 1992 - 1994 (est.)
- c. **Courts:** United States District Court for the District of Arizona

- d. Judges:** Hon. Earl H. Carroll  
Hon. Stephen M. McNamee
- e. Citation:** CIV 92-1080 PHX SMM
- f. Summary:** The Resolution Trust Corporation sued officers, directors, accountants, and lawyers associated with Western Savings & Loan Association. The RTC asserted various claims of negligence, breach of fiduciary duty, and fraud, claiming damages of many millions of dollars. All defendants settled following pretrial discovery and motion practice.
- g. My role:** Our firm represented a Phoenix-area law firm that had acted as outside counsel to Western Savings. I drafted and argued motions and pretrial issues, handled discovery, and ultimately negotiated a favorable settlement with the RTC.
- h. Other counsel:**

Mike Manning  
Stinson Morrison Hecker  
1850 North Central Avenue  
Suite 2100  
Phoenix, AZ 85004  
(602) 279-1600  
Opposing counsel

Ed Hendricks  
Meyer Hendricks & Bivens  
3003 North Central Avenue  
Suite 1200  
Phoenix, AZ 85012  
(602) 604-2200  
Co-counsel

Frank Lewis  
Langerman, Lewis, Marks,  
Wolfe & Dasse  
1400 Arizona Title Building  
111 West Monroe  
Phoenix, AZ 85003-1787  
(602) 254-6071  
Counsel for co-defendant

E. Scott Dosek  
Kutak, Rock  
8601 N. Scottsdale Road  
Suite 300  
Scottsdale, AZ 85253  
(480) 429-5000  
Counsel for co-defendant

Jeffrey D. Colman  
Jenner & Block  
One IBM Plaza  
Chicago, IL 60611  
(312) 222-9350  
Counsel for co-defendant

H. Michael Clyde  
Todd P. Kerr  
Brown & Bain, P.A.  
2901 North Central Avenue  
P.O. Box 400  
Phoenix, AZ 85001-0400  
(602) 351-8335  
Counsel for co-defendant

David F. Cunningham  
White, Koch, Kelly &  
McCarthy, P.A.  
P.O. Box 787  
Santa Fe, NM 87504  
(505) 982-4374  
Counsel for co-defendant

Ronald E. Warnicke  
Warnicke & Littler  
1411 North Third Street  
Phoenix, AZ 85004  
(602) 256-0400  
Counsel for co-defendant

Michael J. LaVelle  
Kimerer & LaVelle  
2425 East Camelback Road  
Phoenix, AZ 85016  
(602) 279-2100  
Counsel for co-defendant

Daniel Cracchiolo  
David M. Villadolid  
Burch & Cracchiolo  
702 East Osborn, Suite 200  
Phoenix, AZ 85011-6882  
(602) 274-7611  
Co-counsel

Bart J. Patterson  
Univ & Comm College  
5555 W. Flamingo Road  
Las Vegas, NV 89103  
(702) 889-8426  
Counsel for co-defendant

Numerous other counsel not listed

4. **Ira A. Abrahamson, et al. v. Western Savings, et al.**

- a. **My client:** A Phoenix-area law firm
- b. **Dates:** 1992 - 1994 (est.)
- c. **Courts:** United States District Court for the District of Arizona
- d. **Judges:** Hon. Stephen B. McNamee
- e. **Citation:** CIV 88-1677 PHX SMM/CIV 88-2060 PHX SMM
- f. **Summary:** This was the companion securities fraud action to the RTC case mentioned above. Plaintiffs sued on behalf of a class of persons who purchased securities issued by Western Savings. The trial court granted our client's motion to dismiss. Other defendants ultimately settled with the plaintiff class.
- g. **My role:** I drafted all motion papers and argued all motions, including the dispositive motion.
- h. **Other counsel:**

Gene Mesh  
Gene Mesh & Associates  
3133 Burnet Avenue  
P.O. Box 29073  
Cincinnati, OH 45229  
Counsel for plaintiffs

Steven J. Toll  
Cohen, Milstein & Hausfeld  
1401 New York Avenue, N.W.  
Washington, D.C. 20005  
(202) 408-4600  
Counsel for plaintiffs

E. Scott Dosek  
Kutak Rock  
8601 N. Scottsdale Road  
Suite 300  
Scottsdale, AZ 85253  
(480) 429-5000  
Counsel for co-defendant

Ronald E. Warnicke  
 Warnicke & Littler  
 1411 North Third Street  
 Phoenix, AZ 85004  
 (602) 256-0400  
 Counsel for co-defendant

Bart J. Patterson  
 Univ & Comm College  
 5555 W. Flamingo Road  
 Las Vegas, NV 89103  
 (702) 889-8426  
 Counsel for co-defendant

H. Michael Clyde  
 Todd R. Kerr  
 Brown & Bain, P.A.  
 2901 North Central Avenue  
 Phoenix, AZ 85012  
 (602) 351-8335  
 Counsel for co-defendant

Counsel for numerous other parties not listed

5. **Botma v. Parillo, Weiss & Ohalloran**

- a. **My client:** Parrillo Weiss & O'Halloran
- b. **Dates:** 2000 – June, 2002 (est)
- c. **Courts:** Maricopa County Superior Court  
 Arizona Court of Appeals  
 Arizona Supreme Court
- d. **Judges:** Hon. Paul Katz  
 Hon. E.G. Noyes, Jr. (Court of Appeals)  
 Hon. Jefferson Lankford (Court of Appeals)  
 Hon. James B. Sult (Court of Appeals)
- e. **Citation:** 202 Ariz. 14, 39 P.3d 538 (2002) (Court of Appeals)  
 CV 2000-010821 (Superior Court)
- f. **Summary:** Plaintiffs sued the Phoenix office of the Chicago law firm of Parrillo, Weiss & O'Halloran for legal malpractice. The plaintiffs were both the former client of Parrillo Weiss and the plaintiff who had sued the client in the underlying tort litigation. The client had settled the tort litigation by assigning to the plaintiff a legal malpractice claim against Parrillo Weiss. Plaintiffs argued that such assignments, which are permitted under Arizona law against insurance companies, should also be permitted against lawyers. The trial court granted our motion to dismiss, the court of appeals affirmed, and the Arizona Supreme Court denied review.

g. **My role:** I was lead defense counsel in this matter and argued the case in the trial court and the court of appeals. There was no argument in the Arizona Supreme Court.

h. **Other counsel:**

Charles D. Roush  
Roush, McCracken, Guerrero & Miller  
650 North Third Avenue  
Phoenix, AZ 85003  
(602) 253-3554  
Opposing counsel

6. **Honeywell v. General Electric**

- a. **My client:** Honeywell Incorporated
- b. **Dates:** 1995-1997 (est.)
- c. **Courts:** United States District Court for the District of Arizona
- d. **Judges:** Hon. Stephen M. McNamee
- e. **Citation:** CIV 95-2882 PHX SMM
- f. **Summary:** Honeywell sued General Electric under the Comprehensive

Environmental Response, Compensation, and Liability Act for contribution to groundwater contamination at a Honeywell facility. GE had owned and operated the facility for several years before its acquisition by Honeywell. Discovery concerned historical operations at the facility and expert opinions. The case was settled pre-trial.

g. **My role:** I was lead counsel for Honeywell. I argued all significant issues before the court, took the lead in discovery and expert work, and negotiated the settlement with opposing counsel.

h. **Other counsel:**

Shane R. Swindle  
Brown & Bain  
2901 North Central Avenue  
20th Floor  
Phoenix, AZ 85012  
(602) 381-8384  
Co-counsel

Chris Thomas  
Squire Sanders & Dempsey  
40 North Central Avenue  
Suite 2700  
Phoenix, AZ 85004  
(602) 528-4044  
Opposing Counsel



James A. Bruen  
 Peter Modlin  
 Farrella Braun & Martel  
 235 Montgomery Street  
 San Francisco, CA 94105-1250  
 (415) 954-4400  
 Opposing Counsel

7. **RTC v. Charles H. Keating, Jr., et al. (In re American Continental Corporation/Lincoln Savings and Loan Securities Litigation)**

- a. **My client:** A Phoenix-area law firm
- b. **Dates:** 1989- 1992 (est.)
- c. **Courts:** United States District Court for the District of Arizona
- d. **Judges:** Hon. Richard M. Bilby (deceased)
- e. **Citation:** MDL 834 (No 89-1509-PHX-RMB)
- f. **Summary:** The Resolution Trust Corporation sued officers, directors,

accountants, and lawyers associated with Lincoln Savings & Loan Association. The RTC asserted various claims of negligence, breach of fiduciary duty, and fraud, claiming damages of several hundred million dollars. All defendants eventually settled with the RTC.

g. **My role:** Our firm represented a Phoenix-area law firm that had acted as outside counsel to Lincoln Savings. I drafted and argued significant motions and pretrial issues, handled discovery, and negotiated a favorable settlement with the RTC.

**h. Other counsel:**

Mike Manning  
 Stinson Morrison Hecker  
 1850 North Central Avenue  
 Phoenix, AZ 85004  
 (602) 279-1600  
 Opposing counsel

James Powers, Esquire  
 Christopher Callahan, Esquire  
 Fennemore Craig  
 3003 N. Central Avenue, Suite 2600  
 Phoenix, AZ 85012  
 (602) 916-5482  
 Counsel for co-defendants

The Hon. Michael Hawkins  
 United States Court of Appeals for the Ninth Circuit  
 401 West Washington Street  
 Phoenix, AZ 85003  
 (602) 332-7310  
 Counsel for co-defendants

Stephen M. Dichter, Esquire  
 Bryan Cave  
 Two North Central Avenue  
 Phoenix, AZ 85003  
 (602) 364-7309  
 Counsel for co-defendants

Counsel for numerous other parties not listed

8. **Centrust v. PMI**

- a. **My client:** PMI
- b. **Dates:** 1985 – 1990 (est.)
- c. **Courts:** Maricopa County Superior Court  
 Arizona Court of Appeals  
 Arizona Supreme Court
- d. **Judges:** Hon. Jeffrey Cates (Superior Court)  
 Hon. Fernandez (Court of Appeals)  
 Hon. P.J. Roll (Court of Appeals)  
 Hon. J. Livermore (Court of Appeals)
- e. **Citation:** 166 Ariz. 50, 800 P.2d 37 (1990) (Court of Appeals)
- f. **Summary:** Centrust sued PMI, a mortgage insurance company, for several million dollars in losses arising out of a failed real estate transaction. PMI defended on the ground that the mortgage insurance had been procured through fraud and misrepresentation. Judgment was entered in favor of PMI after a bench trial spanning several weeks. The court of appeals subsequently affirmed the judgment.
- g. **My role:** I tried the case with my partner, Larry Hammond. We divided responsibilities for all aspect of the trial.
- h. **Other counsel:**

Andrew Gordon  
 Coppersmith Gordon  
 2633 East Indian School Road  
 Suite 300  
 Phoenix, AZ 85016  
 (602) 381-5460  
 Opposing counsel

9. **In re Zang**

- a. **My client:** State Bar of Arizona
- b. **Dates:** 1982-1987 (est)
- c. **Courts:** Arizona Supreme Court
- d. **Judges:** State bar hearing panel  
 Supreme Court opinion authored by Hon. Stanley Feldman

- e. **Citation:** 154 Ariz. 134, 741 P.2d 267 (1987) (Supreme Court)
- f. **Summary:** The State Bar of Arizona brought disciplinary charges against a Phoenix area law firm, alleging that the firm engaged in misleading advertising and other unethical practices. Following a three-week evidentiary hearing, a hearing committee of the state bar found in favor of the bar and ruled that the firm's two lawyers should be suspended from the practice of law. The Arizona Supreme Court affirmed.
- g. **My role:** I was co-bar counsel in this case, wrote all briefs, participated actively in the evidentiary hearing, and argued the case before the Arizona Supreme Court.
- h. **Other counsel:**

Ed Hendricks  
Meyer, Hendricks & Bivens  
3003 North Central Avenue, Ste. 1200  
Phoenix, AZ 85012  
(602) 604-2200  
Co-counsel

Frank Lewis  
Langerman, Lewis, Marks,  
Wolfe & Dasse  
111 West Monroe  
Phoenix, AZ 85003-1787  
(602) 254-6071  
Co-counsel

Walter Cheifetz  
Cheifetz & Iannitelli  
3238 N. 16th Street  
Phoenix, AZ 85016  
(602) 952-6000  
Opposing counsel

10. **York v. Arizona Department of Transportation**

- a. **My client:** SunCor Development Company
- b. **Dates:** 1999 - 2001
- c. **Courts:** Maricopa County Superior Court  
Arizona Court of Appeals  
Arizona Supreme Court
- d. **Judges:** Hon. Susan Bolton (Superior Court (now Federal District Court))  
Hon. Michael Ryan (Court of Appeals (now Arizona Supreme Court))  
Hon. Susan A. Ehrlich (Court of Appeals)  
Hon. E.G. Noyes, Jr. (Court of Appeals)
- e. **Citation:** CV01-0026 PR (Supreme Court); 1 CA-CV 00-0188 (Court of Appeals); CV99-02285 (Superior Court)

f. **Summary:** Greg York and the Arizona Department of Transportation entered into a contract for York to purchase several large storm water retention basins in west Phoenix that provided drainage for several developments and cities. SunCor intervened in the action and filed a motion to have York's contract declared void and unenforceable. The trial court granted the motion, the court of appeals affirmed, and the Arizona Supreme Court denied review.

g. **My role:** I was lead counsel for SunCor. I argued the motions in the trial court and argued before the court of appeals. The Arizona Supreme Court did not hear oral arguments.

**h. Other counsel:**

James H. Oeser, Esquire  
986 South Litchfield Road  
Goodyear, AZ 85338  
(623) 932-3014  
Co-counsel

Paul G. Ulrich  
ULRICH & ANGER, P.C.  
3707 N. Seventh Street  
Suite 250  
Phoenix, AZ 85014-5057  
(602) 248-9465  
Opposing counsel

Jeffrey M. Proper, Esquire  
3225 N. Central Avenue, Suite 1615  
Phoenix, AZ 85012-2413  
(602) 235-9555  
Opposing counsel

James R. Redpath  
Assistant Attorney General  
Office of the Attorney General  
1275 W. Washington Street, Room 160  
Phoenix, AZ 85007-2997  
(602) 542-8837  
Attorney for Director of the Arizona  
Department of Transportation

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

No

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

**None. There have been a few legal malpractice claims made against our law firm while I have been a member of the firm's board of directors and one of its corporate officers, but these claims have not concerned my legal work or that of lawyers I supervised. I have had no involvement in these cases as a party, witness, or otherwise.**

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

**I am not aware of potential conflicts of interest other than those that naturally arise when a practicing lawyer becomes a judge. Should I be confirmed, I will resolve potential conflicts by following applicable rules and statutes, including 28 U.S.C. § 455. Beyond the steps specified in section 455, I have not determined the specific procedures I would follow to identify areas of concern, but I would adopt appropriate and well accepted procedures to ensure that potential conflicts of interest are identified and avoided. If confirmed, potential conflicts during my initial service would include litigation handled by my former law firm and close associates in practice, any case in which I or my firm acted as a lawyer, any client for whom I or my firm acted as a lawyer, and any matter in which I or my family might have a financial interest.**

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

No

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

**See attached Financial Disclosure Report**

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

**See attached Net Worth Statement**

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

**No**

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

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

**I was interviewed by Senator Jon Kyl and personnel from the White House and Justice Department. I believe my nomination is based on those interviews and on inquiries made by Senator Kyl and his office of members of the Arizona legal community.**

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

**No**

Chairman HATCH. Well, thank you.  
Mr. Hicks?

**STATEMENT OF S. MAURICE HICKS, JR., NOMINEE TO BE  
DISTRICT JUDGE FOR THE WESTERN DISTRICT OF LOUISIANA**

Mr. HICKS. Thank you again for the opportunity to appear. I am most honored and most humbled by the President's nomination and the opportunity to have gotten this far in the process.

Like Mr. Campbell, I too have no opening statement, but would like to take the opportunity to introduce my family and some of my long-term lawyer friends from Shreveport and others who have traveled here for this purpose, if I might.

Chairman HATCH. Thank you very much.

Mr. HICKS. First is my wife, Glynda. Will you stand?

[Ms. Hicks stood.]

Mr. HICKS. Next to her is my son, Tyler; and Charles Salley, who was the first lawyer that I worked under 25 years ago; and my other family members seated immediately behind them, daughters Christy and Whitney; my law partner Mike Hubley, and a rather surprise guest, Chief Judge Richard Haik, of the Western District of Louisiana, based in Lafayette.

[The biographical information of Mr. Hicks follows:]

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

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

Samuel Maurice Hicks, Jr.  
S. Maurice Hicks, Jr.  
Samuel M. Hicks, Jr.  
Maury Hicks

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

United States District Judge, Western District of Louisiana

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

610 Marshall Street, Suite 700  
Shreveport, LA 71101  
Phone: (318) 221-3221

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

DOB: 12/05/52  
New Orleans, Louisiana

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

Married to Glynda Barmore Hicks  
Paralegal: Hicks, Hubley & Marcotte  
610 Marshall Street, Suite 700  
Shreveport, LA 71101

3 dependent children



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

Louisiana State University Law School  
 202 Law Center  
 Baton Rouge, Louisiana 70803  
 1974-77  
 Juris Doctor Degree, 5/77

Texas Christian University  
 2800 S. University Dr.  
 Sadler Hall  
 Ft. Worth, TX 76129  
 1970-1974  
 Bachelor of Arts, 5/74

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

S. Maurice Hicks, Jr., A Professional Law Corporation, D/B/A:	October 1982 - Current
Hicks, Hubley & Marcotte	610 Marshall Street, Ste. 700 Shreveport, Louisiana 71101
Hicks & Hubley	610 Marshall Street, Ste. 700 Shreveport, Louisiana 71101
Hicks, Bookter & Hubley	610 Marshall Street, Ste. 700 Shreveport, Louisiana 71101
Hicks & Bookter	610 Marshall Street, Ste. 1014 Shreveport, Louisiana 71101
Rountree & Hicks (3/81-6/84)	1308 Commercial National Bank Shreveport, Louisiana 71101
Lunn, Irion, Switzer, Johnson & Salley (8/77-3/81) Associate Attorney	500 Slattery Building Shreveport, Louisiana 71101

Louisiana Legislative Council (1975-77) Law Clerk & Staff Attorney	Louisiana State Capitol, 20 <sup>th</sup> Floor Baton Rouge, Louisiana 70804
Children & Arthritis, Inc. Advisory Board Member Non-profit corporation No payment or compensation	2751 Albert Bicknell Dr., Suite 2E Shreveport, Louisiana 71103
Spring Lake - Pierremont Hills Homeowners Association, Inc. President, 1996 No payment or compensation	517 Dumbarton Shreveport, Louisiana 71106
Kings Highway Christian Church (Disciples of Christ) Chairman, Official Board, 1995-1996; Vice Chairman, 1994-1995 Board of Elders, 1997-1999 Chairman, 1997-1998 Deacon, 1992-1995 No payment or compensation	806 Kings Hwy. Shreveport, Louisiana 71104
Texas Christian University Volunteer Boards Kelly Alumni Center Chair, Addison & Randolph Clark Society, 1997-1998 Board Member, Addison & Randolph Clark Society, 1993-1998 Member, Addison & Randolph Clark Society, 1993-current Commission on the Future of TCU, Delegate, 2000 TCU Professional Advisor's Network, 1998-current No payment or compensation	2800 Stadium Dr. Fort Worth, TX 76129
Centenary College of Louisiana President's Advisory Council No payment or compensation	2620 Centenary Blvd. Shreveport, Louisiana 71104

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

None.

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

Winner, LSU Robert Tullis Moot Court Competition (with Stephen C. Reidlinger), 1977

LSU Law School Moot Court Board, 1976-77

Phi Delta Phi  
(Legal Fraternity) Scholarship, 1976

Phi Delta Phi  
Certificate of Merit, 1975

Phi Beta Kappa, 1974

Shreveport Jaycees  
Key Man Award, 1977  
Key Director Award, 1978

National Registry of Who's Who

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

Louisiana State Bar Association (1977-current)

Louisiana State Bar Foundation (1999-current)

Louisiana State Bar Association, Committee on Bar Admissions

Examiner, Federal Jurisdiction & Procedure (2002-current)

Assistant Examiner, Federal Jurisdiction & Procedure (1993-2001)

American Bar Association (1977-current)

Louisiana Association of Defense Counsel

Board of Directors (1982-85)

Defense Research Institute (1984-current)

Shreveport Bar Association (1977-current)

Bar Association for the Fifth Federal Circuit (1995-current)

Louisiana Association of Defense Counsel, Member, 1977-2002

Board of Directors, 1982-85

Faculty Member, LADC Trial Academy, 1989

Instructor, LADC Trial Tactics Seminar, 1994

Instructor, LADC North Louisiana Defense Counsel Seminar, 1994, 1995

Louisiana Judicial College, New Orleans, Louisiana  
Instructor, 1994  
LSU Law Center, Continuing Legal Education Series, Baton  
Rouge, Louisiana, Instructor and Panel Member, 1993  
American Inns of Court, Harry V. Booth - Henry A. Politz Inn of Court,  
Shreveport, Louisiana  
Barrister, 1991-1993  
Master, 2001-current

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

Admitted to practice in Louisiana, 10/7/77  
Admitted to the Bar of the First Judicial District Court, 10/77  
  
Admitted to practice United States District Court, Western District of Louisiana, 11/77  
  
Admitted to practice on pro hac vice basis, United States District Court, Eastern District of Texas, Marshall, 1990 and Texas State Courts in Longview, 1991 or 1992  
  
Admitted to practice  
(A) Old U. S. Court of Appeals for the Fifth Circuit, 1977  
(B) New U. S. Court of Appeals for the Fifth Circuit, 1982  
(C) U. S. Supreme Court, 2001

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

University Club of Shreveport (current)  
  
East Ridge Country Club (1996-current)  
  
Northwest Louisiana North-South Civil War Roundtable (2000-current)  
Vice President (2001-current)

- McCrery Capitol Club (1988-current)
- Golden Gryphon Society, Inc. (Mardi Gras Organization)  
Sponsors of the Krewe of Alla (1986-current)
- Mystick Krewe of Louisianians, Inc. (Washington Mardi Gras Organization)  
(1994-current)  
Krewe Lieutenant (1999-current)
- Chico Gun Club (1995-current)
- National Rifle Association (1995-current)
- Spring Lake - Pierremont Hills Homeowners Association, Inc.  
(1991-1996); President (1996)
- Republican National Committee
- Kings Highway Christian Church (Disciples of Christ)  
Shreveport, Louisiana (1991-current)  
Chairman, Official Board, 1995-1996;  
Vice Chairman, 1994-1995  
Board of Elders, 1997-1999  
Chairman, 1997-1998  
Deacon, 1992-1995  
Chairman, 1993 Stewardship Campaign  
Adult Sunday School Teacher  
New Perspectives, 1998-1999  
Pioneer Class, 1999-current  
Youth Ministry Team  
ChiRho (Middle School), 1992-1995; 2000-2001  
CYF (High School), 1999-2000  
Outreach Mission Work
- Texas Christian University, Ft. Worth, Texas  
Chair, Addison & Randolph Clark Society, 1997-1998  
Board Member, Addison & Randolph Clark Society, 1993-1998  
Member, Addison & Randolph Clark Society, 1993-current  
Commission on the Future of TCU, Delegate, 2000  
TCU Professional Advisor's Network, 1998 current  
Student Recruiting, Leaders in a Network for Key  
Students (LINKS), TCU Admissions Office, 1983-current  
20 year Reunion Committee, 1994

25 year Reunion Committee, Class Gift Chair, 1999  
TCU Alumni Association  
TCU Frog Club

Centenary College of Louisiana  
President's Advisory Council (Current)

To my knowledge none of these organizations formerly discriminated or currently discriminates on the basis of race, sex or religion, either through formal membership requirements or the practical implementation of membership policies.

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

Louisiana Judicial College

Instructor: New Orleans, Louisiana

"Practical and Procedural Effects on Pretrial Motion Practice After State v. Foret and Daubert v. Merrell Dow Pharmaceuticals," 1994

Louisiana Association of Defense Counsel, Trial Tactics Seminar

Instructor: Beaver Creek, CO

"Practical and Procedural Effects on Pretrial Motion Practice After State v. Foret and Daubert v. Merrell Dow Pharmaceuticals," 1994

LSU Law Center, Continuing Legal Education Series, Baton Rouge, Louisiana

Instructor and Panel Member:

Mastering the Evidence Seminar, "Expert Witnesses After Daubert," 1993

Copies of speeches have not been retained.

National Business Institute, Inc.

P. O. Box 3067

Eau Claire, WI 54702

Co-author and lecturer

"Trying the Automobile Liability Case"

September 11, 1991, Shreveport, LA

January 21, 1993, Shreveport, LA

April 12, 1995, Shreveport, LA

- "Environmental Cases in Louisiana"  
1992, Shreveport, LA
- "Trying the Soft Tissue Injury Case in Louisiana"  
December 19, 1997, Shreveport, LA
- "Keys to Effective Expert Witness Examination"  
December, 1996, Shreveport, LA  
December 18, 1998, Shreveport, LA  
December 20, 2000, Shreveport, LA

I have also given presentations and seminars to lawyers and judges on various topics of legal interest, including expert witnesses. Outlines of the subject matters covered are contained in seminar materials published by National Business Institute, Inc. as indicated in an answer to a previous question.

With respect to speeches to various groups, I typically do not retain copies of my remarks. I have spoken to a Boy Scout Order of the Arrow awards banquet on leadership (May, 2000) and have made several presentations to the members of the Northwest Louisiana North-South Civil War Roundtable. Topics of those presentations have included "Gettysburg - the Second Day," "Judah P. Benjamin," and "Levees, Dams and Damn Levees - the Destruction of Levees along the Mississippi by the Union and Construction of Levees to Control the Rising Mississippi," and "Abraham Lincoln: Saint, Sinner or Spinner?"

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

I have not testified before a committee or subcommittee of the Congress.

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

The general state of my health is good.

Date of last physical: May 22, 2002

16. **Citations:** If you are or have been a judge, provide:
- (a) a short summary and citations for the ten (10) most significant opinions you have written;

- (b) a short summary and citations for all rulings of yours that were reversed or significantly criticized on appeal, together with a short summary of and citations for the opinions of the reviewing court; and
- (c) a short summary of and citations for all significant opinions on federal or state constitutional issues, together with the citation for appellate court rulings on such opinions.

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

Not applicable

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

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

I have not held any public elected or appointed office. I have not been a candidate for elective or appointed positions.

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

I have been actively involved in various capacities with the McCrery For Congress Campaign from its inception in late 1987 leading up to the April, 1988 Special Election for the 4<sup>th</sup> Congressional District of Louisiana until the present time. In addition to being a campaign contributor, I have served as a member of the campaign steering and finance committees for each election cycle to the present time. I have also served as a campaign attorney and a member of a small circle of advisors to Congressman Jim McCrery. I attend regular meetings to discuss issues, strategy and other topics.



I have actively participated in the following campaigns as an unpaid advisor with no official title:

- A) Honorable Jeffrey P. Victory, Justice, Louisiana Supreme Court. I served on the steering committee for Justice Victory's Supreme Court race and for his Court of Appeal race several years earlier. (1999 campaign)
- B) Honorable Roy Brun, District Judge, First Judicial District Court, Caddo Parish, Louisiana. (1997 campaign)
- C) Honorable B. Woodrow Nesbitt, Jr., District Judge, Caddo Parish, Louisiana. (2000 campaign)
- D) Honorable Max Malone, State Senator, District 37, State of Louisiana. (1995 and 1999 campaigns)
- E) Honorable Wayne Waddell, State Representative, District 5, State of Louisiana. (1997 campaign)
- F) Wm. B. "Pete" King, unsuccessful campaign for Judge of Caddo Parish Juvenile Court. (1999 campaign)

Glynda and I hosted receptions for the following candidates:

- A) Steve Forbes, April 1999
- B) Steve Prator, Sheriff, Caddo Parish, Louisiana, June 2000
- C) Henry Connick (race for Louisiana Attorney General), Spring 1992

I have been publicly identified as a contributor to the Victory 2000 (Louisiana), the Bush-Cheney campaign.

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

- (a) Describe chronologically your law practice and legal experience after graduation from law school including:
  - (1) whether you served as clerk to a judge, and if so, the name for the judge, the court and dates of the period you were a clerk;

I have not served as a clerk to a judge.

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

1984-85 Solo Practice (Professional Law Corporation)  
610 Marshall Street, Suite 1014, Shreveport, LA 71101

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

S. Maurice Hicks, Jr., A Professional Law Corporation, D/B/A:	October 1982 - Current
Hicks, Hubley & Marcotte (6/99 - current)	610 Marshall Street, Ste. 700 Shreveport, Louisiana 71101
Hicks & Hubley (8/91 - 6/99)	610 Marshall Street, Ste. 700 Shreveport, Louisiana 71101
Hicks, Bookter & Hubley (7/90 - 8/91)	610 Marshall Street, Ste. 700 Shreveport, Louisiana 71101
Hicks & Bookter (7/85 - 7/90)	610 Marshall Street, Ste. 1014 Shreveport, Louisiana 71101
Rountree & Hicks (3/81-6/84)	1308 Commercial National Bank Shreveport, Louisiana 71101
Lunn, Irion, Switzer, Johnson & Salley (8/77-3/81) Associate Attorney	500 Slattery Building Shreveport, Louisiana 71101
Louisiana Legislative Council (1975-77) Law Clerk & Staff Attorney	Louisiana State Capitol, 20 <sup>th</sup> Floor Baton Rouge, Louisiana 70804

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

Litigation practice in twenty-fifth year in Shreveport, Louisiana with emphasis on commercial and insurance-related litigation in state and federal courts ranging from general aviation accidents, automobile accidents, product liability, asbestos claims, construction disputes, environmental claims, lender liability claims, architects' and engineers' malpractice claims, intellectual property claims, insurance coverage questions as well as oil and gas accident and contamination claims.

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

Typical current clients include: national insurance companies and their insureds, manufacturers, timber and paper companies, architects and engineers, oil companies, and copyright holders.

The vast majority of my legal career has been devoted to litigation and litigation-oriented dispute resolution in state and federal courts, primarily in Louisiana. With respect to my insurance practice, I have also represented many insureds on coverage issues or on the merits of the claims filed against them. I have also had a great deal of experience representing many individuals on a wide variety of personal matters, including estate planning, personal injury claims, contract negotiations, copyright issues and general legal matters.

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

I appear in court frequently.

- (2) Indicate the percentage of these appearances in

(A)	federal courts	-	10%
(B)	state courts of record	-	85%
(C)	other courts	-	5%

- (3) Indicate the percentage of these appearances in:

(A)	civil proceedings	-	98%
(B)	criminal proceedings	-	2%

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

I estimate the number of cases I tried to verdict or judgment to be about 150 cases with 95% as lead or sole trial counsel and approximately 5% as co-counsel. Many were multi-defendant cases, each with their own attorney.

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

Approximately 30% of those cases have been jury trials in state and federal courts.

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

I have not practiced before the United States Supreme Court.

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

On a pro bono basis, I have consulted with and prepared wills for the elderly. I have also worked with juvenile adjudicated in need of care, including a young man I have represented over a period of over four years. Pro bono work varies year to year and ranges from 50-75 hours per year. I also represented on a pro bono basis a criminal defendant in Lincoln Parish charged with negligent homicide involving the death of his closest friend. Over 150 hours was devoted to that case.

Children & Arthritis, Inc.

As an advisory board member, I attend various quarterly meetings, assist in preparing applications for grants, updating corporate records, planning the annual retreat and legal consultations when necessary. These activities are done without compensation. About fifty hours per year is contributed.

Kings Highway Christian Church

I devote a substantial amount of time to church-related activities, including providing legal advice to church members and providing notarial services.

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

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

- (b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;
- (c) the party or parties whom you represented; and
- (d) describe in detail the nature of your participation in the litigation and the final disposition of the case.

1. **Angelina Plantation Farm v. Norton Oil Co., et al, #298,344, 1st Judicial District Court, Caddo Parish, Louisiana (Hon. C. J. Bolin, Jr. , by designation) and Angelina Plantation Farm v. The Honorable Ernest A. Burguières, III, Commissioner of Conservation, #412, 365 "D", 19th Judicial District Court, East Baton Rouge Parish, Louisiana**

ATTORNEYS:

Mr. R. Joseph Wilson - Justiss Oil Company  
Gaharan & Wilson  
P. O. Drawer 1356  
Jena, LA 71342  
Phone: (318) 992-2104

Mr. Joseph L. Hargrove, Jr. - Outside Corp. Counsel for  
Hargrove, Pesnell & Wyatt Norton Oil Co.  
401 Market Street, Ste. 600  
P.O. Box 59  
Shreveport, LA 71101-0059  
Phone: (318) 429-7200

S. Maurice Hicks, Jr. - Trial Counsel  
Hicks, Hubley & Marcotte Norton Oil Co.  
610 Marshall Street, Ste. 700  
Shreveport, LA 71101  
Phone: (318) 221-3221

Philip Asprodites - Bass Enterprises  
Gordon, Arata, McCollam,  
Duplantis & Eagan, LLP  
40th Floor  
201 St. Charles Avenue  
New Orleans, LA 70170-4000  
Phone: (504) 582-1111

- Robert Boese - Angelina Plantation Farm  
 Attorney at Law  
 103 Riviera Court  
 Lafayette, LA 70501  
 Phone: (337) 856-5944
- Jeffrey W. Hurt - Angelina Plantation Farm  
 Leonard, Hurt, Frost & Lilly  
 600 North Pearl, Ste. 900  
 Dallas, TX 75201  
 Phone: (214) 954-6300
- Ms. Vicki Warner - David New Drilling Company  
 Barham & Warner  
 920 Pierremont Road, Ste. 412  
 Shreveport, LA 71106  
 Phone: (318) 865-0081
- Mr. Ronald E. Raney - David New Drilling Company  
 Lunn, Irion, Johnson,  
 Salley & Carlisle  
 330 Marshall Street, Suite 500  
 P. O. Box 1534  
 Shreveport, LA 71165-1534  
 Phone : (318) 222-0665
- Dan R. Grubb  
 In Proper Person (deceased)

This is a still-pending multimillion dollar suit for damages brought by the owners and operator of a 20,000 acre rice and soybean farm in Concordia Parish, Louisiana, situated between the Black River and the Mississippi River. It involves two primary areas of science and engineering: petroleum engineering and state promulgated rules and regulations governing the plugging and abandonment of dry holes or formerly producing oil wells on the one hand and groundwater hydrology on the other hand. Plaintiff attempted to establish causation between properly plugged and abandoned oil and gas facilities and the presence of saltwater at the base of the shallow Mississippi River Alluvial Aquifer that served as an irrigation source for Angelina's crops. The first trial on the causation issue was conducted in 1987 by the Louisiana Commissioner of Conservation for a period of about 6 weeks in Baton Rouge, Louisiana. The commissioner ruled against Angelina; however, Angelina later petitioned the judge in the pending civil damages suit to present new evidence on the causation issue. Pursuant to court order, plaintiff filed a new application with the Commissioner of Conservation and a second trial was held over the course of about 4 weeks in January and February, 1994. Again, the

Commissioner ruled against Angelina on the causation issue. Plaintiff appealed those findings to the 19th Judicial District Court, East Baton Rouge Parish, Louisiana under the Louisiana Administrative Procedures Act. That appeal is pending but is inactive.

This case involves the interplay and sophisticated technical analysis of complex engineering principles. Multiple experts testified regarding the movement of groundwater through various aquifer media, encroachment of saltwater into freshwater aquifers and lenses of brine left over geological time as the Mississippi River meandered across the region. Petroleum engineers testified regarding the science of petroleum engineering, its principles and the adequacy of state-mandated plugging and abandonment of oil and gas wells.

I served as trial counsel for one of the primary defendants, Norton Oil Company, Inc., in both hearings and in the pending civil damages litigation.

The case is not yet reported, and probably will be dismissed due to abandonment; however, the findings by the Commissioner will be used in pretrial motion practice to obtain dismissal of the action for damages.

2. **Gregory Diaz v. City of Shreveport and Burns Security Services, Inc., Honorable Tom Stagg in 1978 (Court docket # is not in database), U. S. District Court, Western District of Louisiana, Shreveport, Jury Trial**

ATTORNEYS:

Mr. Robert E. Piper, Jr. - Plaintiff  
Mr. Frank Brown  
Piper & Associates  
624 Pierre Ave.  
Shreveport, LA 71103  
Phone: (318) 226-0826

S. Maurice Hicks, Jr. - Burns Security  
Richard H. Switzer (Deceased)  
Lunn, Irion, Switzer, Johnson & Salley  
509 Marshall Street, Ste. 500  
Slattery Building  
Shreveport, LA 71101  
Phone: (318) 222-0665

Roland J. Achee - City of Shreveport  
**Address at present:**  
Rountree, Cox, Guin & Achee  
400 Travis, Ste. 1200  
P.O. Box 1807  
Shreveport, LA 71166-1807  
Phone: (318) 226-0993

The docket number for this case is unknown - it was filed before the January 1, 1977 start date for the Clerk's database. It was tried in late 1978 and resulted in a jury verdict in favor of the defendants. It was also my first federal jury trial.

Plaintiff filed a 28 U.S.C. §1983 action alleging violation of their civil rights as a result of an altercation at a security checkpoint at the Shreveport Regional Airport. I represented Burns Security as trial counsel with a senior partner, Richard H. Switzer, at my side during the trial.

This case drove home the power of focused cross-examination and the devastating consequences of successfully impeaching witnesses through prior inconsistent statements. In this case, tape recordings were used to impeach the credibility of the plaintiff's wife who admitted on the tape recording that her husband was loud, obnoxious and had been drinking before arriving at the airport. Plaintiff did not appeal the verdict. The case is not reported.

3. **Alexander v. Burroughs Corporation, 359 So.2d 607 (La. May 22, 1978) (No. 61106), William J. Fleniken, Jr. (Deceased), 1st Judicial District Court, Caddo Parish, LA**

ATTORNEYS

Harry R. Nelson - Plaintiffs  
**Address at present:**  
207 Texas, 2nd Floor  
Shreveport, LA 71101  
Phone: (318) 222-0317

Frank M. Dodson - Plaintiffs  
**Address at present:**  
Cook, Yancey, King & Galloway  
1700 Deposit Guaranty Tower  
Post Office Box 22260  
Shreveport, Louisiana 71120-2260  
Phone:(318) 221-6277



Roland J. Achee - Plaintiffs  
**Address at present:**  
Rountree, Cox, Guin & Achee  
400 Travis, Ste. 1200  
P.O. Box 1807  
Shreveport, LA 71166-1807  
Phone: (318) 226-0993

S. Maurice Hicks, Jr. - Burroughs Corporation  
Lunn, Irion, Switzer, Johnson & Salley  
509 Marshall Street, Ste. 500  
Slattery Building  
Shreveport, LA 71101  
Phone: (318) 222-0665  
**Address at present:**  
330 Marshall Street, Ste. 500  
Shreveport, LA 71101  
Phone: (318) 222-0665

In this case a claim was filed by a bankruptcy trustee on behalf of a business named Peerless Supply. The claim was made under the Louisiana law of redhibition seeking damages and rescission of the sale of a Burroughs Corporation business computer claimed to be defective. The issue before the Supreme Court was whether Louisiana jurisprudence establishing a legal trade-off between a use value credit and accrued prejudgment legal interest should be applied or whether the use value credit should be determined independently. I briefed and argued the case at the Louisiana Supreme Court. Unfortunately, the Supreme Court reversed the court of appeal and threw out the automatic application of the "rule of equivalencies." The case has been cited repeatedly over the years in Louisiana redhibition cases and in cases where computation of prejudgment legal interest on judgments are at issue. It was my first actual case to brief and argue before the Louisiana Supreme Court.

4. Winans v. Rockwell Intern. Corp., et al, consolidated with Funai v. Rockwell International Corporation, 705 F.2d 1449, 13 Fed. R. Evid. Serv. 634 (5th Cir. (La.), May 31, 1983) (No. 82-3057) Hon. Tom Stagg, Jury Trial

## ATTORNEYS:

Robert S. Cooper, Jr. and Terry Loup Cooper & Cooper One American Tower Baton Rouge, LA Terry Loup <b>Address at present:</b> 909 Poydras St., Suite 2000 New Orleans, LA 70112	-	Plaintiffs
F. Drake Lee Cook, Yancey, King & Galloway 333 Texas Street, Suite 1700 Shreveport, LA 71101 Phone: (318) 221-6277	-	Goodyear Tire & Rubber Co.
A. Richard Christovich, Jr. R. K. Christovich Christovich & Kearney 601 Poydras Street New Orleans, LA 70130 Phone: (504) 561-5700	-	Rockwell International, Inc.
Harry A. Johnson, Jr. Lunn, Irion, Johnson, Switzer & Salley 500 Slattery Building Shreveport, LA Phone: (318) 222-0665	-	Atlantic Aviation, Inc.
S. Maurice Hicks, Jr. Rountree & Hicks 1308 Commercial National Bank Building Shreveport, LA 71101 Phone: (318) 226-0993	-	Seaboard Tank Sealing Corporation

Russell Holloway - Air Center, Inc.  
 Holloway, Dobson, Hudson & Bachman Third Party Defendant  
 Ste. 900, 1 Leadership Square  
 211 N. Robinson  
 Oklahoma City, OK 73102  
 Phone: (405) 235-8593

William A. Porteous, III - General Electric  
 Porteous, Hainkel, Toledano & Sarpy  
 704 Carondelet  
 New Orleans, LA 70130  
 Phone: (504) 586-1241

These consolidated wrongful death actions arose out of the explosion of a corporate jet aircraft at treetop level in a heavily forested area near Sieper, Louisiana. I represented a fuel system repair company who had worked on the aircraft some time before the incident. Suit was filed pursuant to diversity jurisdiction provided by 28 USC § 1332. I filed a third party demand against a non-diverse aircraft maintenance facility who had worked on the aircraft just before the crash. A total of 21 trial days was set aside; however, following 7 days of trial, the plaintiffs rested their case, and after all defense counsel evaluated the plaintiffs' case as weak. A tactical decision was made by all defense counsel to present no evidence, allowing the case to go to the jury after closing arguments.

This tactical decision required dismissal of my client's third party claim for indemnity or contribution without prejudice. The jury absolved all of the defendants of liability. On appeal, the U.S. 5th Circuit Court of Appeal affirmed the verdict.

The cause of this aircraft crash was the subject of multiple engineering and scientific or technical disciplines, ranging from structural and aerodynamic engineering, jet engine design, to engine repair and overhaul, fuel system design and maintenance, aircraft crash reconstruction as well as proper pilot procedures and responses to in-flight emergencies. The sheer volume and complexity of the evidence posed a challenge to all counsel in presenting the case to a jury.

As attorney for Seaboard, I tried the case to a jury, then briefed and argued the appeal to the U.S. 5th Circuit Court of Appeal. On appeal, the primary issue with respect to Seaboard was the applicability of the doctrine of res ipsa loquitur under the facts.

5. **Huey Dyess v. Brampton Engineering, et al**, Hon. Donald E. Walter, Jury Trial, U.S. District Court, Western District of Louisiana, Monroe Division, #89-0237, jury verdict for plaintiffs reversed on appeal to the U.S. 5th Circuit, #91-4175, April 1, 1992, rehearing denied, May 28, 1992 (unpublished opinion).

ATTORNEYS:

Brian Crawford  
 Don Anzelmo  
 Crawford & Anzelmo - Plaintiff  
 200 Beaird Street  
 P.O. Box 14600  
 Monroe, LA 71207-4600  
 Phone: (318) 325-3200

Ben R. Hanchey - Intervenor  
 Hudson, Potts & Bernstein  
 130 DeSiard Street  
 P.O. Box 3008  
 Monroe, LA 71210-3008  
 Phone: (318) 388-4400

S. Maurice Hicks, Jr. - Brampton Engineering  
 Michael S. Hubley  
 Hicks & Hubley  
 610 Marshall St., Ste. 700  
 Shreveport, LA 71101  
 Phone: (318) 221-3221

This case involved a product liability action against my client, a Canadian engineering firm. I served as co-trial counsel with my partner, Mike Hubley. My specific responsibilities included cross-examination of plaintiffs expert engineering witnesses and preparing and questioning our client's in-house engineers. Following several days of trial, the jury found Brampton Engineering liable for plaintiffs injuries and awarded over \$300,000 in damages. All other defendants settled before trial.

On appeal to the U.S. 5th Circuit, the court reversed the finding of liability and held that there was no evidence of proximate cause linking the Brampton's conduct to the plaintiff's injuries. Plaintiffs were cast with district court and appellate costs. My partner and I tried the case, then drafted the appellate brief together and argued the appeal.

The oral argument on appeal was held at the University of Mississippi Law School moot courtroom and was televised to classes via closed circuit television. The case was decided on the basis of well settled principles of law and was therefore not reported under Local Rule 47.5. Plaintiff's application for rehearing was denied.

6. **Malisa Williams v. Kelly DeGueurce, et al #97,001, Sec. C, 26th Judicial District Court, Bossier Parish, Louisiana, Honorable Ford E. Stinson, Jr.**

ATTORNEYS:

Mr. Charles G. Tutt Mr. Thomas A. Bordelon Attorneys at Law 900 Pierremont Road, Suite 206 Shreveport, Louisiana 71106 Phone: (318) 868-6633	-	State Farm Fire & Casualty Company
Mr. Francis M. Gowen, Jr. Pierremont Office Park Phase II 910 Pierremont Road, Suite 107 P. O. Box 18561 Shreveport, LA 71138 Phone: (318) 865-5911	-	Dr. James DeGueurce (Personal Attorney)
Mr. Marshall Pearce Casten & Pearce 401 Edwards Street Shreveport, LA 71138 Phone: (318) 221-3444	-	Dr. James C. DeGueurce
Mr. A. Michael Boggs Mr. Jefferson R. Thompson Boggs & Thompson 2168 Airline Drive #A Bossier City, LA 71111 Phone: (318) 747-7466	-	Malisa Williams and Michael Brandon Sweeney, Plaintiffs

S. Maurice Hicks, Jr. - Kelly DeGueurce  
 Lydia M. Rhodes  
 Hicks, Hubley & Marcotte  
 610 Marshall St., Ste. 700  
 Shreveport, LA 71101  
 Phone: (318) 221-3221

This case involved sexual molestation claims made by a then fifteen year-old male student against his then twenty-eight year-old female science teacher. I served as lead and trial counsel for Kelly DeGueurce assisted by another attorney in my firm, Lydia M. Rhodes, in the civil damage case filed after she had pleaded guilty to one count of consensual sex with a juvenile. The facts were that a nine month sexual relationship had been broken off by the fifteen year-old student after he consulted an attorney. The fifteen year-old (either with or without his mother's complicity and permission) and perhaps on advice of counsel, videotaped their last sexual encounter. Facts in these cases are seldom what they seem on the surface. On the first day of trial, November 13, 2000, I announced the intention of my client to file a Chapter 13 bankruptcy petition in Mississippi. The trial judge did not want to waste time trying a case that would be stayed or potentially nullified by a bankruptcy proceeding. Eventually, the case was settled on terms favorable to the defendants with my client paying nothing. Our evaluation of the case led us to believe that a jury would likely award zero damages under the peculiar facts of the case.

This case would have presented an opportunity to test community standards of admitted conduct and misconduct in terms of money damages. No case like it had been previously reported in Louisiana. The vast majority of nationally reported cases involved male teachers with underage female students. The possible implications of a jury verdict in this case went far beyond the boundaries of the case.

7. **Tucker v. American States Ins. Co., 747 So.2d 620 (La. App. 2 Cir., 9/22/99)**  
 (No. 31,970-CW and 31,971-CW), Hon. Scott J. Crichton, First Judicial  
 District Court, Caddo Parish, Louisiana

ATTORNEYS:

Mr. Jack M. Bailey, Jr. - Dr. Austin Tucker and  
 2790 Fairfield Avenue Beverly Tucker  
 Shreveport, LA 71104  
 Phone: (318) 222-5200

Mr. Brian A. Homza - American Central Ins. Co.  
Cook, Yancey, King & Galloway  
1700 Deposit Guaranty Tower  
333 Texas Street  
Shreveport, LA 71120-2260  
Phone: (318) 221-6277

Mr. James A. Mijalis - United Fire & Casualty  
Lunn, Irion, Johnson, Salley & Carlisle Company  
330 Marshall Street, Suite 500  
P. O. Box 1534  
Shreveport, LA 71165-1534  
Phone: (318) 222-0665

S. Maurice Hicks, Jr. - American National  
Hicks & Hubley Property & Casualty Co.  
610 Marshall St., Ste. 700  
Shreveport, LA 71101  
Phone: (318) 221-3221

This litigation involved a multimillion dollar claim made by a quadriplegic as a result of a fall from a tree. Four different liability insurers were involved. One of those settled soon after suit was filed. I represented one of the three remaining comprehensive general liability carriers. There were various coverage issues involved, but the remaining defense lawyers all agreed that there was no liability. After discovery was completed, motions for summary judgment were filed by the insurers, but the trial judge denied the motions. Supervisory writs were applied for with the Louisiana Second Circuit Court of Appeal, but were denied. Writs taken to the Louisiana Supreme Court were granted with instructions to the appellate court to obtain full briefs and hear oral arguments on the issues raised by defendants.

The Second Circuit Court of Appeal reversed the trial court and granted the defense motions for summary judgment on the liability issue. This is a reported case. I drafted the appellate brief filed on behalf of ANPAC and American Central Ins. Co. assisted by their counsel, Mr. Homza. On appeal, I presented the defense rebuttal argument.

From a practitioner's viewpoint, the case represents a strong application of Louisiana's revised civil procedure rules that now favor pre-trial dispositions by motions for summary judgment.

8. **Johnson vs. First National Bank of Shreveport, et al**  
 a) 786 So.2d 84 (La. 5/15/01) (No. 2000-CC-2487,2496, 2498)  
 b) 792 So.2d 33 (La. App. 3 Cir., 6/20/01 (No. 2000-870)  
 and  
**Young v. First National Bank of Shreveport, et al**  
 794 So.2d 128 (La. App. 2 Cir. 8/22/01) (No.34,214), Honorable  
 Charles B. Adams

ATTORNEYS:

- |  |   |  |
|--|---|--|
| Mr. Ronald E. Raney<br>Lunn, Irion, Johnson, Salley<br>& Carlisle<br>P. O. Box 1534<br>Shreveport, LA 71165-1534<br>Phone: (318) 222-0665              | - | Fidelity & Casualty Co. of<br>New York, Commercial Ins.<br>Co. of Newark, and Phoenix<br>Assurance Co. of New York |
| Mr. Harry D. Simmons<br>Klotz & Simmons<br>505 Milam<br>Shreveport, LA 71101<br>Phone: (318) 221-1507  | - | North River Ins. Co.   |
| Ms. Deborah Shea Baukman<br>Mayer, Smith & Roberts<br>1550 Creswell Street<br>Shreveport, LA 71101<br>Phone: (318) 222-2135                            | - | St. Paul Insurance Co.<br>(Excess/Umbrella Liability Insurer)  |
| S. Maurice Hicks, Jr.<br>Lydia M. Rhodes<br>Hicks, Hubley & Marcotte<br>610 Marshall Street, Ste. 700<br>Shreveport, LA 71101<br>Phone: (318) 221-3221 | - | St. Paul Insurance Co.<br>(formerly known as<br>Fidelity & Guaranty Ins.<br>Underwriters, Inc.)                    |
| Mr. Bernard S. Johnson<br>Cook, Yancey, King & Galloway<br>P.O. Box 22260<br>Shreveport, LA 71120-2260<br>Phone: (318) 221-6277                        | - | Aetna Casualty & Surety<br>Company and Standard Fire<br>Insurance  |



Mr. James R. Carter Porteous, Hainkel, Johnson & Sarpy 704 Carondelet Street New Orleans, LA 70130-3774 Phone: (504) 581-3838	-	Pacific Employer's Ins. Co.
Mr. Anthony S. Cox Caron, McCormick, Constants & Goldberg 1999 Bryan St., Ste. 1115 Dallas, TX 75201 Phone: (214) 220-5013	-	Fireman's Fund Ins. Co. of Louisiana
Mr. Paul D. Palermo Syridon, Koch, Wallace & Palermo Three Lakeway Center, Ste. 3010 3838 North Causeway Boulevard Metairie, LA 70002 Phone: (504) 830-7800	-	International Ins. Co.
Mr. David Means, III Attorney at Law Courthouse Square P. O. Drawer 839 Mansfield, LA 71052-0839 Phone: (318) 872-3945	-	Plaintiffs
Ms. Mary Olive Pierson Cooper & Pierson P. O. Box 14647 Baton Rouge, LA 70898-4647 Phone: (225) 927-5765	-	Plaintiffs
Mr. Stephen O. Scandurro Scandurro & Layrisson, L.L.C. 607 St. Charles Avenue, Ste. 100 New Orleans, LA 70130 Phone: (504) 522-7100	-	Plaintiffs
Mr. Henry C. Gahagan, Jr. 727 2nd Street P. O. Box 1188 Natchitoches, LA 71457 Phone: (318) 357-0385	-	Plaintiffs

These consolidated cases were part of a group of nine cases filed by independent cattlemen against the First National Bank of Shreveport alleging officer and director misdeeds and fraud connected with agricultural lending practices from 1977 to 1988. Various insurers have been involved at different times in different phases of these claims. I represented one of the four comprehensive general liability insurers in these cases during all phases of discovery, trial and appeal.

The Johnson and Young cases were consolidated for trial by jury on myriad issues ranging from fraudulent lending practices, course and scope of employment, coverage defenses and the general state of the cattle industry nationally. At trial, the jury awarded Mr. Johnson \$584,000. That award was reduced by the Louisiana Third Circuit Court of Appeal to \$150,000.

The same jury awarded Mr. Young \$1,069,000; Mrs. young (who had died before trial) received \$1,069,000. The Louisiana Second Circuit Court of Appeal reversed the award to Mrs. Young in toto and reduced the award to Mr. Young to \$75,000.

Due to the inconsistent awards by two different appellate courts, all parties sought review by the Louisiana Supreme Court; however, all writs were denied.

This was complex, contentious and lengthy litigation with many legal and factual issues. These cases illustrate and underscore the value and importance of Louisiana's constitutionally sanctioned appellate review of law and fact. These cases were originally filed in 1988, but were finally resolved in 2001. One remaining case of the original nine is pending and set for trial in the First Judicial District Court, Caddo Parish, Louisiana.

9. **Lesniewski v. Fowler Trucking Co., 471 So.2d 916 (La. App. 2 Cir., 1/16/84)**  
**(No. 15864-CA), Hon. C. J. Bolin, Jr., First Judicial District Court, Caddo Parish, Louisiana, Jury Trial**

S. Maurice Hicks, Jr.  
 Hicks & Bookter  
 610 Marshall Street, Ste. 700  
 Shreveport, LA 71101  
 Phone: (318) 221-3221

- James H. Dibler, Fowler  
 Trucking Co., Inc. and  
 U. S. Fidelity & Guaranty  
 Company

Harry D. Simmons - Joseph Randall Lesniewski  
Bodenheimer, Jones, Klotz  
& Simmons

**Address at present:**  
Mr. Harry D. Simmons  
Klotz, Simmons & Reeks  
509 Milam Street  
Shreveport, LA 71101  
Phone: (318) 221-1507

Paul R. Mayer (retired) - Halliburton  
Mayer, Smith & Roberts  
1550 Creswell Street  
Shreveport, LA 71101  
Phone: (318) 222-2135

This was a case involving a multimillion dollar claim for damages made on behalf of a drunk driver who technically died in an auto accident but was successfully resuscitated at the hospital only to become a spastic quadriplegic who could no longer talk. The doctrine of pure comparative negligence was relatively new at the time of this 1984 trial. It pitted the drunk driving of the plaintiff at the time of the mid-afternoon crash with the fault of my client transporting a load that was over the maximum height limit. The top of an oil drilling rig section being transported struck an overpass on I-20, dropping the steel frame onto the middle travel lane. A pickup truck had successfully stopped behind the steel frame but was struck two minutes later by the plaintiff's car as it accelerated.

The jury awarded Mr. Lesniewski \$1.7 million in damages but found the plaintiff 40% at fault. The court of appeal affirmed the award and the liability apportionment. A settlement before trial could not be reached. The judgment was substantially below plaintiff's settlement demand.

This case demonstrated the unpredictability of juries in severe personal injury situations but underscored the reality that some cases simply have to be tried to get resolved.

10. Fields v. Senior Citizens Center, Inc. of Coushatta, consolidated with Dupree v. Senior Citizens Center of Coushatta, 528 So.2d 573 (La. App. 2 Cir. 5/4/88) (No. 19,542-CA, 19,543-CA), Hon. Richard N. Ware (deceased), Jury Trial, 39th Judicial District Court, Red River Parish, Louisiana

<p>G. M. Bodenheimer (Deceased) Bodenheimer, Jones, Klotz &amp; Simmons <b>Law Firm currently:</b> Bodenheimer, Jones &amp; Szwak 401 Market Ste. 240 Shreveport, LA 71101 Phone: (318)424-1400</p>	<p>-</p>	<p>Helen H. Fields, et al</p>
<p>S. Maurice Hicks, Jr. Sara E. Adams Hicks &amp; Bookter 610 Marshall Street, Ste. 700 Shreveport, LA 71101 Phone: (318) 221-3221</p>	<p>-</p>	<p>Janet Fields Dupree and Randall Wayne Dupree, Plaintiffs</p>
<p>Eskridge E. Smith, Jr. Cook, Yancey, King &amp; Galloway <b>Law Firm currently:</b> Eskridge E. Smith, Jr. Law Corporation 1611 Jimmie Davis Highway Bossier City, LA Phone: (318) 742-4713</p>	<p>-</p>	<p>Capital Enterprise Ins. Group</p>
<p>Howard B. Gist, Jr. Gist, Methvin, Hughes &amp; Munsterman <b>Address at present:</b> Howard B. Gist, Jr. Gist Methvin, A.P.L.C. 803 Johnson Street P.O. Box 1871 Alexandria, LA 71309-1871 Phone: (318) 448-1632</p>	<p>-</p>	<p>Senior Citizens Center of Coushatta, Inc. and Mount Vernon Fire Ins. Co.</p>

John Dale Powers  
 William E. Willard  
 Powers, Vaughn & Clegg  
**Address at present:**  
 John Dale Powers  
 William E. Willard  
 Powers & Willard, L.L.P.  
 7967 Office Park Blvd.  
 P.O. Box 15948  
 Baton Rouge, LA 70895  
 Phone: (225) 928-1951

- Appellate Counsel  
 for Senior Citizens Center,  
 of Coushatta, Inc. and  
 Mount Vernon Fire Insurance  
 Company

Donald G. Horton  
**Address at present:**  
 Donald G. Horton  
 620 Rush Street  
 P.O. Box 649  
 Coushatta, LA 71019  
 Phone: (318) 932-6615

- Corporate Counsel  
 Senior Citizens Center  
 of Coushatta, Inc.

In these consolidated cases tried to a jury, I represented Janet Fields Dupree and her husband in a wrongful death claim filed against a nursing home, that housed her elderly father, William Fields. The fact situation is extremely unusual. Mr. Fields resided in the nursing home under a V.A. contract. He was mentally impaired and on behavior control medication. On a Saturday night, Mr. Fields walked unnoticed through the front door of the nursing home. Once he was discovered missing, the staff ran out to find him standing on the shoulder across U.S. Highway 71. They yelled to him to stay there; he nodded and stepped into the northbound lane of travel where he was struck and killed by a van driven by his youngest daughter, Janet Fields Dupree. The nursing home's insurer offered only a pittance to settle Janet's claim and the claim of her mother and four siblings. It was a question of liability - would a jury hold the daughter liable or partly liable for the death of her father in these unique circumstances? After a contentious trial, the jury returned a verdict awarding damages to all plaintiffs, finding the nursing home 100% at fault. The verdict was affirmed on appeal in all respects.

I prepared and tried the case for Janet Dupree. Ms. Adams assisted with exhibits. I prepared the appellate brief and orally argued the case before the Louisiana Second Circuit Court of Appeals.

This particular case required caring and careful guidance of my client. It ranks as one of the most difficult trials in my career from an emotional standpoint. The risk for an adverse finding of liability was significant, however, the jury held Janet Fields Dupree blameless for the death of her father.

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

I have never been convicted of a crime.

21. **Party to Civil or Administrative Proceedings:** State whether you, or any business of which you are or were an officer, have ever been a party or otherwise involved as a party in any civil or administrative proceeding, within ten years of your nomination, that is reflected in a record available to the public. If so, please describe in detail the nature of your participation in the litigation and the final disposition of the case. Include all proceedings in which you were a party in interest. Do not list any proceedings in which you were a guardian *ad litem*, stakeholder, or material witness.
1. Samuel Maurice Hicks, Jr. vs. Donna Crowson (automobile accident injuries) No. 390,600, 1st Judicial District Court, Caddo Parish, Louisiana, filed on or about June 14, 1993. The suit was filed to interrupt the statute of limitations. As settlement was reached without an answer being filed. The dismissal was filed on or about October 25, 1996.

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

With respect to current clients, I would anticipate potential conflicts of interest should any case filed in the United States District Court in Shreveport involve a former client as a party.

A list of current, long-term clients will be provided to the Clerk of Court for the Western District of Louisiana as automatic recusals for an appropriate period of time after being sworn in as a federal judge. After the lapse of that time, cases will be screened on an individual basis for potential conflicts of interest. Pending cases involving lawyers at my former firm (Hicks, Hubley & Marcotte) will also be included in this recusal list for as long as a residual financial relationship exists. In all events I will follow the guidelines of the Code of Judicial Conduct in the resolution of potential or actual conflicts of interest.

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

I have no plans, commitments or arrangements to pursue outside employment, with or without compensation, during my service with the court.

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

See attached Financial Disclosure Report

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

See attached Statement of Net Worth

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

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

There is not a "selection commission" *per se*; however, an informal committee consisting of the Louisiana Republican Congressional Delegation (Congressmen Tauzin, McCreery, Cooksey, Baker and Vitter), Ms. Pat Brister (Chair, Louisiana Republican Party), Ms. Susie Haik Terrell (Louisiana Commissioner of Elections), Governor Mike Foster and Mr. Boysie Bollinger recommended my nomination to the federal bench after considering a number of candidates. Congressman McCreery submitted my name for consideration by the committee.

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

In addition to personal interviews with each committee member (except Congressman Richard Baker), I supplied each with a comprehensive personal resume. I have also conferred with U. S. Senators John Breaux and Mary Landrieu and members of their respective staffs. I also was interviewed by Mr. Tim Flannigan (Deputy White House Counsel) and associate White House Counsel after my name was submitted for consideration as a nominee for the federal bench.

In due course I was also interviewed by the FBI and the U.S. Department of Justice. I was nominated on September 12, 2002.

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

No one involved in the process of selecting me as a judicial nominee discussed a specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how I would rule on such case, issue or question.



Chairman HATCH. Judge, we are grateful to have you here. We are grateful to have all your family members here. It means a lot to us. We appreciate having you here. Thank you.

Mr. Moschella?

**STATEMENT OF WILLIAM EMIL MOSCHELLA, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AFFAIRS, DEPARTMENT OF JUSTICE**

Mr. MOSCHELLA. Mr. Chairman, thank you for the opportunity to appear today. I would like to introduce my family as well. I am accompanied by my wife, Amy; our two children, Emily and Matthew, 6 and 2, and my father, Emil Moschella, and my mother, Ellen Moschella.

Chairman HATCH. We are so happy to have you all here.

Mr. MOSCHELLA. My brothers, Edward, Michael and Christopher, all here with me in spirit.

[The biographical information of Mr. Moschella follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)  
William Emil Moschella
2. Address: List current place of residence and office address(es.)  
Falls Church, Virginia.  
  
Committee on the Judiciary  
U.S. House of Representatives  
2138 Rayburn HOB  
Washington, D.C. 20515
3. Date and place of birth.  
April 17, 1968; Knoxville, TN.
4. Marital Status: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).  
  
Married; Spouse's Maiden name: Amy Helene Rouleau (Homemaker).
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.  
  
University of Virginia (1986 - 1990); B.A. History (Spring, 1990).  
George Mason University School of Law (1992-1995); J.D. (December 1995).
6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.  
  
4/2001 to Present: House Committee on the Judiciary, Chief Legislative Counsel & Parliamentarian\*\*  
  
10/1999 to 4/2001 House Committee on the Judiciary, Chief Investigative Counsel

- 2/1999 to 9/1999: House Committee on Rules, General Counsel
- 4/1998 to 2/1999: House Committee on the Judiciary, Counsel\*
- 5/1997 to 5/1998: House Committee on Government Reform, Counsel\*
- 9/1990 to 5/1997: Office of Congressman Frank R. Wolf, Served as Senior Legislative Assistant, Legislative Assistant, Staff Assistant, Systems Manager, and Intern.
- 6/1990 to 9/1990: Vienna Trophies and Awards, aka VTA, Inc., Office Manager.

\*\* I assisted the Select Committee on Homeland Security for several days during the 107<sup>th</sup> Congress during which time I drafted amendments for the Select Committee's consideration and assisted at the Committee's markup.

\* In April, 1998, I was a shared employee and worked for both the House Committee on Government Reform and the House Committee on the Judiciary.

When I lived in Arlington, Virginia, I was the Treasurer of the Carlisle Park Homeowners Association for several years. I do not have records of the years I was treasurer, but it was in the early to middle 1990's.

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

Not Applicable

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

As an undergraduate, I earned two varsity letters as a middle distance runner on the University of Virginia's Track and Field Team which competes in the Atlantic Coast Conference at the NCAA Division 1A level.

While in night law school, I was a member of the George Mason University Civil Rights Law Journal.

During my employment in the Office of Congressman Frank R. Wolf, I was recognized for my work by the Bureau of Alcohol, Tobacco, and Firearms; the Senior Executive Service; and the National Coalition Against Legalized Gambling.

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

Member, Virginia State Bar; Member, Federalist Society.

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

I do not believe I am a member of an organization which actively lobbies before public bodies. Other organizations to which I belong are:

St. James Parish, Falls Church, Va; and  
High Point Pool, Falls Church, Va.

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

All Virginia State Courts (Admitted June 3, 1996).

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

Coauthor, Cleanup and Reuse of the Avtex-FMC Superfund Site in Front Royal, Virginia State Bar Journal, Volume XXI, Number 4, (Fall 1995) (Copy Attached).

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

The present state of my health is excellent. I have no record of my last complete physical examination.

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

Not Applicable

15. Legal Career:

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

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

I have not served as a clerk to a judge.

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

I have not been a sole practitioner.

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

4/2001 to Present: Chief Legislative Counsel & Parliamentarian\*\*  
House Committee on the Judiciary  
2138 Rayburn HOB  
Washington, D.C. 20515

10/1999 to 4/2001 Chief Investigative Counsel  
House Committee on the Judiciary  
2138 Rayburn HOB  
Washington, D.C. 20515

2/1999 to 9/1999: General Counsel  
House Committee on Rules  
H-304 The Capitol  
Washington, D.C. 20515

- 4/1998 to 2/1999: Counsel\*  
House Committee on the Judiciary  
2138 Rayburn HOB  
Washington, D.C. 20515
- 5/1997 to 5/1998: Counsel\*  
House Committee on Government Reform  
2147 Rayburn HOB  
Washington, D.C. 20515
- 12/1995 to 5/1997: Senior Legislative Assistant  
Office of Congressman Frank R. Wolf  
241 Cannon HOB  
Washington, D.C. 20515
- 9/1990 to 12/1995: Office of Congressman Frank R. Wolf, Served as Senior  
Legislative Assistant, Legislative Assistant, Staff Assistant,  
Systems Manager, and Intern (I held these positions prior to  
graduating from law school.)

\*\* I served the Select Committee on Homeland Security for several days in which I drafted amendments for the Select Committee's consideration and assisted at the Committee's markup.

\* In April, 1998, I was a shared employee and worked for both the House Committee on Government Reform and the House Committee on the Judiciary.

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

My entire legal career has been as a legislative attorney on Capitol Hill. As the House Committee on the Judiciary's Chief Legislative Counsel and Parliamentarian, I am responsible for developing and implementing all Committee objectives, strategies, and legislative plans. I provide all parliamentary advice and assistance for all Committee and floor proceedings. I oversee, manage and direct all legislative activities of the Committee, including organizing hearings and markups and drafting legislation, amendments, Committee reports, statements, and speeches.

As the House Committee on the Judiciary's chief investigative counsel, I conducted oversight of matters falling within the jurisdiction of the Committee, including Justice Department and Judicial Branch activities. I coordinated congressional investigations with the General Accounting Office and U.S. Department of Justice Inspector General. I analyzed documents and interviewed witnesses. I drafted briefing memoranda, statements, and questions to prepare the Chairman and other members for congressional hearings.

As the General Counsel for the House Committee on Rules, I advised the Committee and House leadership on legislative floor strategy. I advised the Committee and House leadership on general legal and parliamentary matters. I drafted order of business resolutions governing legislative procedures for the floor of the U.S. House of Representatives along with supporting statements and background memoranda.

As Counsel to the House Committees on the Judiciary and Government Reform and as Senior Legislative Assistant to Congressman Frank R. Wolf, I provided general procedural and legislative advice. My responsibilities included drafting bills, resolutions, and statements and conducting research on a variety of topics.

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

My typical clients consisted of the Committees of the House (including the members of those Committees) and the Member of Congress that I have worked for as outlined in question 15(a)(3).

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

As a legislative attorney, I have not appeared in court frequently or occasionally.

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

The matters outlined in question 16 were all federal matters.

3. What percentage of your litigation was:

- (a) civil;
- (b) criminal.

The matters outlined in question 16 were civil in nature.

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

None.

5. What percentage of these trials was:

- (a) jury;
- (b) non-jury.

None.

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

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

In 1998 and during the course of my employment with the House Committee on the Judiciary, I was one of several attorneys that worked on a matter that was considered by Judge Norma Holloway Johnson of the U.S. District Court for the District of Columbia. *See In re Sealed Case*, Misc. Nos. 98-434 and 98-437 (NHJ). To the best of my knowledge, this matter is still under seal. However, the order arising out of this matter is public. The Court ordered the Department of Justice to disclose certain documents under specified conditions to the House Committee on the Judiciary.



In 1999 and during the course of my employment with the House Committee on the Judiciary, I worked on a complaint filed before the Judicial Council of the D.C. Circuit. See *In the Matter of Judicial Misconduct or Disability*, Judicial Council Complaint Nos. 99-11 and 99-01 (Judicial Council of D.C. Cir., Feb. 1, 2001). In this matter, the Chairman of the House Committee on the Judiciary's Subcommittee on Courts and Intellectual Property filed a formal complaint under 28 U.S.C. § 372 about the conduct of a certain judge.

The following individuals have worked with me on various issues throughout my career on Capitol Hill:

Phil Kiko, House Committee on the Judiciary, 202-225-3951  
 Perry Apfelbaum, House Committee on the Judiciary, 202-225-6504  
 Ted Kalo, House Committee on the Judiciary, 202-225-6504  
 Sampak Garg, House Committee on the Judiciary, 202-225-6504  
 Janet Shaffron, Office of Congressman Frank R. Wolf, 202-225-5136  
 Tom Mooney, House Committee on International Relations, 202-225-5021  
 Carl Thorsen, Office of the House Majority Leader, 202-225-4000  
 Vince Randazzo, Business Roundtable, 202-872-1260  
 Edward Pagano, Senate Committee on the Judiciary, 202-224-7703  
 Jeff Miller, Senate Subcommittee on Antitrust, Competition, and Business and Consumer Rights, 202-224-9494  
 Robert Raben, The Raben Group, 202-547-6805

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

Throughout my 12 plus years on Capitol Hill, I have had the privilege to be involved in the development and passage of numerous bills and resolutions. As the Chief Legislative Counsel and Parliamentarian for the House Committee on the Judiciary, I am largely responsible for shepherding the Committee's legislative priorities through the Congress. Most recently, during the 108<sup>th</sup> Congress, I was involved in the successful passage of S. 151, the PROTECT Act, which was passed by both the House and Senate on April 10, 2003.

During the 107<sup>th</sup> Congress, I was involved in the successful passage of a number of important bills. Of particular significance, I played key role in the development, negotiation, and passage of the USA PATRIOT Act (Pub. L. No 107-56). I also oversaw for the House of Representatives the successful passage of the 21<sup>st</sup> Century Department of Justice Appropriations Authorization Act (Pub. L. No. 107-273), including drafting the legislation in the House and amendments thereto and serving as chief House negotiator in the conference with the Senate. I also assisted the Select Committee on Homeland Security with the passage of the Homeland Security Act of 2002, Pub. L. 107-296.

I was also involved with numerous bills that did not become law including legislation relating to bankruptcy reform, broadband deployment, and unsolicited commercial email.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

I am vested in the Federal Employee Retirement System's Thrift Savings Plan, which, as of March 31, 2003, totaled \$100,711.95.

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

In the event of a potential conflict of interest, I will consult with the Department of Justice's ethics official.

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

No.

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

*See Financial Disclosure Report (Attached).*

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

*See Net Worth Statement (Attached).*

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

In approximately fall of 1991 through the summer of 1992, I was a Member of the Fairfax County Republican Committee. I have not retained any records indicating the exact dates I served on the Committee.

I have never held a position with, but have volunteered (ex. literature drops) for, the following political campaigns:

- Tom Davis for Chairman of the Fairfax County Board of Supervisors, Volunteer, (1991).
- Jim Lamb for Virginia House of Delegates, Volunteer, (1991).
- Dick Fisher for Virginia House of Delegates, Volunteer, (1991).
- Jane Woods for Virginia State Senate, Volunteer, (1991).
- Friends of Frank R. Wolf, Volunteer, (1990, 1992, 1994, 1996).
- McSlarrow for Congress (1994)
- Tom Davis for Congress, Volunteer (1996).
- George Gekas for Congress, Volunteer (2002).
- RNC 72 Hour Task Force Deployment Program, Volunteer (Deployed to Minnesota Senate Race) (2002).

This list represents the best of my recollection. It is possible that I volunteered for, or assisted, other campaigns. It is also possible that while volunteering for one of the above campaigns, I assisted another campaign. For example, while volunteering for Congressman Frank Wolf's campaigns, I distinctly recall handing out literature for Senator John Warner and Sheriff Carl Peed. I was not specifically volunteering for those campaigns, but distributed their literature at joint campaign events.

In addition to the above listed political campaigns, I volunteered on the Bush-Cheney DOJ Transition Team (Dec. 2000-Jan. 2001).

## III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

Almost since the day I graduated from the University of Virginia, I have contributed to the community through my dedication to public service. Whether as an intern in 1990 to my current position with the Committee on the Judiciary, I have demonstrated a strong commitment to government service. My wife and I contribute financially to a number of charitable organizations (including Catholic Charities, various Catholic missions, various educational institutions, and other charities) that assist the disadvantaged in numerous ways. Furthermore, recently I have assisted with the High Point Pool Swim Team and certain events sponsored by the St. James Parent-Teacher Organization.

Given that my experience as an attorney has been confined to serving the legislative branch of the Federal government and have never represented a private person or entity in any fora, I have not undertaken the private representation of a client as called for under Canon 2 of the American Bar Association's Code of Professional Responsibility.

2. Do you currently belong, or have you belonged, to any organization which discriminates on the basis of race, sex, or religion - through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies.

I have never belonged to such an organization.

Chairman HATCH. Well, you have to be very proud of your son and your husband. We are proud of him, as well, and this is a very, very important position. I have heard so many good things about you that I think stands you in good stead with regard to this position.

Let me just take a few questions because I have high respect for all of you. I know you and I don't think we need to take too long, but let me start with you, Mr. Campbell.

Under what circumstances do you believe it appropriate for a Federal court to declare a statute enacted by Congress unconstitutional?

Mr. CAMPBELL. Your Honor—or pardon me, Mr. Chairman, any statute comes to a court with a presumption of constitutionality, and I believe a Federal judge should accord it that kind of respect. Certainly, at the district court level, any judge approaching a question of constitutionality would be obligated to apply the Constitution as it is written and the precedent of the Supreme Court, or in my case the Ninth Circuit. But it should happen rarely and reluctantly, in my opinion.

Chairman HATCH. Mr. Hicks, do you disagree with that?

Mr. HICKS. I don't disagree with that. I have been involved in only one constitutional issue in my years of practice and I can tell you that with respect to that particular issue presented early on in my career, good lawyers with good briefs, good arguments and good information and evidence presented to the judge assist the judge in making those kinds of decisions.

I would agree that there is a measure of restraint and a presumption of constitutionality that apply in considering that. However, it is the exercise of the ultimate power of a sitting Federal judge to uphold or overturn a particular act of Congress, and it should be done so only after extensive briefing and clear and convincing evidence of its unconstitutionality.

Chairman HATCH. Well, thank you.

Mr. Moschella, Lee Rawls, former Assistant Attorney General for Legislative Affairs under the first President Bush, and who we are now fortunate enough to have in the Senate on the staff of our Majority Leader, stated that he had two clear missions: to make sure that Congress and the staff get prompt and relevant information, and to make sure that the Department of Justice speaks with a unified and single voice.

Do you agree with Mr. Rawls' formulation of the role of the Office of Legislative Affairs, and what do you envision as the mission of that office?

Mr. MOSCHELLA. Well, Mr. Chairman, I absolutely agree with Mr. Rawls, and you are fortunate to have him back in the Senate. I was sitting and continue to sit where your staff sits today, and getting information for Members of Congress is absolutely critical. You need it in your oversight function, you need it in your legislative function. You can't make intelligent decisions without information, and so I will make it, if confirmed, a top priority.

And with regard to the other issue that Mr. Rawls testified to, I reviewed that testimony and I wholeheartedly agree with it.

Chairman HATCH. Thank you.

Now, let's go to you, Mr. Hicks. In general, Supreme Court precedents are binding on all lower Federal courts, as you know, and circuit court precedents are binding on the district courts as well certainly within that particular circuit.

Now, are you committed to following the precedents of the higher courts faithfully and giving them full force and effect even if you have personal disagreements with them?

Mr. HICKS. Yes, Mr. Chairman. One of the things in jury trials that a judge instructs, whether it is a 6-person or a 12-person jury, is to put aside personal feelings with respect to a particular law in order to decide the facts of the case.

In bench trials, we follow what the precedents and what the law as given to us are, and that is part of the role of the judge in doing precisely that. Personal opinion versus the rule of law—personal opinion doesn't enter into it. The rule of law in this country is paramount and I would have a sworn duty to uphold that.

Chairman HATCH. Thank you.

Mr. Campbell, what would you do if you believed the Supreme Court had erred, or the Court of Appeals had seriously erred in rendering a decision? Would you nevertheless apply the decision or your own best judgment on the merits?

Mr. CAMPBELL. I would apply the decision, Mr. Chairman.

Chairman HATCH. Regardless of whether you completely disagreed with that decision?

Mr. CAMPBELL. That is correct.

Chairman HATCH. Do you feel the same way, Mr. Hicks?

Mr. HICKS. I do indeed, Mr. Chairman.

Chairman HATCH. Now, if there were no controlling precedent dispositively concluding an issue with which you were presented in your circuit, what sources would you apply for persuasive authority, Mr. Hicks?

Mr. HICKS. As I understand the task of an Article III sitting Federal judge, I am given two law clerks, a courtroom deputy and a secretary, and my clerks will work very hard at my behest in researching everything that needs to be dug out. I can tell you that even after 25 years of practice, I enjoy doing personal research on particular issues.

In cases of first impression or certain *res nova* issues, it is incumbent on me, as well as my staff, to do detailed research, to require good arguments and thorough briefing by the parties involved, in order for me, sitting as a judge, to make the best judgment call I can make in responding to that new issue or a case of first impression.

Chairman HATCH. Thank you.

Do you have any disagreement with that, Mr. Campbell?

Mr. CAMPBELL. I do not, Mr. Chairman.

Chairman HATCH. Well, you two have come to us very highly recommended. I have no doubt that you will both make terrific judges, and I want to commend you both for the privilege that you are going to have of serving on our Federal bench.

I don't think anything as seriously as the—I take everything seriously, but I don't take anything more seriously than I do the confirmation of judges because, to me, Congress writes unconstitu-

tional legislation all the time. I mean, I have seen it year after year after year. They don't seem to give a darn.

Certainly, I have written some stuff that I thought was constitutional that was found not to be in some respects—the Religious Freedom Restoration Act, the Americans with Disabilities Act, the Violence Against Women Act. Some of those aspects were ruled unconstitutional. I didn't particularly agree with the Court.

But Congress is not the body that has saved this country year after year, nor has the Executive because executives sometimes act extra-judicially and extra-constitutionally. It has been the courts that have really preserved the Constitution and kept us strong. So these positions are extremely important, and that is why, I guess, they are so hotly contested sometimes.

It is important to have various points of view on maybe the hot contests that do occur. On the other hand, I think we ought to be fair. I have seen some gross unfairness with regard to Federal judicial nominations over the last number of years and I am really getting pretty tired of it. But I am proud of both of you. I intend to put you through as quickly as we can, and I can't imagine why anybody would want to vote against you.

In particular, Mr. Campbell, you are a credit to your law school, the University of Utah. I think it is terrific that we are now going to have another University of Utah person on the Federal bench. We have a considerable number of them and some of the best in the country today are University of Utah graduates. We are looking forward to seeing Michael McConnell do a terrific job as one of the leading constitutional experts who was a professor at the University of Utah for years.

Mr. Moschella, let me ask you one more question. You have served for a total of 6 years as counsel to several House committees, including the House Committees on Government Reform and Rules, as well as counsel and chief counsel to the House Committee on the Judiciary.

How has that experience prepared you for leading the Office of Legislative Affairs?

Mr. MOSCHELLA. Well, Mr. Chairman, I hope the 6 years have taught me the importance of Congress' role, and hopefully I can bring that to the Department of Justice. I was and am a zealous advocate for my current client, and will be if confirmed for the Department of Justice.

It seems to me that part of my job in being that advocate will be to explain and convince the folks at the Department about the importance and the role that Congress plays and the need to be responsive and to work with you on the policies that are important to the American people.

Chairman HATCH. Well, thank you. Now, I notice you come from the House side. I hope you realize how important the Senate is as well. I have the feeling you do.

We are grateful to have all of you here today, and we are grateful that you are willing to serve and you are willing to sacrifice, in the case certainly Mr. Campbell and Mr. Hicks, very successful law practices to go on the Federal bench, where you will earn less money than many of the recent law review graduates earn.



If it was remuneration, very few people would want to serve in the Federal courts who are good lawyers. But the reason I am sure both of you want to serve is because it is a terrific opportunity to serve your country and your fellow citizens.

So we are grateful to you for being willing to do that, to make this sacrifice, and I look forward to getting you both through as quickly as possible. And, Mr. Moschella, I look forward to getting you through as well. We are very proud of you and we know your reputation and we know how good it is and we think the Justice Department is going to be well served by you.

So with that, we will recess until further notice.

[Whereupon, at 12:43 p.m., the Committee was adjourned.]

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

## QUESTIONS AND ANSWERS

**Responses to Questions for William Emil Moschella  
Senator Richard J. Durbin  
May 2, 2003**

1. Mr. Moschella, I have reviewed the materials you provided the Committee, and I am impressed with your background and qualifications. However, I have some serious concerns about the Justice Department's non-responsiveness to Congressional inquiries. If confirmed, this problem will fall under your purview. I am still awaiting answers to dozens of questions that I have submitted to Attorney General Ashcroft over the last year, and I know that other members of this Committee have experienced similar problems.

I understand that Attorney General Ashcroft and his staff are very busy, and I accept that they might not always be able to respond to the Committee's questions immediately. But I am still awaiting responses to questions that I submitted, following a hearing on July 25, 2002, concerning post-September 11 detainees and the NICS audit log. I'm also awaiting responses to questions, submitted on January 30, 2003, regarding the National Security Entry-Exit Registration System (NSEERS). These questions deal with counterterrorism, national security, and civil liberties, not trivial issues. This delay is unacceptable and demeans the importance of the Committee's oversight role. Congressional oversight of the Justice Department is vitally important. It is our responsibility to monitor closely DOJ's activities and hold the DOJ accountable to the American people.

If you are confirmed as Assistant Attorney General for Legislative Affairs, one of your primary responsibilities will be to facilitate Congressional oversight. How will you improve on OLA's poor track record of responding to Congressional inquiries?

Answer:

Congressional oversight is an important responsibility, and I appreciate the importance of Senate Judiciary Committee oversight. I served as the House Judiciary Committee's Chief Investigative Counsel for then Chairman Hyde and have participated in a number of oversight projects under Chairman Sensenbrenner. Congressional oversight is an important component of our federal system and the legislative process.

I do not have, at this time, a specific plan to improve on OLA's record of responding to inquiries such as those outlined in your question. I will, if confirmed, review the current system and make improvements if necessary. I also welcome any comments that you and others may have to improve the system.

2. According to a recent article in the *New York Times*, the Office of Legislative Affairs sent a memo to DOJ staff directing them to clear with OLA all "significant, substantive" contacts with Congressional staff and members. I understand that OLA's position is that the memo simply memorializes previously existing policy. Nonetheless, I am concerned

that it may have a chilling effect on interactions between DOJ and Congressional staff. This is particularly important because of DOJ's non-responsiveness to Committee inquiries. When the Attorney General does not timely respond to questions from Committee members, oftentimes our only source of information is DOJ staff. I am concerned about this memo. You worked for the House Judiciary Committee so I'm sure that you understand Justice Department oversight and the importance of honest, unencumbered interactions between DOJ staff and Congress.

- A. If confirmed, what would your policy be on interactions between DOJ staff and Congress?

Answer:

As a long-time legislative attorney with more than 12 years of experience on Capitol Hill, I believe it is important that legislators have access to information in order to inform their decisions about critical public policy issues. Legislators need information to fulfill both their legislative and oversight responsibilities. One important role of the Office of Legislative Affairs is to coordinate the development of information in response to congressional requests. As I stated at my confirmation hearing, I agreed with the testimony of prior nominees for this position before the Senate Judiciary Committee, that the Department must speak with one unified voice to Congress.

- B. Does the recent memo, in fact, represent a departure from previous policy?

Answer:

I am familiar with the memorandum to which you refer only through press reports and have not reviewed it. Therefore, I do not have an opinion with regard to whether this memorandum represents a departure from previous policy. I am familiar, as I indicated in my response to question 2(A), that the longstanding policy of the Department is to communicate with Congress with one unified voice.

**Responses to Questions for Will Moschella, Nominee to be Assistant Attorney General  
Submitted by Senator Leahy**

1. For several months, I have been requesting information from the Department about the new anti-terrorism legislation that it has been crafting. In January and early February, my office called the Office of Legislative Affairs (OLA) several times on this subject, only to be told that there was no new legislation in the works. Then, on February 7, 2003, a draft of the bill dated January 9, 2003, was leaked to the press and posted on a Web site.

Frankly, I expect more from the Department of Justice. I hope that your experience working for Chairman Sensenbrenner will make you sensitive to our need for accurate information about what the Department is up to. When a member of my staff calls OLA with a question, I expect her to get a straight answer.

Now, since the Department's secret anti-terrorism bill leaked on February 7, I have pressed the Attorney General repeatedly for more information about the bill. While I have yet to get any answers, Department representatives have told the press that the bill is "coming soon," and that it "will be filling in the holes" of the USA PATRIOT Act. Does the Department plan to consult with Members of this Committee – Democrats as well as Republicans – before presenting any new anti-terrorism proposals to Congress?

Answer:

As a long-time legislative attorney with more than 12 years of experience on Capitol Hill, I appreciate the importance to legislators of receiving timely information in order to inform their decisions about critical public policy issues. Legislative decisions should not be made in a vacuum. While I do not have particular information about the draft legislation to which you refer, I understand the valuable role that consultation with Congress frequently plays in the legislative process. During my time on Capitol Hill, I have observed administrations consult with the Congress at various stages of the development of legislative proposals. If confirmed, I will try to facilitate that consultation process, which I believe is generally beneficial to both branches.

2. Over the past few years, the Department has not only become more secretive than ever, it has also become far less prompt in producing what little information it is willing to produce. I have dozens of outstanding requests to various Department components to which the Department has not yet responded, dating back as far as July 2001. As you must know from your work with Chairman Sensenbrenner, it is difficult if not impossible for this Committee to conduct effective oversight of the Department if it takes more than a year to get its questions answered. As the head of OLA, what will you do to expedite and facilitate the flow of information between the Department and Congress?

Answer:

Congressional oversight is an important responsibility, and I appreciate the importance of

Senate Committee on the Judiciary oversight. I served as the House Judiciary Committee's Chief Investigative Counsel for Chairman Hyde and have participated in a number of oversight projects under Chairman Sensenbrenner. Congressional oversight is an important component of our federal system and the legislative process.

I do not have, at this time, a specific plan to "expedite and facilitate the flow of information between the Department and Congress." I will, if confirmed, review the current system and make improvements if necessary. I also welcome any comments that you and others may have to improve the system.

3. On March 27, 2003, in response to a request by the Attorney General at the annual senior leadership retreat, the Office of Legislative Affairs issued new Guidelines for the 108<sup>th</sup> Congress. Among other things, these Guidelines state that OLA is meant to serve as a "buffer" between DOJ components and Congress, and that it would "assist in determining the appropriateness of proceeding with potential briefings" on Capitol Hill. Do these new Guidelines reflect a shift in Department policy, and if not, why were they issued?

Answer:

I regard the provision of information to Congress for both legislative and oversight matters to be an important responsibility of the Office of Legislative Affairs. I do not have any specific knowledge of the guidelines to which you refer and do not know whether they reflect a shift in Department policy or why they were issued.

As I stated at my confirmation hearing, I agreed with the statement made by Lee Rawls who testified that the Office of Legislative Affairs has two clear missions. "One is to make sure that Congress and the staff get prompt and reliable information . . . and that our second charge is to make sure that the various client bodies throughout the Department of Justice – that includes the FBI, Immigration, and DEA – that those client bodies speak to you with a united and one voice so you can rely on what any one part says to you." *Confirmation Hearings on Federal Appointments, Hearings Before the Senate Comm. on the Judiciary*, 101<sup>st</sup> Cong., 2<sup>nd</sup> Sess., S. Hrg. 101-651, Pr. 8, 87 (1990) (testimony of Mr. Lee Rawls).

It would be my intention, if confirmed, to ensure that the Office of Legislative Affairs facilitates and coordinates appropriate communication between the Department and Congress so that accurate and reliable information is provided in a timely manner.

## SUBMISSIONS FOR THE RECORD

**Judiciary Committee**  
**Statement of Senator George Allen**  
**Introduction of William Moschella**  
**Nominee: Assistant Attorney General for Legislative Affairs**  
**April 30, 2003**

Chairman Hatch and Members of the Committee, I appreciate the opportunity to introduce to you a fellow Virginian, Mr. William E. Moschella from Falls Church. Mr. Moschella has been nominated by President Bush to fill a key position in the U.S. Department of Justice - the position of Assistant Attorney General for Legislative Affairs. Members of this Committee know particularly well how important this position is, and I believe Mr. Moschella is an outstanding nominee.

Mr. Moschella has spent over twelve years serving in various positions on Capitol Hill. He has been an intern, the General Counsel of the House Committee on Rules, and the Chief Legislative Counsel and Parliamentarian for the House Committee on the Judiciary just to name a few. His most recent experience on the House Judiciary Committee has prepared him well to assume the responsibilities and duties as the Department of Justice's ambassador to the Congress. He has an in depth knowledge of the legislative process which he has successfully used to help pass many landmark bills. Members of this Committee know Mr. Moschella for his work on the 21<sup>st</sup> Century Department of Justice Appropriations Authorization Act, and most recently the PROTECT Act, which the President is scheduled to sign today. Because Mr. Moschella's talents are well known in the House, former Majority Leader Dick Armey asked Will to assist the House Select Committee on Homeland Security to which he provided legal, policy, and procedural advice regarding the Homeland Security Act of 2002.

Mr. Moschella is well known for his competence and professionalism and has earned the respect of Members and staff from both sides of the aisle. Mr. Moschella attended two great Virginia universities. He attended the University of Virginia as an undergraduate and attended law school at night at George Mason University School of Law while working for Congressman Frank R. Wolf.

Mr. Chairman, I commend the President for nominating Mr. Moschella to the position of Assistant Attorney General, and I respectfully urge the Committee's swift approval of his nomination.



**New York University**  
*A private university in the public service*

School of Law  
 Office of the Vice Dean  
 40 Washington Square South, Room 402  
 New York, NY 10012-1099  
 Telephone: (212) 998-6200  
 Fax: (212) 995-4658  
 E-Mail: [stephen.gillers@nyu.edu](mailto:stephen.gillers@nyu.edu)  
 Stephen Gillers, *Vice Dean and Professor of Law*

VIA FACSIMILE AND MAIL

February 26, 2003

Honorable Charles E. Schumer  
 United States Senate  
 313 Hart Senate Office Building  
 Washington, DC 20510

Dear Senator Schumer:

This letter replies to an inquiry from your office on a matter of judicial ethics. I have taught legal and judicial ethics at New York University School of Law for 25 years and do nearly all my research and writing in the field. I feel entirely qualified to respond to the inquiry.

I am asked whether it would be appropriate for a nominee for a seat on a lower federal court to respond to the following request in connection with his or her confirmation hearings:

Please identify three Supreme Court cases that have not been reversed and which you have not previously criticized publicly where you are critical either of the Court's holding or reasoning and please discuss the reasons for your criticism.

I conclude that it would be appropriate for a nominee to answer the question posed. Our judicial conduct rules – both those promulgated by the ABA and those issued by the Judicial Conference of the United States – explicitly encourage judges to participate in the effort to improve the law, including “decisional law,” in their extrajudicial activities. Expressing an extrajudicial opinion on a decided legal issue – as opposed to expressing an extrajudicial opinion on a pending or impending case – does not signal any lack of impartiality that will disqualify a judge from participating in a later case that contains that issue.

Discussion

I assume that the nominee is not a sitting judge. Nonetheless, judicial candidates should avoid public statements that a judge would be forbidden to make. The ABA Code of Judicial Conduct purports to govern the behavior of candidates for judicial office (whether appointed or elected) as well as judges. ABA Model Rule 8.2(b), widely adopted, likewise provides: “A

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February 26, 2003

lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.”

We should also recognize that the judicial conduct code governing federal judges is not the ABA Model Code of Judicial Conduct, but the Code of Conduct for United States Judges, promulgated by the Committee on Codes of Conduct of the Judicial Conference of the United States. The Code of Conduct for U.S. Judges derives from the ABA Model Code but differs in certain regards. Nonetheless, a nominee for a federal judicial post should comply with restrictions on speech that the ABA Code validly imposes on candidates for judicial office.

No one doubts that every lower federal and state court judge will disagree with some number of Supreme Court decisions. No one doubts, too, that despite disagreement, lower court judges are fully able to implement decisions with which they disagree. Our system of justice depends on it. Sometimes, indeed, we know for a fact that lower federal or state court judges disagree with a Supreme Court decision, yet we give those judges the responsibility of implementing the decision. This happens, for example, whenever the Supreme Court reverses a circuit or state court and remands the case for further consideration. The case will almost always return to the very same circuit judges (and always to the same state court) whose decision the Supreme Court reversed. Obviously, those judges (or those in the majority) disagree with the Supreme Court’s opinion – they were reversed – but we trust them to comply with the Supreme Court’s mandate. We do not require remand to different judges.

We are fortunate to have the views of the Supreme Court itself on the legal appropriateness of answering the question you pose. Just last term, *Republican Party of Minnesota v. White*, 122 S.Ct. 2528 (2002), considered the constitutionality of a Minnesota rule restricting judicial campaign speech. A candidate for election to the Minnesota Supreme Court had challenged the state’s restriction on his ability to publicly criticize certain decisions of the *very court* for which he was a candidate. When the case reached the Supreme Court, the lower federal courts and the Minnesota Supreme Court had construed the state’s restriction quite narrowly. As construed, the Minnesota rule only prohibited campaign statements on “disputed issues that are likely to come before the candidate if he is elected judge.” Even on those issues, the lower courts said, the candidate could offer “general discussions of case law and judicial philosophy.” *Id.* at 2533. Despite the narrow holding, Justice Scalia’s opinion for the Court said that the Minnesota rule violated the First Amendment. Because the Minnesota rule, as construed, was substantially less restrictive of speech than current language in the ABA Model Code, the Court’s decision renders that language unconstitutional as well. The ABA is now working on new language to satisfy the Court’s opinion.

The candidate in *Republican Party* was seeking election to the very court whose opinions he wanted to criticize. He would if elected be in a position to limit or overrule those precedents. This is not so for the lower court nominees before you, who will be bound by Supreme Court opinions whether or not they agree with them. In other words, a federal court nominee’s



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February 26, 2003

criticism of a Supreme Court opinion cannot be interpreted as a veiled promise to change the law. He or she will have no power to do so. As a result, the danger to the nominee's appearance of impartiality is even less than in *Republican Party*.

Justice Scalia discussed the interest in impartiality from multiple perspectives, two of which are relevant here.

Justice Scalia said that impartiality may mean "lack of preconception in favor of or against a particular *legal view*." *Id.* at 2536 (emphasis in original). The Court held that this state interest was not sufficient to overcome First Amendment objections. Justice Scalia recognized that judges have legal views on issues all the time and still may sit in cases raising those issues. Quoting Chief Justice Rehnquist's memorandum opinion declining to recuse himself in *Laird v. Tatum* (1972) despite congressional testimony that Mr. Rehnquist had given as an Assistant Attorney General, Justice Scalia wrote:

A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. As then-Justice Rehnquist observed of our own court: "Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers." Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. *Id.* (Internal citation omitted.)

Justice Rehnquist also wrote in *Laird* that a lack of preconceived views on legal issues "would be evidence of lack of qualification, not lack of bias." *Id.*

Next, Justice Scalia said that the state's interest in impartiality "might be described as [an interest] in open-mindedness. This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case." In response, Justice Scalia pointed out that judges will often have expressed an opinion on a legal issue, yet we nevertheless deem them able to sit in a case raising that issue. Justice Scalia wrote:

Most frequently, of course, that prior expression [of a legal position] will have occurred in ruling on an earlier case. But judges often state their views

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on disputed legal issues outside the context of adjudication – in classes that they conduct, and in books and speeches. *Id.* at 2537.

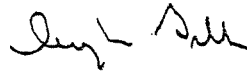
Here Justice Scalia cited Canon 4(B) of the ABA Code of Judicial Conduct, which provides: "A judge may write, lecture, teach, speak and participate in other extra-judicial activities concerning the law." (The Code of Conduct for U.S. Judges has a parallel provision in Canon 4(A).) The definition of "law" about which judges may speak and write explicitly includes "decisional law." ABA Code, Terminology. Although the authority to engage in "extra-judicial activities concerning the law [is] subject to the requirements of this Code," that clause "is used notably in connection with the judge's governmental, civic or charitable activities." Canon 4(B), Commentary.

It does not matter to this analysis that the candidate in *Republican Party* was running for elective office while nominees before you seek confirmation in the United States Senate. *Republican Party* tells us that impartiality is not compromised when a judge or candidate criticizes decisional law. Its holding does not depend on whether the candidate is seeking election or confirmation. Consequently, it would be appropriate for the nominee to reply. If anything, *Republican Party* presented a more compelling case for restricting speech because the candidate there, if elected, would be in a position to change the law with which he disagreed.

Of course, a candidate for judicial office should not signal how he or she would decide particular cases. But speaking generally, even critically, about decisional law is quite different from addressing how the nominee would decide particular cases. *Republican Party*, *id.* at 2535-36 (distinguishing between speech that reveals partiality toward "parties" and speech that reveals a position on "issues"). Obviously, this requires some line-drawing and sensitivity on the part of both the Judiciary Committee and the nominee. But the distinction is clear. See generally, Stephen Gillers, "If Elected, I Promise [\_\_\_\_\_]" – *What Should Judicial Candidates Be Allowed to Say?*, 35 *Ind. L. Rev.* 726 (2002). Furthermore, the risk of nominees signaling how they would decide particular cases is illusory in this situation because they will be bound to apply Supreme Court decisions with which they disagree.

I hope I have responded adequately to the question posed by your office. Please feel free to call me if I can be of further assistance.

Sincerely yours,



Stephen Gillers



News Release  
**JUDICIARY COMMITTEE**

*United States Senate • Senator Orrin Hatch, Chairman*

April 30, 2003

Contact: Margarita Tapia, 202/224-5225

**Statement of Chairman Orrin G. Hatch  
Before the United States Senate Committee on the Judiciary  
Hearing on the nomination of**

**John G. Roberts, Jr., for the  
U.S. Court of Appeals for the D.C. Circuit**

I am pleased today to welcome to the Committee four outstanding nominees. We will consider three judicial nominees: John Roberts for the District of Columbia Circuit, David Campbell for the District of Arizona, and Maury Hicks for the Western District of Louisiana. We will also hear from Will Moschella, who has been nominated to be Assistant Attorney General for the Office of Legislative Affairs at the Department of Justice Office.

Let me say a few words about our first nominee, John Roberts, who has quite a history as a judicial nominee. He was originally nominated for a seat on the D.C. Circuit more than 11 years ago by the first President Bush, but was never given a hearing and was never confirmed. He was renominated by the current President Bush on May 9, 2001, but he did not receive a hearing in the 107<sup>th</sup> Congress. He was then renominated for the third time this past January. All told he has been nominated by two different presidents on 3 separate occasions for the federal appellate bench.

The Committee finally held a hearing on Mr. Roberts's nomination on January 29, 2003. During that marathon hearing, which started at 9:30 a.m. and did not end until after 9:00 p.m., he answered every question that he was asked in a precise and informative manner. He also answered myriad written questions submitted to him after the hearing – more than 70, to be precise. The Committee favorably reported his nomination for consideration by the full Senate with bipartisan support: All ten Republican Members of the Committee voted for Mr. Roberts, along with four Democratic Members. However, pursuant to an agreement between the Republican and Democratic Senate leadership, I have asked Mr. Roberts to return for this hearing with the clear understanding that his nomination will move to the Senate floor for an up or down vote without undue delay. This means that, pursuant to our agreement, the Committee will vote on Mr. Roberts's nomination a week from tomorrow, which is Thursday, May 8. Any written questions should accordingly be submitted to Mr. Roberts and the other nominees no later than 5:00 p.m. on Friday, May 2.

Mr. Roberts is widely considered to be one of the premier appellate litigators of his generation. His legal accomplishments are superb and include a remarkable 39 arguments before the United States Supreme Court. His record leaves no doubt that he is mainstream and fair.

During the course of his career, he has argued both sides of the same issue in different cases, demonstrating that he is indeed a lawyer's lawyer. He has also represented parties from all sides of the political spectrum. His clients have included large and small corporations, trade organizations, non-profit organizations, states, and individuals. It is an honor to have such a remarkable legal mind before this Committee.

I would like to make just a few comments about Mr. Roberts's legal background. Upon graduating *magna cum laude* from Harvard Law School, he served as a law clerk for Second Circuit Judge Henry Friendly, and then for Supreme Court Justice William Rehnquist. His public service career included tenure as special assistant to Attorney General William French Smith, Associate White House Counsel, and Principal Deputy Solicitor General. Since 1993, he has been a partner with the prestigious D.C. law firm of Hogan & Hartson, where his practice has focused on federal appellate litigation.

There is no question that Mr. Roberts has the experience and intelligence to be an outstanding federal appellate judge. And if the support for his nomination from his peers is any indication, he also has the requisite judicial temperament and unbiased fairness that are the hallmarks of truly great judges. One letter the Committee received is from *156 members* of the D.C. Bar, all of whom urge Mr. Roberts's swift confirmation. The letter is signed by such legal luminaries as Lloyd Cutler, who was White House Counsel to both President Carter and President Clinton; Boyden Gray, who was White House Counsel to the first President Bush; and Seth Waxman, who was President Clinton's Solicitor General. The letter states:

"Although, as individuals, we reflect a wide spectrum of political party affiliation and ideology, we are united in our belief that John Roberts will be an outstanding federal court of appeals judge and should be confirmed by the United States Senate. He is one of the very best and most highly respected appellate lawyers in the nation, with a deserved reputation as a brilliant writer and oral advocate. He is also a wonderful professional colleague both because of his enormous skills and because of his unquestioned integrity and fair-mindedness. In short, John Roberts represents the best of the bar and, we have no doubt, would be a superb federal court of appeals judge."

Another letter is from 13 of Mr. Roberts's former colleagues at the Solicitor General's Office. This letter states, "Although we are of diverse political parties and persuasions, each of us is firmly convinced that Mr. Roberts would be a truly superb addition to the federal court of appeals. . . . Mr. Roberts was attentive and respectful of all views, and he represented the United States zealously but fairly. He had the deepest respect for legal principles and legal precedent – instincts that will serve him well as a court of appeals judge."

Others echo these sentiments. Clinton Solicitor General Seth Waxman called Mr. Roberts an "exceptionally well-qualified appellate advocate[.]" Another Clinton Solicitor General, Walter Dellinger, said, "In my view . . . there is no better appellate advocate than John Roberts." And Yale Law Professor provided this personal glimpse: ". . . I asked Mr. Roberts whether he would be comfortable taking me – a Democratic young lawyer – under his wing. His response: 'Not only would I be comfortable with it, I want you here because I want to learn what others who may at times see the world differently than I think.'"

In my view, this is precisely the type of person we want to see confirmed as a federal appellate judge -- one who will be respectful of all sides of an argument and who will follow the law, not some personal agenda, in deciding which party should prevail. I have every confidence that John Roberts will make a sterling addition to the D.C. Circuit, and I look forward to hearing from him today.

I will reserve my remarks about the other nominees we are considering until their panels are called forward.

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**Statement of Senator Orrin G. Hatch, Chairman**

**Before the Committee on the Judiciary  
United States Senate**

**on the Nominations of**

**David G. Campbell for the U.S. District Court  
for the District of Arizona  
and**

**S. Maurice Hicks, Jr., for the U.S. District Court  
for the Western District of Louisiana**

**April 30, 2003**

I would now like to welcome to the Committee the two district nominees we will consider today. I think we can all agree that they have exhibited great patience here today, an attribute that will serve them well as federal trial judges. Both of these nominees have been introduced and lavished with praise by their home state senators and, in the case of Mr. Hicks, two congressmen as well, so I will keep my remarks brief.

**David Campbell**, our nominee to the U.S. District Court for the District of Arizona, has a wealth of legal experience that will serve him well on the federal bench. I must say that he demonstrated excellent judgment early on by choosing to attend law school at the University of Utah. Upon graduation, Mr. Campbell clerked for Ninth Circuit Judge Clifford Wallace, and for then Associate Justice William Rehnquist on the United States Supreme Court. He joined the law firm of Meyer, Hendricks, Victor, Osborn & Maledon in 1982 and became a partner there in 1986. Since 1995, Mr. Campbell has been a partner at Osborn Maledon where he practices in the area of general civil litigation. In addition to his distinguished legal career, Mr. Campbell has been a great asset to his community and has donated many hours of pro bono service and volunteer time to help individuals and families in need in his community.

**Maurice Hicks**, our nominee for the Western District of Louisiana, has also had a distinguished legal career. Upon graduation from Louisiana State University Law School, Mr. Hicks worked for the Louisiana

Legislative Council. He then embarked on a 25-year career in private practice. A founding partner of his law firm, Mr. Hicks has developed an expertise in commercial and insurance-related litigation, torts, and intellectual property claims. Despite the demands of his practice, he has also devoted time in his legal career for pro bono work, including preparing wills for the elderly and working with adjudicated juveniles. Mr. Hicks's extensive experience and familiarity with the courtroom will serve him well on the federal bench.

I welcome both of these fine nominees to the Committee, and I look forward to hearing from them.

**Statement of Senator Orrin G. Hatch  
Before the Senate Judiciary Committee  
Hearing on the Nomination of William Moschella for  
Assistant Attorney General for Legislative Affairs  
April 30, 2003**

I would like to start our final panel of the day by welcoming Mr. Moschella before the Committee and congratulating him for being nominated by President Bush. It is a true pleasure to have Mr. Moschella before the Committee. His impressive background and past government service make me confident that he will be a great asset to the Department of Justice, the Committee and the American people.

The Assistant Attorney General for Legislative Affairs serves as the legislative liaison between Congress and the Department of Justice. Some of the staff, and indeed many Members, might argue that this position is the most important position at the Department.

The Office of Legislative Affairs must represent the interests and opinions of the Department before Congress. This is no small task, given the number of important issues facing our country today. The Office also internally coordinates testimony given before the Senate and the House of Representatives. Furthermore, the Office reviews legislation proposed by other departments with the Office of Management and Budget and other executive branch agencies.



Mr. Moschella is well prepared for heading this important office. He has served in a number of government positions and is very familiar with the inner workings of Congress. From 1990 to 1997, Mr. Moschella held a variety of positions for Congressman Frank Wolf while he attended law school at George Mason University. From 1997 to the present, Mr. Moschella served on the House Committee on Government Reform, the House Committee on Rules, and, most recently, the House Committee on the Judiciary. While at the House Judiciary Committee, he has served in a variety of roles, including Chief Investigative Counsel and Chief Legislative Counsel under the leadership of current Chairman James Sensenbrenner. Mr. Moschella earned a reputation for being a fair-minded and diligent Chief Counsel, who developed a detailed and thorough understanding of the inner workings of the Department of Justice.

I understand that Chairman Sensenbrenner wanted to testify today but was unable to do so because of a prior commitment. He has sent a letter to the Committee in support of Mr. Moschella's nomination. I also note that the Committee has received letters of support from Congressman Conyers, the Ranking Member of the House Judiciary Committee, and from Virginia Senator George Allen. I will submit all of these letters for the record.

Mr. Moschella's experience in Congress, along with his significant experience in working with the Justice Department on a variety of issues, make him well qualified to serve as the

Assistant Attorney General for Legislative Affairs, and our liaison with the Department.

Let me close by again expressing my pleasure in having such a well qualified nominee before us today. I am hopeful that this Committee and the Senate as a whole will move quickly to confirm him.

## SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

LESTER S. HYMAN  
SENIOR OF COUNSEL  
DIRECT DIAL (202) 424-7509  
LSHYMAN@SWIDLAW.COM

THE WASHINGTON HARBOUR  
3000 K STREET, NW, SUITE 300  
WASHINGTON, DC 20007-5116  
TELEPHONE (202) 424-7500  
FACSIMILE (202) 424-7643  
WWW.SWIDLAW.COM

NEW YORK OFFICE  
THE CHRYSLER BUILDING  
405 LEXINGTON AVENUE  
NEW YORK, NY 10174  
(212) 973-0111 FAX (212) 891-9598

6 June 2001

Dear Pat -

Just a brief note to tell you that court nominee John Roberts is an old friend of mine and one of the finest lawyers in this country. His legal background and experience are impeccable.

Although John and I share differing political views on some subjects, I can assure you that, as a judge, he will always respect the law and act in a responsible and measured way — never as a knee-jerk ideologue. I hope you'll find it possible to support John Roberts' nomination. Many thanks -

(es)



## Yale Law School

NEAL KUMAR KATYAL  
*Visiting Professor of Law*

February 22, 2002

Senator Patrick Leahy  
Chairman, Senate Judiciary Committee  
United States Senate  
Washington, DC

Dear Senator Leahy:

I am writing to urge the confirmation of John G. Roberts as a Judge on the United States Court of Appeals for the District of Columbia. I have had the privilege of having some firsthand experience with Mr. Roberts that may shed light on his nomination. I believe him to be the very finest advocate I have ever seen before the Court, and a man of the highest integrity.

I know Mr. Roberts quite well because I worked with him for three months on a daily basis after I graduated from law school. Before accepting employment with his law firm, Hogan & Hartson, I asked Mr. Roberts whether he would be comfortable taking me—a Democratic young lawyer—under his wing. His response: “Not only would I be comfortable with it, I want you here because I want to learn what others who may at times see the world differently than I think.” Over the years, I have often come back in my mind to Mr. Roberts’ response, as an aspiration for me to strive towards and as an example for my students. It was evident to me when he said it, and clear in the subsequent months, that his statement was sincerely heartfelt. Over those months, I was treated with respect and care as we worked through several extraordinarily complicated legal issues together. Mr. Roberts has always sought out different points of view, and has avoided the trap that most of us at one time or another fall into, of just talking to those with whom we feel most comfortable. These skills, among others, make him, quite simply, the most talented lawyer with whom I have ever worked. He is careful and honest, a beautiful writer and a kind manager to boot.

In the 100 or so Supreme Court arguments I have seen, John has been the best advocate I have ever come across. The reason why is simple: he is remarkably honest with the Court. He does not try to hide the caselaw on the other side of his position, rather, he confronts it directly and with skill. I believe very strongly that he would act no differently as a lower court judge, and that he would approach judicial precedent with the honesty and the care with which it is due. For the above reasons, I would have no hesitation whatsoever in recommending any student of mine — liberal or conservative — to clerk for him. He would quite simply be one of the top handful of judges in the country, not simply in terms of sheer intelligence, but also in terms of disposition.

In short, I believe that John Roberts has the integrity, temperament, and brilliance to be one of the finest judges to have ever served on the United States Court of Appeals for the District of Columbia. I urge you to begin the process of confirming him.

Sincerely,

A handwritten signature in black ink, appearing to read "Neal Katyal", written in a cursive style.

Neal Katyal

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*from the office of*  
**Senator Edward M. Kennedy**  
*of Massachusetts*

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FOR IMMEDIATE RELEASE  
April 30, 2003

CONTACT: Stephanie Cutter  
(202) 224-2633

OPENING STATEMENT OF SENATOR EDWARD M. KENNEDY AT THE  
JUDICIARY COMMITTEE EXECUTIVE SESSION ON THE  
JOHN ROBERTS NOMINATION

We welcome the nominee back to the Committee to continue the truncated hearing which began three months ago. I hope that the decision to continue this hearing, after the confusion and conflict of the past few months, is a sign that we can restore the broader sense of comity and good will which has characterized the operations of this Committee for most of the four decades during which I have served on it.

The advice and consent function assigned to us by the framers of the Constitution is vital to the proper functioning of our government. It was a major feature of the structure the framers designed not only for themselves but for all future generations. We do not sit here today merely to express our individual preferences about particular judges or even to express the preferences of our constituents. We act today as inheritors of a great tradition and a great responsibility to balance the powers of the Executive branch in selecting the members of the Judicial Branch.

We were given the advice and consent power over judicial appointments so that the two elected branches – the Executive and the Legislative – would share co-ordinate and co-equal responsibility for the third branch, the “undemocratic” branch where judges are insulated from us, from the President and from the electorate by lifetime appointments.

But the framers gave us insulation too, so that we could exercise our functions – including the advice and consent function – fearlessly and freely even when required to consider the actions of a popular President. We were given six-year terms – longer than the House and longer than the President. We were given staggered terms, so that no more than a third of us would be at risk at one time. And we were given the authority to set our own rules for the way we exercise our responsibilities, including advice and consent.

We have a historic obligation to assure that the Judicial branch remains free and independent, that it is not a political tool of the Executive, that its obligation is to the Constitutional principles and Constitutional rights which lie at the heart of our democracy. Our role is positive and proactive, not passive and reactive, regardless of whether the President shares our political or philosophical views.

-more-

And we on the Judiciary Committee have a unique role which we cannot fulfill unless we have ample opportunity in Committee to question the nominees and to discuss in detail how we think the advice and consent power should be exercised with respect to each nominee. That process resumes today with respect to Mr. Roberts.

His appointment is a special one because he has been nominated for a special court. The D.C. Circuit makes decisions with national impact on the lives of all of the American people. Its decisions govern the scope and effectiveness of

- occupational health and safety laws
  - consumer protection laws
  - federal labor laws
  - fair employment laws, including race, gender, and disability discrimination cases
  - workers' rights to organize
  - Clean Air Act rules
  - Freedom of information rules
  - First Amendment rights in broadcast media
- and many other rights of individuals under the Constitution and laws enacted by Congress.

And so we must take special care with this and all other appointments to this court.

No one has a right to be appointed to any federal appellate court. The burden is on the President and the nominee to demonstrate that the nomination should be consented to. Of course, the less weight the President places on the Senate's "advice" role, the more weight must be placed on our consent role. Because the District of Columbia has no Senators of its own, the usual pre-appointment consultation has not occurred, leaving an even heavier burden on the process we conduct today. Let us approach it with the seriousness of purpose and deliberation it deserves.

### **Statement of Senator Jon Kyl on David Campbell**

I strongly support the nomination of David Campbell to the District Court.

David G. Campbell is a partner in the Phoenix, Arizona law firm of Osborn Maledon. Mr. Campbell graduated from the University of Utah Law School in 1979, where he was a Note Editor on the Law Review and was awarded Order of the Coif. Following graduation Mr. Campbell worked as a law clerk for Judge J. Clifford Wallace of the United States Court of Appeals for the Ninth Circuit and Justice William H. Rehnquist of the Supreme Court of the United States.

Mr. Campbell's law practice for the last 20 years has focused primarily on civil litigation. He has handled state constitutional cases, litigation brought by the Resolution Trust Corporation, mass tort cases, class actions, environmental cases, and various business disputes. His cases have been litigated in federal and state courts, often as complex, multi-party lawsuits.

Mr. Campbell served on the Arizona State Bar Association's Committee on Rules of Professional Responsibility, as a member and chairman of a State Bar disciplinary hearing committee, and as co-bar counsel in a major bar disciplinary case. He is on the State Bar's Multi-Jurisdictional Practice Task Force, has taught by invitation in the State Bar's professional course, has served as a panel member for the Arizona Commission on Judicial Performance Review, is currently Chairman of the Arizona Lawyer Representatives to the Ninth Circuit Judicial Conference, and has served as President of the Sandra Day O'Connor Inn of Court.

Mr. Campbell has taught as an adjunct professor of law at the Arizona State University Law School and as a visiting professor at the J. Reuben Clark Law School at Brigham Young University, where he was named Professor of the Year. He has published articles on lawyer ethics and civil procedure.

Mr. Campbell and his wife, Stacey, are the proud parents of five children.



**U.S. SENATOR PATRICK LEAHY**

CONTACT: David Carle, 202-224-3693

VERMONT

**Statement of Senator Patrick Leahy  
Judiciary Committee Hearing  
On the Nomination of John Roberts  
To the Court of Appeals for the District of Columbia  
April 30, 2003**

We welcome John Roberts, who is nominated to the United States Court of Appeals for the District of Columbia Circuit. I am pleased that Mr. Roberts will receive the undivided attention that a lifetime nomination to this circuit deserves, and I look forward to hearing his answers to our questions. When we last saw Mr. Roberts he was flanked by two other circuit court candidates -- Sixth Circuit nominees Jeffrey Sutton and Deborah Cook. As he will recall, the overwhelming majority of questions during that marathon hearing were directed to Mr. Sutton. Today, we will have a chance to focus on Mr. Roberts in our effort to determine what kind of judge he would be if confirmed. That Mr. Roberts' hearing is occurring today is no fault of his nor of Democratic Members of this Committee. We all regret that he was thrown into that most unusual hearing earlier this year.

The District of Columbia Circuit is a most important one. It is a circuit to which President Clinton nominated two outstanding individuals during his second term. Both were denied Committee votes by the Republican majority. That action has led to the possibility of imbalance on that Court. Given its special jurisdictional responsibilities, the District of Columbia Circuit is a most important circuit. The obstruction of President Clinton's nominees has yet to be remedied in any regard despite efforts that I and others have made to overcome the errors of the recent past, while seeking a measure of justice, balance and accommodation.

Next, we will hear from district court nominees Maurice Hicks of Louisiana and David Campbell of Arizona. Both of these attorneys have the support of their home-state Senators for nomination to the district court. I look forward to hearing their testimony.

Finally, we have before us the nomination of William Moschella to be Assistant Attorney General in the Office of Legislative Affairs at the Department of Justice. This office serves as the liaison between the Justice Department and Congress. From my personal perspective, this is an especially important appointment at the moment because the Justice Department has been less than responsive to this Senate's requests for information. In the wake of September 11<sup>th</sup> and the corresponding expansion of federal law enforcement practices, many of us have been calling for and working for appropriate oversight. I have submitted many oversight letters to the Justice Department containing requests for information that even now await any response. In addition, the Justice Department is required to respond to Congress' requirements for reports about various programs that it funds. For example, as part of an amendment Senator Wyden and I offered to omnibus appropriations legislation, the Justice Department is required to contribute to a report

senator\_leahy@leahy.senate.gov  
http://leahy.senate.gov/

regarding the current and future use of technologies being developed by the Total Information Awareness project at the Defense Department.

I look forward to hearing how Mr. Moschella will work to improve the quantity and the quality of the Justice Department's communication with Congress. Many of us know Mr. Moschella and worked with him as he served on the staff of the House Judiciary Committee. I know that Chairman Sensenbrenner and Chairman Hyde think the world of him and know that others on the Committee, both Democrats and Republicans, respect his integrity, ability and commitment. I share their positive view of Mr. Moschella. I trust that he will not forget his "roots" and that he will be working to ensure that questions and concerns from members from both sides of the aisle and from both chambers of Congress get the attention of the Department and receive responsive answers.

#####

December 18, 2002

The Honorable Tom Daschle  
The Honorable Orrin Hatch ✓  
The Honorable Patrick Leahy  
The Honorable Trent Lott  
United States Senate  
Washington, D.C. 20510

Re: Judicial Nomination of John G. Roberts, Jr. to the United States Court of Appeals  
for the District of Columbia Circuit

Dear Senators Daschle, Hatch, Leahy, and Lott:

The undersigned are all members of the Bar of the District of Columbia and are writing in support of the nomination of John G. Roberts, Jr., to serve as a federal court of appeals judge on the United States Court of Appeals for the District of Columbia Circuit. Although, as individuals, we reflect a wide spectrum of political party affiliation and ideology, we are united in our belief that John Roberts will be an outstanding federal court of appeals judge and should be confirmed by the United States Senate. He is one of the very best and most highly respected appellate lawyers in the nation, with a deserved reputation as a brilliant writer and oral advocate. He is also a wonderful professional colleague both because of his enormous skills and because of his unquestioned integrity and fair-mindedness. In short, John Roberts represents the best of the bar and, we have no doubt, would be a superb federal court of appeals judge.

Thank you.

Sincerely,

**Donald B. Ayer**, Jones, Day, Reavis & Pogue  
**Louis R. Cohen**, Wilmer, Cutler & Pickering  
**Lloyd N. Cutler**, Wilmer, Cutler & Pickering  
**C. Boyden Gray**, Wilmer, Cutler & Pickering  
**Maureen Mahoney**, Latham & Watkins  
**Carter Phillips**, Sidley, Austin, Brown & Wood  
**E. Barrett Prettyman, Jr.**, Hogan & Hartson  
**George J. Terwilliger III**, White and Case

**E. Edward Bruce**, Covington & Burling  
**William Coleman**, O'Melveny & Myers  
**Kenneth Geller**, Mayer, Brown, Rowe & Maw  
**Mark Levy**, Howrey, Simon, Arnold & White  
**John E. Nolan**, Steptoe & Johnson  
**John H. Pickering**, Wilmer, Cutler & Pickering  
**Allen R. Snyder**, Hogan & Hartson  
**Seth Waxman**, Wilmer, Cutler & Pickering

(Signatures continued next page)

Jeanne S. Archibald, Hogan & Hartson  
Jeannette L. Austin, Mayer, Brown Rowe & Mawt  
James C. Bailey, Steptoe & Johnson  
Stewart Baker, Steptoe & Johnson  
James T. Banks, Hogan & Hartson  
Amy Coney Barrett, Notre Dame Law School  
Michael J. Barta, Baker, Botts  
Kenneth C. Bass, III, Sterne, Kessler, Goldstein & Fox  
Richard K. A. Becker, Hogan & Hartson  
Joseph C. Bell, Hogan & Hartson  
Brigida Benitez, Wilmer, Cutler & Pickering  
Douglas L. Beresford, Hogan & Hartson  
Edward Berlin. Swidler, Berlin, Shereff, Friedman  
Elizabeth Beske (Member, Bar of the State of California)  
Patricia A. Brannan, Hogan & Hartson  
Don O. Burley, Finnegan, Henderson, Farabow, Garrett & Dunner  
Raymond S. Calamaro, Hogan & Hartson  
George U. Carneal, Hogan & Hartson  
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Richard W. Cass, Wilmer, Cutler & Pickering  
Gregory A. Castanias, Jones, Day, Reavis & Pogue  
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H. Bartow Farr, Farr & Taranto  
Jonathan J. Frankel, Wilmer, Cutler & Pickering  
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David Frederick, Kellogg, Huber, Hansen, Todd & Evans  
Richard W. Garnett, Notre Dame Law School

(Signatures continued next page)

H.P. Goldfield, Vice Chairman, Stonebridge International  
Tom Goldstein, Goldstein & Howe  
Griffith L. Green, Sidley, Austin, Brown & Wood  
Jonathan Hacker, O'Melveny & Myers  
Martin J. Hahn, Hogan & Hartson  
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John C. Keeney, Jr., Hogan & Hartson  
Michael K. Kellogg, Kellogg, Huber, Hansen, Todd & Evans  
Nevin J. Kelly, Hogan & Hartson  
J. Hovey Kemp, Hogan & Hartson  
David A. Kikel., Hogan & Hartson  
R. Scott Kilgore, Wilmer, Cutler & Pickering  
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Philip C. Larson, Hogan & Hartson  
Richard J. Lazarus, Georgetown University Law Center  
Thomas B. Leary, Commissioner, Federal Trade Commission  
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Robert A. Long, Covington & Burling  
C. Kevin Marshall, Sidley Austin Brown & Wood  
Stephanie A. Martz, Mayer, Brown, Rowe & Maw  
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Mark E. Maze, Hogan & Hartson  
Mark S. McConnell, Hogan & Hartson  
Janet L. McDavid, Hogan & Hartson

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Thomas L. McGovern III, Hogan & Hartson  
A. Douglas Melamed, Wilmer, Cutler & Pickering  
Martin Michaelson, Hogan & Hartson  
Evan Miller, Hogan & Hartson  
George W. Miller, Hogan & Hartson  
William L. Monts III, Hogan & Hartson  
Stanley J. Brown, Hogan & Hartson  
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Glen D. Nager, Jones Day Reavis & Pogue  
William L. Neff, Hogan & Hartson  
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Karol Lyn Newman, Hogan & Hartson  
Keith A. Noreika, Covington & Burling  
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George T. Patton, Jr., Bose, McKinney & Evans  
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Philip D. Porter, Hogan & Hartson  
Patrick M. Raher, Hogan & Hartson  
Laurence Robbins, Robbins, Russell, Englert, Orseck & Untereiner  
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David J. Saylor, Hogan & Hartson  
Patrick J. Schiltz, Associate Dean and St. Thomas More Chair in Law  
University of St. Thomas School of Law  
Jay Alan Sekulow, Chief Counsel, American Center for Law & Justice  
Kannon K. Shanmugam, Kirkland & Ellis  
Jeffrey K. Shapiro, Hogan & Hartson  
Richard S. Silverman, Hogan & Hartson  
Samuel M. Sipe, Jr., Steptoe & Johnson  
Luke Sobota, Wilmer, Cutler & Pickering  
Peter Spivak, Hogan & Hartson  
Jolanta Sterbenz, Hogan & Hartson  
Kara F. Stoll, Finnegan, Henderson, Farabow, Garrett & Dunner  
Silvija A. Strikis, Kellogg, Huber, Hansen, Todd & Evans  
Clifford D. Stromberg, Hogan & Hartson

(Signatures continued next page)

Mary Anne Sullivan, Hogan & Hartson  
Richard G. Taranto, Farr & Taranto  
John Thorne, Deputy General Counsel, Verizon Communications Inc.  
& Lecturer, Columbia Law School  
Helen Trilling, Hogan & Hartson  
Rebecca K. Troth, Washington College of Law, American University  
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J. Warren Gorrell, Jr., Chairman, Hogan & Hartson  
John B. Watkins, Wilmer, Cutler & Pickering  
Robert N. Weiner, Arnold & Porter  
Robert A. Welp, Hogan & Hartson  
Douglas P. Wheeler, Duke University School of Law  
Christopher J. Wright, Harris, Wiltshire & Grannis  
Clayton Yeutter, Hogan & Hartson (former Secretary of Agriculture)  
Paul J. Zidlicky, Sidley Austin Brown & Wood

cc: The Honorable Alberto Gonzales  
Counsel to the President

May 23, 2001

The Honorable Patrick J. Leahy  
United States Senate  
433 Russell Senate Office Building  
Washington, DC 20510

Dear Senator Leahy:

We write to support the nomination of John G. Roberts, Jr. for the D.C. Circuit Court of Appeals.

The National School Boards Association is the nationwide organization representing public school governance. NSBA's mission is to foster excellence and equity in public elementary and secondary education through leadership. Founded in 1940, NSBA is a not-for-profit federation of associations of school boards across the United States and its territories. NSBA represents the nation's 95,000 school board members that govern 14,980 local school districts serving the nation's more than 47 million public school students.

It is clear from his professional record that John Roberts is a highly intelligent and motivated attorney. Mr. Roberts has distinguished himself as an outstanding legal scholar from the start of his career. He was managing editor of the law review at Harvard Law School and served as a Supreme Court clerk for Justice Rehnquist. He continues to excel in private practice and is a distinguished member of the Supreme Court Bar.

What may not be as clear from the written record is his character. Mr. Roberts is a dedicated public servant. He has represented a number of public bodies himself, and further, regularly provides assistance to many other attorneys who also represent public entities. Mr. Roberts is among those attorneys who are always willing to contribute their time and professional expertise. He has often given his time to provide training, counsel, and advice to others. He has participated on programs within the National School Boards Association and the Counsel of School Attorneys as a speaker and author.

In addition, he has been willing to assist school attorneys as they have prepared to present arguments in the United States Supreme Court. His willingness to spend extended time assisting others comes from his dedication to improving the practice of law. He is not outcome oriented in his approach to legal issues. Instead, he seeks accuracy and fairness in his work. He is always willing to take the time to do things right; and he is willing to support others who exhibit similar values. Above all, he personifies the qualities of an outstanding jurist with his even-temper and respectful demeanor.

National School Boards Association

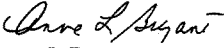


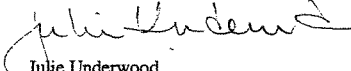
*Excellence and Equity  
in Public Education  
through School Board  
Leadership*



Socrates wrote that a judge should have four characteristics – “to hear courteously, to answer wisely, to consider soberly, and to decide impartially”. We are confident that Mr. Roberts possesses all of these attributes.

Sincerely,

  
Anne L. Bryant  
Executive Director

  
Julie Underwood  
General Counsel/Associate  
Executive Director

ROBBINS, RUSSELL, ENGLERT, ORSECK & UNTEREINER LLP

1801 K STREET, N.W., SUITE 411  
WASHINGTON, D.C. 20006  
PHONE (202) 775-4500  
FAX (202) 775-4510

June 25, 2001

The Honorable Patrick Leahy  
United States Senator  
Senate Judiciary Committee  
433 Russell Senate Office Building  
United States Senate  
Washington, D.C. 20510

Re: Nomination of John G. Roberts, Jr.

Dear Senator Leahy:

We write to support the nomination of John Roberts to the United States Court of Appeals for the District of Columbia Circuit. Each of us served with Mr. Roberts in the Office of the Solicitor General during the time that he was Deputy Solicitor General. Although we are of diverse political parties and persuasions, each of us is firmly convinced that Mr. Roberts would be a truly superb addition to the federal court of appeals.

As the Committee will doubtless hear from many quarters, John is an incomparable appellate lawyer. Indeed, it is fair to say that he is one of the foremost appellate lawyers in the country. But we know him best in his capacity as Deputy Solicitor General – and in that capacity, he served his country and the Office of the Solicitor General with great distinction. The Office then, as now, comprised lawyers of every political affiliation – Democrats, Republicans, and Independents. Mr. Roberts was attentive to and respectful of all views, and he represented the United States zealously but fairly. He had the deepest respect for legal principles and legal precedent – instincts that will serve him well as a court of appeals judge.

In recent days, the suggestion has surfaced in press accounts that Mr. Roberts may be expected to vote in particular cases along the lines intimated in briefs he filed while in the Office of the Solicitor General. As lawyers who served in that Office, we emphatically dispute that assumption. Perhaps uniquely in our society, lawyers are called upon to advance legal arguments

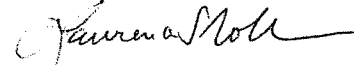
ROBBINS, RUSSELL, ENGLERT, ORSECK & UNTEREINER LLP

The Honorable Patrick Leahy  
June 25, 2001  
Page 2

for clients with whom they may, in their private capacities, disagree. It is not unusual for an individual lawyer to disagree with a client, while at the same time fulfilling the ethical duty to provide zealous representation within the bounds of law. And government lawyers, including those who serve in the Solicitor General's Office, are no different. They too have clients – federal agencies and officers, with a broad and diverse array of policies and interests. Moreover the Solicitor General, unlike a private lawyer, does not have the option of declining a representation and telling a federal agency to find another lawyer.

We hope the foregoing is of assistance to the Committee in its consideration of Mr. Roberts's nomination. He is a superbly qualified nominee.

Very truly yours,



Lawrence S. Robbins  
Robbins, Russell, Englert, Orseck  
& Untereiner LLP\*  
1801 K Street, N.W.  
Suite 411  
Washington, D.C. 20006

Michael Lazerwitz  
Cleary, Gottlieb, Steen & Hamilton  
2000 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006

Christopher Wright  
Harris, Wiltshire & Grannis  
1200 18<sup>th</sup> Street, N.W.  
Washington, D.C. 20036

Alan Horowitz  
Miller & Chevalier  
655 15<sup>th</sup> Street, N.W.  
Suite 900  
Washington, D.C. 20005-5701

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\* All references to institutions are for identification purposes only.

PEBBINS, RUSSELL, ENGLERT, ORSECK & UNTEREINER LLP

The Honorable Patrick Leahy  
June 25, 2001  
Page 3

Maureen Mahoney  
Latham & Watkins  
555 Eleventh Street, N.W.  
Suite 1000  
Washington, D.C. 20004-1304

Stephen Marzen  
Shearman & Sterling  
801 Pennsylvania Avenue, N.W.  
Ninth Floor  
Washington, D.C. 20004-2604

Stephen Nightingale  
Counsel  
ING North America Insurance Corporation  
151 Farmington Avenue, TS31  
Hartford, CT 06156-8975

William Kelley  
Notre Dame Law School  
Notre Dame, IN 46556

Richard Seamon  
University of South Carolina  
School of Law  
Main & Greene Streets – Room 301  
Columbia, SC 29208

Thomas Hungar  
Gibson, Dunn & Crutcher  
1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036-5306

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The Honorable Patrick Leahy  
June 25, 2001  
Page 4

David Shapiro  
Harvard University Law School  
Cambridge, MA 02138

Thomas W. Merrill  
John Paul Stevens Professor of Law  
Northwestern University Law School  
357 East Chicago Avenue  
Chicago, IL 60611

John F. Manning  
Columbia University School of Law  
435 W. 116<sup>th</sup> Street  
New York, NY 10027

*The San Diego Union-Tribune, April 24, 2002*

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April 24, 2002, Wednesday

**SECTION:** NEWS;Pg. A-3

**LENGTH:** 556 words

**HEADLINE:** Tahoe landowners out of luck, Supreme Court rules

**BYLINE:** Mark Helm; HEARST NEWS SERVICE

**BODY:**

WASHINGTON -- In a victory for environmentalists, the Supreme Court ruled yesterday that the government does not have to compensate hundreds of Lake Tahoe, Nev., landowners who have waited in vain two decades for approval to build lakeside homes.

In a 6-3 ruling, the court reaffirmed the right of the government to block property owners from building for long periods of time on open land to protect the environment or to stop overdevelopment.

Writing for the majority, Justice John Paul Stevens rejected arguments that government agencies must either act within a certain time in making environmental decisions on land use or compensate landowners who are banned from building. He said putting short time frames on temporary ordinances barring construction would "create added pressure on decision-makers to reach a quick resolution of land-use questions."

Stevens said such a system "would only serve to disadvantage those landowners and interest groups who are not as organized or familiar with the planning process."

In this case -- **Tahoe-Sierra Preservation Council Inc. vs. Tahoe Regional Planning Agency**, 01-1167 -- the parties involved were hundreds of property owners who had bought land around Lake Tahoe -- which straddles the California-Nevada border -- but were prevented from building homes when an agency representing both states decided to halt construction to protect the lake from possible environmental damage. The landowners sued for \$27 million.

In his opinion, Stevens, citing a 1987 Supreme Court decision in a similar case, said California and Nevada had acted within the "normal" boundaries of the law and, therefore, did not owe the landowners any money.

However, he sympathized with the landowners, saying building moratoriums that last longer than one year "should be viewed with special skepticism."

Stevens was joined by Justices Stephen Breyer, Ruth Bader Ginsburg, Anthony Kennedy, Sandra Day O'Connor and David Souter.

In their dissent, three conservatives -- Chief Justice William H. Rehnquist and Justices Antonin Scalia and Clarence Thomas -- called the temporary zoning ordinances in the case

"endless." They said the ordinances amounted to a government seizure of the land without paying for it, a violation of the 5th Amendment's "takings" clause, which says "private property (shall not) be taken for public use, without just compensation."

For example, if the government wants to build a military base on a farmer's land, it must pay that farmer a fair price for the land.

Rehnquist said the prohibition on development around Lake Tahoe had dragged on for so many years that it was a "taking that requires compensation."

While Rehnquist agreed that Lake Tahoe was a "national treasure" that should be protected, he said the "costs and burdens" of saving the area should be "borne by the public at large, not by a few targeted citizens."

Environmental groups hailed the majority decision, saying it would help protect America's countryside from suburban sprawl.

On the other side of the issue, Chip Mellor, president of the Institute for Justice, a conservative legal group in Washington, said the ruling will make it "more difficult for individuals to hold governments accountable when they prevent them from building homes on property that is rightfully theirs."

**GRAPHIC:** 1 PIC; Andy Barron / Associated Press; During their spring break this month, Amanda Rippee (left) and Hilary Archer crawled around rocks in Lake Tahoe. The Supreme Court yesterday ruled against compensating landowners at the lake who have been blocked from building on their properties.

**LOAD-DATE:** April 26, 2002



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## Tahoe ruling leaves owners with empty lots It may be impossible to recoup investment

Stacy Finz, Chronicle Staff Writer

To Ken and Betty Eberle, purchasing two pieces of land at Lake Tahoe in the late 1970s was to be the start of what some day would be a dream retirement home.

To government officials and environmentalists, that house represented a potential nightmare of urban blight, pollution, erosion and damage to a national treasure.

So officials enforced a building moratorium that lasted for six years, and new planning restrictions make it impossible for the property owners to ever build.

The Eberles and 399 property owners in the Tahoe basin argued that the government should pay them for the value they lost on their land during that period. But on Tuesday, the U.S. Supreme Court ruled in favor of the government, saying that the financial constraints of compensating property owners might force officials to overlook good, environmentally sound planning. Environmentalists have hailed the ruling as a victory.

"This is big," said Carl Zichella, regional staff director of the Sierra Club's California, Nevada and Hawaii region. "It takes the wind out of the sails of the property-rights extremists."

But the Eberles would argue that they are far from extremists — just regular people who were hoping to spend their twilight years by the lake.

"When we bought the land, the boys were just learning how to ski," said Ken Eberle, a 68-year-old retired co-owner of a small business now living in Cambria. "At first, we thought we would just build a cabin for the weekends. But we couldn't afford it. Later we decided that it could be our retirement home."

Because they can never build, the Eberles and the other property owners' land is worth pennies on the dollar, said Michael Berger, their appellate lawyer.

Thursday, April 25, 2002  
**San Francisco Chronicle**  
 CHRONICLE SECTIONS

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"Some can't even walk on the land without a permit, let alone pitch a tent," Berger said. "I think these people are pretty much out of luck."

Ken Eberle said he paid \$18,000 for the land 24 years ago. With property taxes and maintenance costs, they have put \$40,000 to \$50,000 into the property. In the early 1990s the Forest Service offered to give the couple \$20,000 for the two parcels — roughly two-thirds of an acre.

A real estate agent told the Eberles they could get as much as \$400,000 if the land was buildable. The average home at Lake Tahoe — without a view of the lake — on the California side sells for about \$700,000, said real estate experts. It's slightly more on the Nevada side because the state does not require residents to pay income or corporate taxes.

Many of the 400 property owners have sold their land to the Forest Service Lake Tahoe Basin, the California-Tahoe Conservancy or Nevada State Lands. The state agencies will buy environmentally sensitive properties for fair market value.

But according to Berger, the land has little value if it's not buildable.

Rochelle Nason, executive director of the League to Save Lake Tahoe, said people buying land in the early 1970s should have been aware that it was going to be tough to get permits to build new houses in the Tahoe basin.

"The area was terribly over subdivided," she said. "More development would hurt the water quality, bring more traffic, create more pollution and turn the place into an urban area."

Zichella, of the Sierra Club, said property owners were taking a chance when they bought land at Lake Tahoe.

"You buy property on the south rim of the Grand Canyon you're taking a chance," he said. "It's the same with any national treasure."

E-mail Stacy Finz at [sfinz@sfnchronicle.com](mailto:sfinz@sfnchronicle.com).

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June 4, 2001

School of Law

The Honorable Patrick Leahy  
 433 Russell Senate Office Building  
 United States Senate  
 Washington, D.C. 20510

Re: Nominations of John G. Roberts and Miguel A. Estrada

Dear Senator Leahy:

I support the nominations of John Roberts and Miguel Estrada to the United States Court of Appeals for the District of Columbia Circuit. I am a lifelong Democrat and have liberal views on most issues. Nonetheless, from working with these gentlemen in the Department of Justice, I am convinced that they would be superb and objective federal judges.

From 1990-1996, I was an Assistant to Solicitors General Kenneth Starr, Drew Days, and (briefly) Acting Solicitor General Walter Dellinger. As a result, I worked in the Solicitor General's Office during most of Messrs. Roberts' and Estrada's tenure there. Indeed, I worked directly under John Roberts on many cases in the office, and I came to know Mr. Estrada well, too. I believe that I am in an excellent position to assess their talents and temperament.

I am sure that you will get plenty of evidence of these men's legal talent, and so I will focus on their temperament. I do so, by the way, as someone who strongly supports women's constitutional right to choose to have an abortion; favors stringent separation of church and state; and recognizes the existence of, and need for, abundant federal power to enforce civil rights. Mr. Roberts and Mr. Estrada will judge each case on its merits. They will approach each case without preconceptions. They will respect the doctrine of stare decisis. They will appreciate the need for the law to be interpreted and applied with compassion and an understanding of the U.S. Constitution as a living document. They will strive with their fellow judges to maintain the integrity of the federal bench. In a word, they will be impeccably judicious.

If I sat down with these men in a room, I suspect that we could find many *political* issues about which they and I disagreed. Still, I will consider it a disgrace if these nominees fail to be confirmed.

Thank you for considering my views.

Sincerely,

Richard H. Seamon, Assistant Professor of Law

F. JAMES SENSENBRENNER, JR., Wisconsin  
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ONE HUNDRED EIGHTH CONGRESS

**Congress of the United States**  
**House of Representatives**

COMMITTEE ON THE JUDICIARY

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April 28, 2003

JOHN CONYERS, JR., Michigan  
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The Honorable Orrin Hatch  
Chairman  
Senate Committee on Judiciary  
Washington, DC 20510

The Honorable Patrick Leahy  
Ranking Member  
Senate Committee on the Judiciary  
Washington, DC 20510

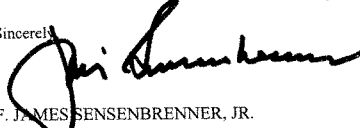
Dear Chairman Hatch, Senator Leahy, and esteemed Committee Members:

I write to you with disappointment that I will be unable to attend the Committee's upcoming hearing on the nomination of William E. Moschella for the position of Assistant Attorney General for Legislative Affairs. While a longstanding commitment will preclude me from personally introducing Mr. Moschella to the Committee, I wish to convey my unequivocal support for his confirmation to this position.

For over a decade, Mr. Moschella has served the Congress with distinction. He has developed a textured understanding of the political, constitutional, and procedural features of the legislative process while working in the Office of Representative Frank Wolf, on the House Committee on Rules, and on the House Committee on the Judiciary. During my tenure as Chairman of the Committee on the Judiciary, Mr. Moschella has been an integral part of my Committee staff. As Chief Legislative Counsel and Parliamentarian, he has been closely involved with virtually every legislative proposal considered by the Committee - a record of accomplishment which is particularly notable when one considers that the Committee filed over one hundred legislative reports during the 107th Congress. I would draw particular attention to Mr. Moschella's work on the Patriot Act and H.R. 2215, the latter of which authorized the Department of Justice for the first time in over twenty years. The experience acquired during bicameral consideration of these measures buttressed Mr. Moschella's substantial institutional knowledge of the Department of Justice and heightened his sensitivity toward issues of continuing congressional interest at the Department. Mr. Moschella's record of achievement, professional dedication, and strong personal character make him exceptionally well-qualified to serve as Assistant Attorney General for Legislative Affairs.

It is without hesitation that I give Mr. Moschella my highest recommendation to serve as Assistant Attorney General for Legislative Affairs and respectfully urge both the Senate Judiciary Committee and the full Senate to act swiftly to confirm him to this post.

Sincerely,

  
F. JAMES SENSENBRENNER, JR.  
Chairman

F. JAMES SENSENBRENNER, JR., Wisconsin  
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April 29, 2003

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The Honorable Orrin Hatch  
Chairman, Committee on the Judiciary  
U.S. Senate, Washington, DC


Dear Mr. Chairman:

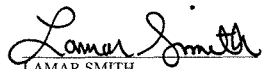
We understand that a hearing has been scheduled on the President's nomination of Mr. William E. Moschella to the position of Assistant Attorney General for Legislative Affairs and write to express our unqualified support for his expeditious consideration and confirmation by the Senate.


Mr. Moschella has ably served the House Committee on the Judiciary for over five years as counsel, Chief Counsel for Oversight and Investigations, and Chief Legislative Counsel and Parliamentarian. His tenure on the Judiciary Committee has been marked by extraordinary professional commitment, dedication to the Committee and to Congress, and uncompromising adherence to the constitutional and procedural safeguards that guide the legislative process. Mr. Moschella's intellectual acumen and ability to quickly grasp the ramifications of complex legislative proposals have facilitated Committee consideration and congressional passage of signal legislative initiatives over the last several years. His participation in Committee consideration of the Patriot Act, Homeland Security Act of 2002, and the 21st Century Department of Justice Appropriations Authorization Act deserve special commendation.


As you know, the nature of the legislative process does not always lend itself to perfect harmony. However, Mr. Moschella has unfailingly striven to amicably resolve differences in a manner that is both respectful and inclusive. This trait, coupled with his detailed understanding of the procedural and political nuances of the legislative process, will permit Mr. Moschella to make an outstanding contribution to the cause of justice as Assistant Attorney General for Legislative Affairs. I hope you will give his nomination the consideration and support that it deserves.

Sincerely,

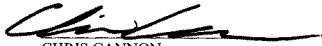
  
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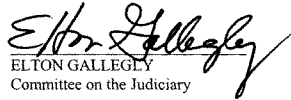
  
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Chairman, Subcommittee on the  
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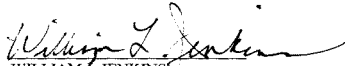
The Honorable Orrin Hatch  
April 29, 2003  
Page 2



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Committee on the Judiciary



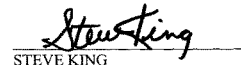
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Committee on the Judiciary



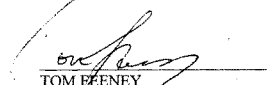
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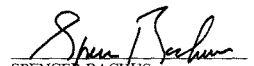
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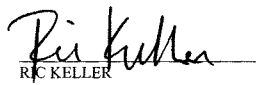
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*The Washington Post, July 05, 2002*

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July 05, 2002, Friday, Final Edition

**SECTION:** EDITORIAL; Pg. A20

**LENGTH:** 566 words

**HEADLINE:** Diversity Serves the Court

**BODY:**

WITH THE JUDICIAL nominations process engulfed in questions of the ideology of potential judges, many observers are rushing to evaluate the just-completed **Supreme Court** term with an avowedly political scorecard. The exercise, it turns out, is largely fruitless. The term had its share of traditional left-right sparring, but the overall output hardly reflects a consistent imposition of will by the five-member conservative majority. Rather, the court's holdings this term are notably eclectic politically. The excesses of the court's conservative majority remain a cause for concern. The court this term continued its unjustified experiment in bolstering the sovereign immunity of states against private suits, this time shielding states from court-like proceedings before federal administrative agencies. It also continued its war against reasonable federal court review of state court convictions -- holding that Virginia could execute a man who had been unknowingly represented at trial by an attorney for his victim. In another case, the court needlessly immunized private prisons against lawsuits by federal inmates alleging violations of their constitutional rights. And it took a bite out of the right of individuals not to incriminate themselves, holding that a state may deprive sex offenders of prison privileges if they refuse to confess to all prior offenses.

But these cases are only part of the story. In the term's most critical cases, the court's conservative bloc either had the better of the argument or suffered defections that enabled the liberal bloc to rule. Sometimes, the justices even agreed in fashions that defied ideological category. The result was a sizable number of valuable decisions.

The court upheld private school vouchers against a church-state challenge, delivering an important affirmation that state experiments that might alleviate the crisis in American education will not be aborted. It also struck down the death penalty for the mentally retarded. It put useful limits on the Americans With Disabilities Act. It delivered to environmentalists one of their most important court victories in recent years, ruling that a temporary moratorium on development around **Lake Tahoe** was not a seizure of private property that required compensation to property holders.

The justices also gave school districts broader latitude to conduct drug testing of students to facilitate treatment. And they issued some important free speech decisions -- affirming the right of Jehovah's Witnesses to canvass door-to-door without seeking government approval

first, for example, and clarifying that states unwise enough to hold elections for judicial offices can't prevent candidates for those offices from speaking their minds about important issues.

The different groupings (and often sub-groupings) of justices bring differing concerns and sensitivities to the table. Some of these sensitivities may be useless -- even dangerous -- for entire classes of cases but valuable for others. The chronic danger is that one faction becomes so dominant that it can drown out -- or force into consistent dissent -- the voices of the other side. But on the Rehnquist court, majorities and alliances continue to shift with no side having a monopoly of wisdom or folly. That fact is worth remembering as the battles over judicial nominations heat up.

**LOAD-DATE:** July 05, 2002





**NOMINATIONS OF CONSUELO MARIA CAL-  
LAHAN, OF CALIFORNIA, NOMINEE TO BE  
CIRCUIT JUDGE FOR THE NINTH CIRCUIT;  
MICHAEL CHERTOFF, OF NEW JERSEY,  
NOMINEE TO BE CIRCUIT JUDGE FOR THE  
THIRD CIRCUIT; AND L. SCOTT COOGLER,  
OF ALABAMA, NOMINEE TO BE DISTRICT  
JUDGE FOR THE NORTHERN DISTRICT OF  
ALABAMA**

---

WEDNESDAY, MAY 7, 2003

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

The Committee met, pursuant to notice, at 9:39 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Kyl, Sessions, Craig, Chambliss, Cornyn, Leahy, Kennedy, Feinstein, Feingold, and Durbin.

Chairman HATCH. We will call this Committee to order, and rather than give our opening statements at this time, we will wait for Senator Leahy, but I understand the distinguish Chairman of the Banking Committee has a hearing this morning, and we are going to turn to you first, Senator Shelby, and then we will go right across.

**PRESENTATION OF L. SCOTT COOGLER, NOMINEE TO BE DIS-  
TRICT JUDGE FOR THE NORTHERN DISTRICT OF ALABAMA,  
BY HON. RICHARD SHELBY, A U.S. SENATOR FROM THE  
STATE OF ALABAMA**

Senator SHELBY. Thank you, Mr. Chairman. I appreciate this.

I would ask that my entire statement regarding the nomination of Scott Coogler to be the United States District Court Judge for the Northern District of Alabama be made part of the record in its entirety.

Chairman HATCH. Without objection.

Senator SHELBY. And, Mr. Chairman, I will be brief.

I am honored to be here before the Committee, and I appreciate your consideration, realizing we have a very important Banking Committee starting at 10 o'clock.

Scott Coogler is a sitting circuit judge, a trial judge, in my home town of Tuscaloosa, Alabama, where he has distinguished himself

as a judge. But before that, he distinguished himself as an attorney and a community leader. He is here today with his wife, Mitzi, and his three children Carlson, Hannah, and Allie. I wish they would stand.

Chairman HATCH. We welcome all of you.

Senator SHELBY. We are proud of him. We are proud of the work he has done. And, Mr. Chairman, I believe he will make an outstanding Federal district judge for the Northern District of Alabama. I endorse his nomination without any reservation, and I hope that the Committee will hold an expeditious markup and reporting to the floor of the Senate.

I appreciate your consideration today, and I know you will do this. And if you will excuse me, I have got to go to the other committee.

Chairman HATCH. Thank you, Senator. You are excused, and we appreciate you taking the time.

Senator SHELBY. Thank you, Mr. Chairman.

Chairman HATCH. And I think it is great for you to take time to come and support the judge.

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

Chairman HATCH. Senator Boxer, we will turn to you next, and then we will go to Senator Corzine, then to Senator Lautenberg.

**PRESENTATION OF CONSUELO MARIA CALLAHAN, NOMINEE TO BE CIRCUIT JUDGE FOR THE NINTH CIRCUIT, BY HON. BARBARA BOXER, A U.S. SENATOR FROM THE STATE OF CALIFORNIA**

Senator BOXER. Thank you, Chairman Hatch and members of the Committee, for allowing me this honor of introducing to you Judge Consuelo "Connie" Callahan, the nominee for the Ninth Circuit Court of Appeal. I would ask her to stand so you can see here.

Judge Callahan is a native of California, born in Palo Alto. She is a graduate of Stanford University and the McGeorge School of Law at the University of the Pacific. She was the first female and the first Hispanic judge to sit on the San Joaquin County Superior Court. Judge Callahan is joined today by her husband, Randy, and, Mr. Chairman, with your permission, I would ask Judge Callahan's husband, Randy, to stand.

Chairman HATCH. We are happy to welcome you here.

Senator BOXER. And I wanted you to know that our nominee has two grown children, who I know are so proud of their mother. The children couldn't be here, but Connie's best friend's son, Will, is here to lend his support, if he would like to stand.

Chairman HATCH. Happy to have you here.

Senator BOXER. I enjoyed very much my visit with Judge Callahan yesterday in my office. We talked at length about her life, her accomplishments, her extensive community involvement in California.

I would ask unanimous consent that the remainder of my statement be placed in the record, but I would like to just tell you a little bit about our conversation.

I think what I was most pleased with is that Judge Callahan understands what a role model she is and that she has taken so much

time out of her busy schedule to spend time with young people in schools. And she goes to those schools often, and what they have done there is to conduct trials in the schools and encourage the students to study the details of the court cases. She is reaching out to generations of Americans, and I always think for our democracy that is very, very key. We need to encourage participation and interest in civic life, including the judicial process.

She has worked hard to protect children in the area of child abuse, and she has received public recognition, and as you know, Mr. Chairman—you have worked with me on this, Senator Biden has as well—protecting children is very important to me.

She is a former board member and president of the San Joaquin County Child Abuse Prevention Center, so I applaud her involvement in all of these community issues. I am pleased to introduce her to you, and I am really looking forward to reading the record, hearing her answer the questions, but I am very optimistic about this fine choice.

Chairman HATCH. Well, thank you, Senator Boxer. We are pleased to have you here and honored to have you here and very pleased that you have given such good recommendations here today.

Senator BOXER. Thank you.

Chairman HATCH. Thank you for coming.

Senator Corzine, we will go to you and then Senator Lautenberg.

Senator CORZINE. Mr. Chairman, if you wouldn't object, I would defer to Senator Lautenberg. We have this tit-for-tat question about senior Senator.

Chairman HATCH. Well, I worried about that, too, because he actually has more years than you do.

Senator CORZINE. Respect is far more important.

Chairman HATCH. Well, that will be fine, and I think it is very gracious, and, Senator Lautenberg, you should remember that.

**PRESENTATION OF MICHAEL CHERTOFF, NOMINEE TO BE  
CIRCUIT JUDGE FOR THE THIRD CIRCUIT, BY HON. FRANK  
LAUTENBERG, A U.S. SENATOR FROM THE STATE OF NEW  
JERSEY**

Senator LAUTENBERG. Thank you very much. That is a very gracious thing for one Senator to give another his time. Wow, we don't usually see that around here.

Chairman HATCH. That is right. I remember the old days.

Senator LAUTENBERG. There was constant deference, Mr. Chairman. That is why it was a little hard to get some things done.

[Laughter.]

Senator LAUTENBERG. In any event, Senator Corzine is a good friend and I really appreciate it. I have a hearing now that I have got to go to, and I want to thank you and our ranking member, Pat Leahy, for holding this hearing on the nomination of Michael Chertoff to be the circuit court judge for the Third Circuit, and he is here with his wife, Meryl, and his son and daughter. And if they would all stand up, you can see what a nice family back-up Michael Chertoff has.

Chairman HATCH. Really happy to have you all here.

Senator LAUTENBERG. Thank you very much. It is hard to understand that Michael can be so aggressive in his pursuit of the law with such a beautiful family.

Chairman HATCH. It is kind of amazing, isn't it?

Senator LAUTENBERG. But I am pleased that President Bush has selected a distinguished New Jerseyan for this important seat on the court of appeals.

Michael Chertoff is a highly intelligent, competent lawyer. I have known him for a long time. As a matter of fact, we shared space in the same building in my first term in the Senate. He has compiled a long and impressive record of accomplishments in both the public and private sector. He distinguished himself academically as an undergraduate at Harvard University and also as a law student at Harvard.

From 1979 to 1980, he clerked for the U.S. Supreme Court Justice William J. Brennan, Jr., before taking a job as an Assistant U.S. Attorney in New York. As U.S. Attorney for the District of New Jersey from 1990 to 1994, Michael Chertoff aggressively tackled organized crime, public corruption, health care and bank fraud, and he also played a critical role in helping the New Jersey State Legislature investigate something called racial profiling, an ugly episode that came about. And I introduced the first bill in the Senate to ban racial profiling, and I am grateful to Mr. Chertoff for the interest he took in this matter at the State level.

The Third Circuit is one of the most impressive courts in the country, and based on past performance, I am confident that Mr. Chertoff will fit right in.

As you know, Mr. Chairman, sometimes I have a question about a nominee, but the fact is that there are so many qualified lawyers that President Bush can and has nominated for different circuits who enjoy broad support in the Senate, and Mr. Chertoff certainly is one such candidate.

So I thank you, Mr. Chairman, and I look forward to working with you, the other Committee members, and the rest of the Senate to get Michael Chertoff confirmed as quickly as possible. We need him. He is ready to do the job.

Chairman HATCH. Well, thank you, Senator Lautenberg. That is high praise indeed, and we are so glad to have you back in the Senate.

Senator LAUTENBERG. Thank you.

Chairman HATCH. We look forward to continuing to work with you on these issues, and we are very proud of your colleague as well. We will excuse you. We know you have a Committee meeting.

Senator LAUTENBERG. Thank you.

Chairman HATCH. Senator Corzine, we are going to go to you, and then I am going to go to Senator Feinstein afterwards, after Senator Corzine. Then I will make my statement.

**PRESENTATION OF MICHAEL CHERTOFF, NOMINEE TO BE  
CIRCUIT JUDGE FOR THE THIRD CIRCUIT, BY HON. JON  
CORZINE, A U.S. SENATOR FROM THE STATE OF NEW JER-  
SEY**

Senator CORZINE. Thank you, Mr. Chairman. Members of the Committee, it is a pleasure for me to be here, as Senator Lauten-

berg, to introduce Michael Chertoff. I think he is one of the terrific people of my State and of the Nation, served our Nation well already in many, many roles. I sometimes think I should recuse myself because he is also a personal friend. I believe very much in both the quality and character of the man. I welcome his family as well.

Senator Lautenberg reviewed some of the ways that he has served our State and Nation extraordinarily ably, and I think he will do the same as a circuit judge in the important Third Circuit.

Impeccable credentials, whether it is the editor of law review, Supreme Court law clerk, U.S. Attorney, or Assistant Attorney General for criminal matters at the Justice Department, in every job he has taken on his role with great professionalism and excellence, and I am sure he will do so on the bench.

Many of us consider him New Jersey's "lawyer laureate." I will agree with that label that a number of our newspapers have placed him under. But I do want to acknowledge—and I think it is important in the context of sometimes the debates we have with regard to judges—that you can actually support and be very enthusiastic about the nomination of someone to the bench who you don't always agree with on all issues. And that is certainly the case with Mr. Chertoff. But his temperament and his commitment to precedent and his character in my mind suit well the role of an appellate judge, and I am just honored to further place his name before the Committee and ultimately in front of the Senate floor.

So I think I will leave my full statement to be placed in the record, but let it be known that this Senator thinks this is one of the finest lawyers and one of the finest legal minds we have in the country.

Chairman HATCH. Well, thank you, Senator Corzine. That is high praise, and we are honored to have you here to give this statement. I share all of your feelings with regard to Michael Chertoff and I think almost all of us do. In fact, I hope all of us do in the Senate because of the great service he has given. But thank you for taking time to be with us today. I appreciate it.

Senator FEINSTEIN, we will go to you, and then we will go to Senator Sessions, and then I will give my statement.

**PRESENTATION OF CONSUELO MARIA CALLAHAN, NOMINEE TO BE CIRCUIT JUDGE FOR THE NINTH CIRCUIT, BY HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA**

Senator FEINSTEIN. Thank you very much, Mr. Chairman. I know that Senator Boxer has already introduced Consuelo "Connie" Callahan, so I am going to be very brief.

As you well know, she currently serves in the California State court system as an appellate judge on the State's Third District Court of Appeals. That is located in Sacramento. I think she is incredibly uncontroversial for someone coming out of our State. I always seem to see the controversy surrounding an individual. There is none here. She was born in Palo Alto. She grew up in my home area, the San Francisco Bay area. She actually attended my alma mater, Stanford. She was graduated with honors. She then attended the University of the Pacific, McGeorge School of Law. She

has essentially spent a good deal of time as a government lawyer, a city attorney for the city of Stockton, then joined the San Joaquin district attorney's office as a deputy D.A. In that office, she established the county's first Child Abuse and Sexual Assault Unit. She has personally handled over 50 jury trials during her tenure as a prosecutor.

In 1986, she became a commissioner of the Stockton Municipal Court, and 6 years later she was appointed to the San Joaquin County Superior Court. In 1996, she was elevated to the State Court of Appeal where she has served since.

All ten justices who serve with Justice Callahan in the Third Appellate District have written in support of her nomination. She is qualified. They say she has the integrity, the capacity, the congeniality, and the diligence to serve with distinction on the Ninth Circuit, and I would ask that my full remarks be entered into the record.

Chairman HATCH. Without objection, we will put your full remarks in. We appreciate that.

Senator FEINSTEIN. Thanks very much.

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

Chairman HATCH. Senator Sessions, we will turn to you.

**PRESENTATION OF L. SCOTT COOGLER, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ALABAMA, BY HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA**

Senator SESSIONS. Thank you, Mr. Chairman. I would just like to briefly comment on Mr. Chertoff's nomination. I had the honor of serving with him in President Bush's administration as United States Attorney. He had a reputation then and maintains it as one of the most effective lawyers in the Department of Justice. He took on challenging criminal cases in that district, from organized crime to public corruption, obtained convictions of Mafia members and powerful politicians. He was a fearless and skilled prosecutor of great integrity, and, of course, he has continued that record of achievement at the Criminal Division of the Department of Justice now where he spearheaded some of America's most important law enforcement priorities of our time. He has testified before this Committee with great skill, and there is just no doubt about it that people in the know about the Department of Justice over the last 20 years, they would rank Michael Chertoff as one of the best lawyers to have served in that body and that institution. That is a high compliment. His record backs that up, and I think it is great that he has been nominated.

Mr. Chairman, I want to mention the superb nominee from Alabama, Scott Coogler, Judge Scott Coogler. He has the academic background, legal competence, and judicial temperament necessary for service on the bench he demonstrated during his 4 years as a State judge on the Alabama Sixth Judicial Circuit in Tuscaloosa County. By all accounts, he has served with distinction and garnered the respect of all the attorneys practicing in that area.

He has received his bachelor's degree with honors from the University of Alabama. In 1984, he graduated from the University of

Alabama School of Law, finishing in the top of his class. He clearly has the intellect to serve on the bench. He practiced law for close to 15 years, which I think is an important attribute of a good judge. He had a broad base of clients, handling civil and criminal issues. He understands the courtroom as a litigant, tried many cases to a verdict as a trial lawyer as an associate and chief and sole counsel on important cases. He has learned how participants in lawsuits should be treated.

In 1999, he joined the State bench. He has shown that he adheres to the rule of law. He is not affected by politics. I talked to a lot of lawyers in the Tuscaloosa area who practice before him. They are very impressed with Judge Coogler. Defense lawyers who thought, well, he had done a lot of plaintiff work, they were a little nervous. They found that he treats people fairly, plaintiffs and defendants, criminal lawyers and prosecutors. They told me they do not win all the time in court, but they believe he is a straight shooter who follows the law. I certainly agree with that and am supportive of him.

His public service extends beyond the courtroom. From 1988 to 1991, he served as a captain in the Judge Advocate General in the Alabama Army National Guard, and he has done more than his share of community service. He served as president of the University of Alabama Law Enforcement Academy Alumni Association, director of the Tuscaloosa Boys and Girls Club since 1999, director since 2000 of a group called FOCUS on Senior Citizens, which aids seniors in remaining independent and active. In addition, he served as the director for Miracle Riders, a program in which mentally and physically disabled children are taught how to ride and care for a horse.

This is a man who has deep connections to his community, high values and high ideals, a proven record of legal competence and integrity. I think he is a great nominee, Mr. Chairman, and I am pleased the President has submitted his name.

Chairman HATCH. Well, thank you, Senator.

Senator SESSIONS. I also would note, Mr. Chairman, he was rated unanimously well qualified, the highest possible rating by the American Bar Association.

Chairman HATCH. Thank you, Senator. That is great praise, as far as I am concerned.

I wonder if we can have all three of you nominees come to the table, and we will swear you all in, if you will remain standing. Please raise your right arms. Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Mr. CHERTOFF. I do.

Justice CALLAHAN. I do.

Judge COOGLER. I do.

Chairman HATCH. Please take your seats. Normally we would take the two circuit court nominees first, but we are going to put all three of you at the table so that we can move expeditiously.

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

Chairman HATCH. Let me just say that Consuelo Callahan, our nominee for the Ninth Circuit, has had an exemplary legal career

in California as a successful prosecutor and an esteemed jurist, as has been said by her Senators. During her 10-year career as a prosecutor, she has handled more than 50 jury trials. She also has firsthand experience with breaking the gender barrier. In 1992, she was appointed to the Superior Court of San Joaquin County, where she was the first female and Hispanic to serve on that court. She was also the first female member of the two local social and service organizations. In 1996, Justice Callahan became the first judge from San Joaquin County to be elevated to the California Court of Appeals in more than 73 years. The ten justices that serve with her on the Third Appellate District and work with her every day sent a letter to the Committee praising her skills as a jurist. They write, "Our only reservation in recommending her confirmation is that it will mean a significant loss to our court. We will miss Connie's energy and enthusiasm, her legal skills, and the positive way in which she fulfills her responsibilities as an appellate jurist." I will submit a copy of that letter for the record. Now, her colleagues' loss, in my opinion, is going to be the Federal judiciary's gain, and I have great confidence that the beleaguered Ninth Circuit will greatly benefit from your service there. In fact, I am counting on it.

Michael Chertoff, I can't say enough about Mike Chertoff. I have known him for a long, long time, and his Senators, both Democrats, have praised him very, very well, and he deserves it. He has won high marks in every job he has ever had from both Democrats and Republicans alike for his pro bono service as counsel to the New Jersey State Legislature during its investigation of racial profiling by the State police. He is a very familiar face to all of us here in the United States Senate as a result of his service as Assistant Attorney General for the Criminal Division at the U.S. Department of Justice and service in a whole wide variety of other ways.

I personally know that all of our colleagues or many of our colleagues admire his intellect, his legal skills, and commitment to the rule of law. I think the Bergen County Record said it best when it endorsed Mr. Chertoff's nomination on March 11th of this year. The paper editorialized, "Mr. Chertoff is exactly the type of nominee the Nation needs for Federal judgeships," and then concluded, "Mr. Chertoff is the type of smart, non-ideological high achiever whom Presidents of both parties should consider for the bench." I think that is very high praise, and I, too, firmly believe that Mr. Chertoff will make one of our great Federal appellate judges.

I have known you for a long time, Mike, and I think everybody who knows you knows what a fine person you are and what an outstanding legal mind you have. So we are just honored that you are willing to sacrifice and go on the court where you will make less than the average law review graduate, first year law review graduate. But we are going to try and change that, too. If I have my way, we are going to change that. It just isn't right.

Our sole district court nominee is L. Scott Coogler, who has been nominated for a seat on the Northern District of Alabama bench. Since 1999, Judge Coogler, as our distinguished Senator from Alabama has said, has served on the Alabama Circuit Court, Sixth Judicial Circuit, so he brings depth and experience to this position. Prior to that, he maintained a successful private practice, handling



a wide range of civil and criminal litigation cases, so Judge Coogler knows firsthand the importance of maintaining a solid judicial temperament. And I am particularly impressed that Judge Coogler has shared his expertise by teaching at his alma mater, the University of Alabama Law School, despite the demands of his judicial service.

So we welcome each of you to the Committee. We look forward to hearing your testimony, and I think, why don't we begin with you, Mr. Chertoff, if you have any statement, and I would like you to introduce your family again to us. And if you have a statement, we would be pleased to take that, and then we will go to Justice Callahan and then to Judge Coogler.

**STATEMENT OF MICHAEL CHERTOFF, NOMINEE TO BE  
CIRCUIT JUDGE FOR THE THIRD CIRCUIT**

Mr. CHERTOFF. Thank you, Mr. Chairman. I do not have a statement. I would be delighted to introduce my family again: my wife, Meryl, and my daughter, Emily, and my son, Philip. Stand up for a moment.

Chairman HATCH. Please stand up. I want the wife to stand, too, so we all can see. You have got to stand, too, Mrs. Chertoff.

Mr. CHERTOFF. I also want to thank you, Mr. Chairman, and Senator Sessions and my two Senators, Senator Lautenberg and Senator Corzine, for all of your gracious remarks. It is a pleasure to be before the Committee.

Thank you.

Chairman HATCH. Well, they are not nearly as laudatory as I would like them to be, and I really feel that deeply about your service. And I think others do as well.

[The biographical information of Mr. Chertoff follows:]

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

1. **Name:** Full name (include any former names used).  
Michael (NMN) Chertoff
2. **Position:** State the position for which you have been nominated.  
U.S. Circuit Judge, U.S. Court of Appeals for the Third Circuit
3. **Address:** List current office address and telephone number. If state of resident differs from your place of employment, please list the state where you currently reside.  

U.S. Department of Justice 950 Pennsylvania Ave., N.W. Rm. 2107 Washington, D.C. 20530 (202) 514-7200	Residence: Maryland
--	---------------------
4. **Birthplace:** State date and place of birth.  
November 28, 1953, Elizabeth, NJ
5. **Marital Status:** (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Please also indicate the number of dependent children.  
Meryl Chertoff, nee' Meryl Justin. Attorney. Currently employed at FEMA (new Department of Homeland Security), Disaster Response Branch, 500 C Street, SW, Washington, D.C. Two dependent children.
6. **Education:** List of reverse chronological order, listing most recent first, each college, law school, and any other institutions of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.  
- Harvard Law School, 1975-1978 - J.D. magna cum laude - 1978  
- Harvard College, Cambridge, MA - 1971-1975. A.B. magna cum laude - 1975  
- London School of Economics, UK, 1972-1973 - year abroad with credit.
7. **Employment Record:** List in reverse chronological order, listing most recent first, all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, non-profit or otherwise, with which

**you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or job description where appropriate.**

<b>6/01 - Present</b>	Assistant Attorney General U.S. Department of Justice 950 Pennsylvania Avenue, N.W. Washington, D.C. 20530
<b>5/94 - 5/01</b>	Partner, Latham & Watkins One Newark Center, 16 <sup>th</sup> Floor Newark, New Jersey 07101-3174
<b>1997 - 2001</b>	Trustee, Association of Criminal Defense Lawyers New Jersey
<b>2000 - 2001</b>	Special Counsel N.J. Senate Judiciary Committee Trenton, New Jersey
<b>1995 - 1999</b>	Investigations Officer N.Y. Mason Tenders District Council (Court-appointed)
<b>1994 - 1996</b>	Special Counsel U.S. Senate Whitewater Committee (includes service as minority counsel to the Banking Committee)
<b>1994 - 2001</b>	Director New Brunswick Development Corporation New Brunswick, New Jersey
<b>6/90 - 4/94</b>	United States Attorney U.S. Attorney's Office, D.N.J. Department of Justice 970 Broad Street, Rm. 702 Newark, NJ 07102
<b>7/87 - 6/90</b>	First Assistant U.S. Attorney U.S. Attorney's Office, D.N.J. Department of Justice 970 Broad Street, Rm. 702 Newark, NJ 07102

9/83 - 6/87      Assistant U.S. Attorney  
U.S. Attorney's Office, S.D.N.Y.  
Department of Justice  
One St. Andrews Plaza  
New York, NY 10007

8/80 - 8/83      Associate, Latham & Watkins  
1300 New Hampshire Ave. NW  
Washington, D.C.

7/79 - 7/80      Law Clerk, Justice William J. Brennan, Jr.  
United States Supreme Court  
One First Street, N.E.  
Washington, D.C.

7/78 - 7/79      Law Clerk, Judge Murray Gurfein  
U.S. Court of Appeals, 2d Circuit  
Foley Square, New York, NY 10007

6/78              Summer Associate, Miller, Cassidy, Larroca & Lewin  
2555 M Street, N.W.  
Washington, D.C. 20037

4/78 - 5/78      Part-time Staff, Massachusetts Legislative Oversight Commission  
State Capitol  
Boston, MA

9/77 - 4/78      Research Assistant, Harvard University School of Law  
Cambridge, MA

6/77 - 7/77      Summer Associate, Sullivan & Cromwell  
125 Broad Street, New York, NY 10004

6/76 - 7/76      Summer Associate, McCarter & English  
Gateway Four  
Newark, NJ 07102

6/75 - 7/75 Intern, Tax Analysts & Advocates  
6830 N. Fairfax  
Arlington, VA

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

NONE.

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

2002 - Juris Doctor honoris causa, Seton Hall Law School, Newark, N.J.

2002 - Trial Attorneys of New Jersey, Trial Bar Award for "Distinguished Service in the Cause of Justice"

1976-1978 - Member and Note Editor, Harvard Law Review

1986 - Annual Legal Award Association of Federal Investigators (for successful prosecution of corruption in Sullivan County, New York)

1987 U.S. Department of Justice John Marshall Award for Outstanding Achievement in Trial of Litigation (for successful prosecution of leaders of Mafia's national "Commission," United States v. Salerno, et al.)

1992 Anti-Defamation League Distinguished Public Service Award

1994 U.S. Department of Health & Human Services Inspector General Prosecutive Leadership Award

1997 Fellow, American Bar Foundation

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

Master, Edward Bennett Williams Inn of Court, Washington, D.C. 2001 -;

Ex Officio Member, Executive Committee, International Association of Prosecutors, 2001 -;

Editorial Board, New Jersey Law Journal 1994-2001;

N.J. Supreme Court Criminal Practice Committee, 1997-2000;

Association of the Federal Bar of the State of New Jersey; 1994-2001

Trustee, Association of Criminal Defense Lawyers - New Jersey 1997-2001;

Association of the Bar of the City N.Y., 1984 -  
 - Committee on Legal Education, 1984 - 1987  
 - Committee on Criminal Advocacy, 1987 - 1990;

Federal Bar Council (NY), 1989 - 2001;

New Jersey State Bar Association, 1989 - present  
 - Executive Board, Federal Practice Committee, 1989 - 1990;

Lawyers Advisory Committee, U.S. District Court,  
 District of New Jersey (ex officio), 1990 - 1994

American Bar Association, 1980 - 1983, 1997 - present  
 - Antitrust Section, 1980 - 1983  
 - American Bar Foundation, 1997 - present

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

District of Columbia	12/19/80
U.S. District Court, District of Columbia	2/2/81
U.S. Court of Appeals, D.C. Circuit	3/10/81
State of New York	12/7/87
U.S. Court of Appeals, 2d Circuit	1/5/84
State of New Jersey	6/7/90
U.S. District Court, S. District of New York	Jan. 1995
U.S. District Court, D.N.J.	6/7/90
U.S. Court of Appeals, 3d Circuit	5/26/95

U.S. Court of Appeals, 7<sup>th</sup> Circuit  
 Supreme Court of the U.S.

5/25/00  
 11/04/02

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

Associated Harvard Alumni; Nomahegan Swim Club, Westfield, NJ; Westfield, N.J., College Men's Club, Westfield, NJ (Raises scholarship money for college-bound students) Cosmos Club, 2121 Massachusetts Avenue, N.W., Washington, D.C.; Harvard Law Review; London School of Economics Alumni.

During my membership periods, none of these organizations discriminated on the basis of race, sex, or religion.

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

**Author:** Note, Valuation of Conrail Under the Fifth Amendment, 90 Harv.L.Rev. 596 (1977)

Case Note, U.S. Trust Co. v. New Jersey, 91 Harv.L.Rev. 83 (1977)

Book Review (with R. Hills) Shareholder Litigation, 60 Wash U.L.Q. 735 (1981)

Book Review of Confessions. Truth and the Law, 93 U.Mich.L.Rev. 1713 (1995)

Article: Changing Definitions of Willfulness in Federal Criminal Law, Washington Legal Foundation Legal Backgrounder, 10/21/94

Article: "Whitewater: Why It Matters" Newsweek

Presentation: "Corporate Self-Examination:  
Internal Investigation of Company  
Wrongdoing in the U.S." (Undated)

**Editor:** Note, Constitutional Problems in the Execution of Foreign Penal Sentences, 90 Harv.L.Rev.1500 (1977)

Note, The Finality Rule for Supreme Court Review of State Court Orders, 91 Harv.L.Rev. 1004 (1978)

Substantially wrote following editorials for N.J. Law Journal:

"Tools Against Terrorism," June 1996;

"Celebrity Jurors," September 1998;

"Unsolomonic Compromise," March 2000.

Victims Attain a Voice in the Criminal Justice Process, New Jersey Lawyer February/March 1994;

Letters: "People v. Sol Wachtler," New York Times Book Review;

Hill Interview: "Michael Chertoff, Senate  
Whitewater counsel says it's hard to conceal the  
truth," The Hill, by Jamie Stiehm.

Participation in a Symposium on Securities Law Enforcement, 17 Seton Hall Legis. J. 1 (1993).

Letter in support of Frederic Woocher as nominee to U.S. District Court, Central District of California, submitted as part of the record by Senator Boxer, November 10, 1999.

Copies of above articles and testimony are attached.

Taped Interviews with Court TV - Harvard Forum on the O.J. Simpson Case, Oct. 5, 1994; C-Span, Spring 1996 (Whitewater Hearings); CNNfn, 4/22/97 and 7/14/97 (Campaign Finance Rules); Fox News 5/11/97 (Whitewater); White Collar Crime Report "Famous White Collar Cases," (undated); A&E American Justice: Defending the Mob (undated). One copy of each tape is being supplied to the Committee.



Additionally, in November 1999, I testified before the N.J. Senate on the question of peremptory challenges in death penalty cases. There was no prepared text and I have no record of the testimony.

I have from time to time spoken to client groups, bar groups and community groups on legal issues involving corporate compliance and practical criminal law issues. I speak extemporaneously and have no recording of these remarks. These presentations included:

Remarks on Law and Humanity, Temple Beth Judah, Margate, NJ, April 28, 2001 (news article submitted).

Panelist, NY Law Journal Conference: Civil Litigation: A View from the Bench and Bar, New York, N. Y., March 22-23, 2001, March 1999, March 1998 (no notes or record except for audiotape of March 1999 session, one copy submitted to the Committee).

Remarks: "Anti-violence Initiatives by the Federal Government," Symposium on Violence held by the NJ Public Health Association and various NJ state agencies, Jamesburg, N.J., Oct. 13, 1993 (rough notes enclosed).

Participant: National Research Council, Urban Violence Conference, Washington, D.C., Oct. 7-9, 1993 (no notes or record).

Speaker on topic of victims' rights, NJ Bar Association Convention, Atlantic City, N.J., May 22, 1993 (no notes or record).

Speaker, "Environmental Regulation in New Jersey," Institute of Business Law, East Brunswick, N.J., April 14-15, 1993 (rough notes enclosed).

Speaker, "Environmental Compliance and Enforcement," Shanley & Fisher Conference, Morristown, N.J., April 1, 1993 (no notes or record).

Speaker on fraud issues, Conference of National Association of Certified Fraud Examiners, Edison, N.J., March 18, 1993 (no notes or record).

Panelist on Government Policy, ABA National Institute on Health Care Fraud, Orlando, Fla., February 12, 1993 (no notes or record).

- Panelist, Anatomy of a Sentence, Seton Hall Law School, Newark, N.J., March 2, 1993 (no records or record).
- Panelist, Hate and Bias Crimes Seminar, Institute for Continuing Legal Education of New Jersey, New Brunswick, N.J., January 8, 1993 (no notes or record).
- Panelist, Civil and Criminal Liability of Officers, Directors and Professionals: Bank and Thrift Litigation in the 1990's. Practising Law Institute, Washington, D.C., October 15-16, 1991 (no notes or record).

Apart from the foregoing, I have no record relating to other presentations I have given over the years prior to my assuming my current position.

From June 1995 to June 1996, while serving as Special Counsel to the Senate Whitewater Committee, I appeared on numerous news shows, and was interviewed by the media. These remarks are contained in various news databases.

Also, as Special Counsel to the Whitewater Committee, and as Special Counsel to the N.J. Senate Judiciary Committee from 2000 - 2001, I participated in numerous hearings, which were transcribed. One copy of the N.J. Senate transcripts is enclosed herewith.

Also, as U.S. Attorney I held press conferences from time to time on various cases and legal issues. I spoke extemporaneously and have no recording of these conferences. Quotes may appear in various news databases, however.

Since assuming my current position as Assistant Attorney General, I have spoken at the following events. I almost always speak without text; any prepared remarks are enclosed herewith.

- July 24, 2001 Speaker at Citizen Crime Commission Conference, Manhattan, NY "Law Enforcement Challenges"
- August 9, 2001 Speaker at the Army Navy Country Club, Arlington, Va. "Fraud Schemes" (text enclosed)
- August 26, 2001 Speaker at the Weed & Seed Conference, Philadelphia, PA.
- October 10, 2001 Speaker at Conference in NY

- October 22, 2001 ABA Money Laundering Enforcement Seminar: "Money Laundering Issues in 2001" - Arlington, Virginia
- October 23, 2001 Speaker at University of Virginia Law School, Charlottesville, Va "Terrorism"
- November 8, 2001 Speaker - The B'Nai B'Rith International Distinguished Achievement Award Dinner
- November 13, 2001 Anti-Terrorism Conference through Executive Office of United States Attorneys, Washington, DC "Terrorism"
- January 24, 2002 ABA White Collar Crime Conference  
Terrorism: "Proposed restructuring of the Department of Justice in the Wake of the 911 Terrorist attacks."
- February 2, 2002 ABA Philadelphia, PA - "Defending the Homeland: "Roles and Responsibilities"
- February 10, 2002 13<sup>th</sup> National Young Leadership Conference, Washington, D.C.  
Terrorism: "Are we Ready on Our Homefront"
- February 12, 2002 Anti Defamation League Legal Conference Terrorism Democracy:  
"Striking the Balance Between Security and Civil Liberties" New York
- February 13, 2002 The City Bar - Program sponsored by the Association's Council on Criminal Justice, Speaker, New York "Terrorism"
- February 27, 2002 ABA White Collar Crime Conference, Miami, Florida  
Speaker at Dinner Topic: "Terrorism"
- March 6, 2002 American Criminal Law Review Panel - U.S. Patriot Act and Civil Liberties" Washington, D.C.
- March 18, 2002 National Academic of Sciences - Roundtable Discussion "Terrorism" Washington, D.C.
- March 20, 2002 The Association of the Federal Bar of the State of New Jersey - Panelist  
"Civil & Criminal Legal Issues Arising Out of the Events of 911"  
New Jersey

April 30, 2002 OCDETF National Conference - Washington, D.C.  
 "Meeting the Demands of the New OCDETF and where DOJ fits into  
 The New OCDETF" (text enclosed)

May 15, 2002 ABA - Health Care Fraud Institute, San Francisco, California  
 "Current State and Future of Health Care Fraud Enforcement by DOJ"

May 22, 2002 New Jersey State Bar Annual Meeting, Atlantic City, NJ  
 "Responses to Terrorism"

May 31, 2002 Seton Hall Law School - Keynote Speaker and honorary degree recipient  
 Newark, New Jersey "Terrorism"

June 6, 2002 Delaware Bench Bar 2002 - Wilmington, DE - Panel "Terrorism"

August 9, 2002 ABA - Plenary Program: "Federal Enforcement 2002", Washington D.C.

August 10, 2002 ABA - Washington, D.C. "Leadership in a Time of Crisis: The Aftermath  
 of 911"

Sept. 8-12, 2002 7<sup>th</sup> Annual IAP Conference, London - "the Threat of Global Crime:  
 Trafficking in Humans, Drugs and Money"

September 9, 2002 Jesus College Cambridge, London  
 12<sup>th</sup> International Symposium on Economic Crime

September 18, 2002 Speaker at Georgetown University - Honors Grad Program

September 26, 2002 Panelist - Washington, D.C. - Corporate Fraud Conference "Investigation  
 & Prosecution Strategies Panel"

October 29, 2002 New York University Law School  
 "Civil Liberties in Post 911 America: A Debate"

Nov. 7-11, 2002 Asian American Journalist Association, Dallas, TX "Terrorism" Panel

November 9, 2002 Federal Judicial Conference, St. Thomas, Virgin Island, Speaker at Dinner  
 "Terrorism"

Nov. 14-16, 2002 Federalist Society's Twentieth Anniversary. Panelist "Law Enforcement  
 and War Against Terrorism, Washington, D.C."

- December 4, 2002 Chicago Crime Commission Stars of Distinction Awards Dinner, "Remarks" Chicago, IL.
- December 11, 2002 Roundtable on Social & Behavioral Sciences & Terrorism: "Modeling Terrorist Organizations", Washington, D.C. - Opening Remarks
- November 15, 2002 Panelist - The Federalist Society for Law and Public Policy Studies - "Law Enforcement and the War Against Terrorism" "Putting the Crooks out of Business"
- Jan. 12-14, 2003 NACDL's Advanced Criminal Law Seminar, Aspen, Colorado "Defending Against Terror: Freedoms in the Balance"
- January 22, 2003 Washington, D.C. - Corporate General Counsel Forum - Speaker at Luncheon - "Changes in Corporate Governance".
- Jan. 26-28, 2003 Workshop for Judges of the Ninth Circuit, Santa Barbera, CA., Civil Rights/National Security - "Cutting Edge Issues in Civil Liberties and National Security"

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

Testimony as invited commentator before the Senate Foreign Relations Committee regarding the constitutionality of proposed Penal Treaties with Mexico and Canada, 95<sup>th</sup> Cong. 1<sup>st</sup> Sess., June 16, 1977, pp. 135-171 (including Text of Note).

Testimony before the U.S. Senate Finance Committee on U.S. Customs Oversight, 5/18/99

Testimony before the U.S. House of Representatives Committee on Ways and Means, Subcommittee on Social Security, Sept. 24, 1992, on "Illegal Disclosure of Social Security Earnings Information by Employees of the Social Security Administration and Department of Health and Human Services Office of Inspector General.."

Since my nomination as Assistant Attorney General I have given the following congressional testimony (copies supplied herewith):

- May 9, 2001 Transcript of Chertoff confirmation Hearing

June 12, 2001 House Judiciary, Subcommittee on Crime

July 18, 2001 Senate Committee on Governmental Affairs, Permanent Select Subcommittee on Investigations

September 26, 2001 Senate Committee on Banking, Housing, and Urban Affairs

October 3, 2001 House Committee on Financial Services

November 14, 2001 House Judiciary, Subcommittee on Crime

November 15, 2001 House Permanent Select Committee on Intelligence

November 28, 2001 Senate Judiciary Committee

November 29, 2001 House Judiciary, Subcommittee on Crime

January 29, 2002 Senate Committee on Banking, Housing, and Urban Affairs

July 10, 2002 Senate Judiciary, Subcommittee on Crime and Drugs

October 9, 2002 Senate Finance committee

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

Excellent health. Last physical examination was January 2003.

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

- (a) a short summary and citations for the ten (10) most significant opinions you have written;
- (b) a short summary and citations for all ruling of yours that were reversed or significantly criticized on appeal, together with a short summary of an citations for the opinions of the reviewing court; and
- (c) a short summary of and citations for all significant opinions on federal or state constitutional issues, together with the citation for appellate court ruling on such opinions.

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

N/A. I have never been a judge.

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

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

Assistant U.S. Attorney, Southern District of New York (Appointment by U.S. Attorney Rudolph Giuliani 1983 - 1987

First Assistant U.S. Attorney, District of New Jersey (Appointment by U.S. Attorney Samuel A. Alito, Jr.) 1987 - 1990

United States Attorney, District of New Jersey (Appointment by U.S. District Court, then by President George H.W. Bush), with Senate advice and consent) 1990-1994

Investigations Officer, N.Y. Mason Tenders District Council (Court Appointment by U.S. District Judge Robert Sweet) 1995-1999

Commissioner, N.J. Election Law Enforcement Commission (Appointment by Governor Whitman, with state Senate advice and consent) 1996

Special Counsel, U.S. Senate Special Committee to Investigate Whitewater and Related Matters (including service as Minority Special Counsel to Banking Committee) (Appointment by Senate Committee) 1994-1996

Special Counsel, N.J. Senate Judiciary Committee (Appointment by Senate Committee) 2000-2001

Assistant Attorney General, U.S. Department of Justice, Criminal Division (Appointment by President George W. Bush with Senate advice and consent) 2001-Present

Have you ever held a position or played a role in a political campaign? If so,

please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I was an alternate delegate to the 2000 Union County, N.J. Republican Convention.

I supplied occasional advice on criminal justice issues to the Bush for President Campaign in 2000, and was a vice chair of the N.J. finance committee in 2000.

From 1997-2000, from time to time I served on finance committees in the campaigns of N.J. State Senators Donald Di Francesco, John Bennett and Joseph Kyrillos.

In the fall of 1996, I did some fundraising for U.S. Senate Candidate Dick Zimmer of New Jersey, and I introduced Bob Dole at a campaign event.

During 1998 and 1999, I served as occasional outside counsel to the local campaign organization of Essex County, N.J., Executive James Treffinger.

Over the years, I have contributed to various political campaigns.

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

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

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

7/78-7/79: Law clerk to the Honorable Murray I. Gurfein, U.S. Court of Appeals for the Second Circuit (now deceased).

7/79-7/80: Law clerk to the Honorable William J. Brennan, Jr., Associate Justice of the U.S. Supreme Court (now deceased).

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

I have never been a sole practitioner.



- (3) the date, 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.
- 8/80-8/83: Associate, Latham, Watkins & Hills formerly at 1333 New Hampshire Ave., N.W., Washington, DC; and 1001 Pennsylvania Ave., N.W., Washington, DC; now located at: Lincoln Square, 555 Eleventh Street, N.W., Washington, DC
- 9/83-6/87: Assistant U.S. Attorney Southern District of New York, One St. Andrews Plaza, New York, NY 10007
- 6/87-5/94: First Assistant and then U.S. Attorney, District of New Jersey, 970 Broad Street, Newark, NJ 07102
- 5/94-5/01: Partner, Latham & Watkins, One Newark Center, Newark, NJ 07101
- 1995-1999: Investigations Officer, N.Y. Mason Tenders District Council (Court Appointment) c/o Latham & Watkins, 885 Third Avenue, New York, NY 10022-4802
- 1996: Commissioner, N.J. Election Law Enforcement Commission, National State Bank Building, 12<sup>th</sup> Floor, 28 W. State Street, CN 185, Trenton, NJ 08625-0185 (Appointment, with state Senate advice and consent)
- 1994-1996: Special Counsel, U.S. Senate Special Committee to Investigate Whitewater and Related Matters, United, United States Senate, Washington, D.C. (Including service as Minority Special Counsel to Banking Committee) (Appointment)
- 2000-2001: Special Counsel, N.J. Senate Judiciary Committee, New Jersey Senate, N.J. Senate Majority Office, State House, P.O. Box 099, Trenton, NJ 08625-0068
- 2001-present: Assistant Attorney General, Criminal Division, U.S. Department of Justice, 10<sup>th</sup> & Constitution Avenue, N.W. Rm. 2107, Washington, D.C.
- (b) (1) Described the general character of your law practice and indicate by date if and when its character has changed over the years.

As a law firm associate (1980-83) my practice was principally large firm litigation, civil and criminal. Some portion of my work involved antitrust counseling, analysis of administrative action, and miscellaneous research.

As a federal prosecutor (1983-1994), I had extensive experience in all phases of criminal investigation and prosecution, including grand jury presentations, trial of cases, and appellate argument. I handled major organized crime, fraud, and corruption prosecutions.

As First Assistant and United States Attorney in New Jersey (1987-1994), I supervised and participated in all types of criminal and civil litigation pursued by my Office, and personally tried organized crime and fraud cases.

As a partner (1994-2001) at Latham & Watkins, I was national chair of the firm's white collar criminal practice. I personally tried numerous criminal and civil cases; represented clients in criminal and SEC investigations, legislative hearings, and business disputes. I was retained by government bodies and corporations to conduct sensitive investigations. For example, I was appointed by U.S. District Judge Robert W. Sweet of the S.D.N.Y. to serve as investigative officer for a labor union under court supervision, and by the New Jersey Senate Judiciary Committee to serve as counsel investigating both state inmate release practices and the issue of state police racial profiling.

As Assistant Attorney General, my practice has involved the prosecution of criminal matters nationally, including, but not limited to, terrorism prosecutions and prosecution of various corporate frauds.

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

I have specialized in practice in criminal and enforcement proceedings. My clients in private practice, have varied and have included large and small public corporations, private companies, prominent political and public figures, individual business people, lawyers, police officers, and news reporters. Currently, my client is the United States.

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

I have appeared in court frequently, both when I was a prosecutor and as a private practitioner. As Assistant Attorney General, I appear occasionally.

(2) Indicate the percentage of these appearances in

- (A) federal courts (80-90%)
- (B) state courts of record; (10-20%)
- (C) other courts. (0%)

(3) Indicate the percentage of these appearances in:

- (A) civil proceedings;
- (B) criminal proceedings.

In private practice from 1994-2001, about 75% criminal and 25% civil.

As a prosecutor, 95% criminal, 5% civil.

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

Approximately 30-35 trials to verdict or judgment. In almost all, I was sole or chief counsel.

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

- (a) jury: About 90%
- (b) non-jury: About 10%

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

In private practice I participated in writing a amicus brief on behalf of Sears, Roebuck in Sony Corp. v. Universal Studios, No. 81-1687 (Jan. 17, 1984). I do not have a copy of the brief.

In November 2002, I argued before the Supreme Court as amicus in Ewing v. California, Dkt. No. 01-6978

As Assistant Attorney General, my name appears as a matter of course on

all briefs filed by the U.S. in criminal matters, but I normally do not see the briefs before they are filed.

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

During my first period in private practice (1980-1983) I represented three indigent defendants on death row in Arkansas through a program operated by the NAACP Legal Defense Fund, and also another indigent defendant in a local criminal appeal. I estimate devoting at least several hundred hours to these cases over three years.

During my second period in practice, my firm and I devoted hundreds of hours, pro bono to conducting a state senate investigation into racial profiling by the state police. At the request of the presiding judge, I also represented pro bono, Elizabeth Felton in U.S. v. Felton, a tax and bankruptcy prosecution. The case resulted in a favorable disposition and involved about 27 hours of work.

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

- (a) the citations, if the cases were reported, and the docket number and date if unreported;
- (b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;
- (c) the party or parties whom you represented; and
- (d) described in detail the nature of your participation in the litigation and the final disposition of the case.

1. **United States v. Thomas Smith, et al.**  
U.S. Dist. Ct., D.N.J.  
Dkt. No. 00-399 (JCL)  
Before Honorable John Lifland and a jury.  
Tried - Oct - December 2000

I was defense counsel for Thomas Smith, a former police officer, charged in this multi-defendant case with a violation of civil rights arising from the death of an individual in police custody. After the trial of approximately 8 weeks, my client was convicted of civil rights conspiracy and a misdemeanor substantive violation. Post-trial motions are now pending.

At trial, I argued virtually all of the motions, conducted virtually all witness examination, and addressed the jury on behalf of my client.

**Co-Counsel:**

For Brian Smith                      Peter Willis  
Willis & Young  
921 Bergen Avenue  
Jersey City, NJ 07306  
(201) 659-2090

For Andrew Garth                      Anthony Iacullo  
Iacullo Saluti & Martino  
103 Park Street, Third Floor  
Montclair, NJ 07042  
(973) 746-5858

For Tyrone Payton                      William Sayers  
293 Eisenhower Parkway  
Livingston, N.J. 07601  
(973) 992-5800

For Paul Carpentieri                      Robert Galantucci  
Galantucci & Patuto  
55 State Street  
Hackensack, NJ 07601  
(201) 646-1100

**Prosecution:**

Patty Schwartz, AUSA  
U.S. Attorney's Office  
970 Broad Street  
Newark, NJ 07102  
(973) 645-2700

2. **State v. Michael Francis**  
NJ Supr. Ct., Mercer County  
Ind. No. 97-07-022  
Before the Honorable Andrew Smithson and a jury.  
Tried January 2000

I was defense counsel in this high profile state criminal case, in which the former Chairman of the New Jersey Sports and Exposition was charged with multiple counts of alleged official misconduct through conflict of interest, extortion, and false statements. Before trial, most of the charges were dismissed on defense motion, on the ground that the allegations did not amount to a crime under state law or were the product of entrapment. The remaining extortion charges were tried to a jury over several days. At the close of the evidence, the trial judge granted the defense motion for acquittal.

I argued the pretrial motions, gave all jury addresses, and conducted all witness examinations.

**Prosecution:**

John A. Matthews, III  
Deputy Attorney General  
State of New Jersey  
Hughes Justice Complex  
Trenton, NJ 08625  
(609) 984-6500

3. **United States v. John Kelly**  
U.S. Dist. Ct., D.N.J.  
Dkt No. Cr. 98-194 (JBS)  
Before the Honorable Jerome B. Simandle and a jury  
Tried August 1998

I was defense counsel in this tax evasion case, in which a doctor and his partner were charged with three years of tax evasion. After a 2-week trial, the defendant was acquitted by the jury.

I argued all motions, gave all jury addresses and conducted all witness examinations.

**Co-Counsel:**

For Michael Gentile

Kevin A. Marino  
One Newark Center  
Newark, NJ 07102-5211  
(973) 824-0300

For Philip Alampi

Walter Weir, Jr.,  
Weir & Partners, LLP  
215 Fries Mill Road  
Turnersville, NJ 08012  
(856) 740-1490

**Prosecutor:**

Carlos Ortiz, AUSA  
U.S. Attorney's Office  
970 Broad Street, 7<sup>th</sup> Floor  
Newark, NJ 07102  
(973) 645-2700

4. **United States v. Antar**  
U.S.D.C., D.N.J.  
Dkt No. Cr. 92-347 (NHP)  
Before Honorable Nicholas Politan and a jury  
Tried June and July 1993  
Rev'd and remanded, 53 F.3d 568 (1995)

I was chief trial prosecutor in this five week racketeering and securities fraud trial which alleged that consumer electronics king "Crazy Eddie" Antar manipulated his stock over a period of years. Antar and his brothers were convicted of racketeering and securities fraud. The conviction was later reversed (after I had left office) because of comments made by the trial judge at sentencing.

At trial, I delivered the opening and rebuttal summations, presented many of the witnesses on direct examination, and conducted the cross-examinations.

**Co-Counsel:**

Paul Weissman, AUSA  
U.S. Attorney's Office  
970 Broad Street, 7th Floor  
Newark, NJ 07102  
(973) 645-2700

**Defense Counsel:**

For Eddie Antar

John Arseneault  
Arseneault & Fassett  
560 Main Street  
Chatham, NJ 07928  
(973) 635-3366

For Mitchell Antar

Jack Ford

American Broadcasting Company  
77 West 66<sup>th</sup> Street  
New York, NY 10023  
(212) 456-1000

For Alan Antar

Gerald Krovatin  
Krovatin & Associates, LLC  
744 Broad Street  
Newark, NJ 07102  
(973) 424-9777

5. **United States v. Gerald McCann**  
U.S. Dist. Ct., D.N.J.  
Dkt. No. Cr. 91-347 (JEL)  
Before Honorable John Lifland and jury  
Tried December 1991  
Aff'd by Order, U.S. Court of Appeals 3<sup>rd</sup> Cir.

I was chief trial prosecutor and successfully handled the appeal in this mail fraud, bank fraud and tax evasion trial of the Mayor of Jersey City, New Jersey. The case arose out of an investment fraud perpetrated by the defendant when he was out of office. The defendant was convicted of 14 felonies, sentenced to jail and removed from office.

I supervised the investigation, argued motions, delivered the opening and rebuttal summation, and examined many witnesses, including the defendant himself.

**Defense Counsel:** Matthew Boylan  
Lowenstein, Sandler  
65 Livingston Avenue  
Roseland, NJ 07068  
(973) 597-2324

6. **United States v. Louis Manna et al.**  
U.S. Dist. Ct., D.N.J.  
Dkt. No. 88-239 (MTB)  
Before the Honorable Maryanne Trump Barry and a jury.  
Tried - February 28 - June 26, 1989  
Aff'd by order. U.S. Ct. App., 3d Cir. Nov. 21, 1990

I was chief trial prosecutor and successfully argued the appeal in this complex, four-month RICO murder prosecution of the consigliere (number 3 ranking member) of the Genovese LCN Family and his associates. The principal defendants were convicted, inter alia, of conspiring to murder John Gotti, boss of the Gambino LCN Family, and



Irwin Schiff, an organized crime-connected businessman, and of various other offenses. Manna and his chief associates received 75-to-80-year prison terms.

I (1) supervised the investigation, (2) argued many of the pretrial motions, (3) delivered the opening and two day-long summations to the jury, (4) presented most of the direct testimony and (5) conducted cross-examination of all the numerous defense witnesses.

**Co-Counsel:**

Maria Beardell, Esq.  
P. O. Box 712  
Waverly, PA 1847  
(717) 586-5971

**Defense Counsel:**

For Louis Manna

Raymond A. Brown  
Brown, Brown & Kologi  
Gateway One  
Newark, NJ 07102  
(973) 622-1846

For Martin Casella

William C. Cagney  
Windels, Marx, Lane &  
Mittendorf, LLP  
120 Albany Street Plaza  
New Brunswick, NJ 08901  
(732) 846-7600

For Richard DeSciscio

David Ruhnke  
Ruhnke & Barrett  
47 Park Avenue  
Montclair, NJ 07042  
(973) 744-1000

For Frank Daniello

Louis C. Esposito  
411 Pompton Avenue  
Cedar Grove, NJ 07009  
(973) 857-5104

For John Derrico

Jerome Ballarotto  
830 Bear Tavern Road  
West Trenton, NJ 08628  
(609) 882-2225

For Rocco Napoli

Michael J. Sluka  
Sluka & Minasian, LLC  
638 Newark Avenue

Jersey City, NJ 07306  
(201) 798-6500

7. **United States v. David Friedland**  
U.S. Dist. Ct., D.N.J.  
Dkt. No. 85 Cr. 322 (JFG)  
Before the Honorable John F. Gerry and a jury.  
Tried - Sept. 1988  
No appeal.

In December 1987, former New Jersey State Senator David Friedland was apprehended in the Maldives Islands on a fugitive warrant. Friedland had been an international fugitive from a pension fund fraud and RICO indictment.

After Friedland's apprehension, I was chief prosecutor at the pretrial and trial stages of the case. I conducted some of the direct and all of the cross-examination at a pretrial suppression hearing, prepared for trial and conducted most of the direct examination at trial, which ended after one week of testimony when Friedland abruptly pled guilty to the RICO charge.

**Co-Counsel:**

J. Fortier Imbert  
425 Park Avenue  
New York, NY 10043  
(212) 559-0825

**Defense Counsel:**

Peter Willis, Esq.  
Willis & Young  
921 Bergen Avenue  
Jersey City, NJ 07306  
(201) 659-2090

8. **United States v. Anthony Salerno, et al.**  
U.S. Dist. Ct., S.D.N.Y.  
Dkt. No. 85 Cr. 139 (RO)  
Before the Honorable Richard Owen and a Jury  
Tried - Sept. 6 - Nov. 19, 1986  
Aff'd, U.S. Ct App., 2d Cir.  
865 F.2d 1370 (1989); 868 F.2d 524 (1989)

I was chief trial prosecutor in the Mafia "Commission case," which charged the Bosses of all five New York La Cosa Nostra Families, and other high ranking Mafia Members, with operating La Cosa Nostra's presiding national "Commission" through a pattern of racketeering acts such as extortion, loan sharking, and the murders of Mafia Boss Carmine Galante and two associates.<sup>1</sup> After a three-month trial, all eight defendants (including three LCN Bosses) were convicted on all counts, and seven were sentenced to 100-year prison terms.

I supervised the two-year investigation and was lead attorney at trial. During the trial, I delivered the opening address and day-long rebuttal summation, conducted much direct examination - including the examination of major cooperators - and conducted all cross-examination. My co-counsel and I received the 1987 John Marshall Award of the Department of Justice for our handling of the trial.

**Co-Counsel:**

John F. Savarese  
Watchell, Lipton, Rosen & Katz  
299 Park Avenue  
New York, NY 10171  
(212) 371-9220

J. Gilmore Childers  
Goldman Sachs & Co  
85 Broad Street  
New York, NY 10004  
(212) 902-1000

**Defense Counsel:**

For Anthony Salerno

Anthony Cardinale  
One Commercial Wharf West  
Boston, MA 02110  
(617) 523-6163

For Anthony Corallo

Albert Guadelli  
14 Tennis Place  
Forest Hills, NY 11375  
(718) 268-4343

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<sup>1</sup> One defendant (Castellano) was murdered and two others died before trial commenced.

For Salvatore Santoro	Samuel H. Dawson (Deceased) 305 Madison Avenue New York, NY 10165 (212) 922-1080
For Christopher Furnari	James LaRossa LaRossa, Mitchell & Ross 41 Madison Ave., 34 <sup>th</sup> Floor New York, NY 10010 (212) 696-9700
Carmine Persico, Jr.	Pro Se
Gennaro Langella	Frank Lopez Last known address: 20 Vesey Street New York, NY 10007 (212) 964-2121
Ralph Scopo	John Jacobs 225 Broadway New York, NY 10007 (212) 571-0805
Anthony Indelicato	Robert Blossner 225 Broadway New York, NY 10007 (212) 571-0805

9. **United States v. Joseph Massino, et al.**  
U.S. Dist. Ct., S.D.N.Y.  
Dkt. No. 81 Cr. 803 (RWS)  
Before the Honorable Robert W. Sweet and a jury.  
Tried - April-June, 1987

After defendant Joseph Massino was apprehended as a fugitive, I was asked to try him and another defendant as co-prosecutor in a racketeering case. The indictment charged the defendants with committing several murders and hijackings as part of the Bonanno La Cosa Nostra Family.

During the six-week trial, I presented the jury opening and rebuttal summation, and conducted approximately half of the direct examination. At the conclusion of the

trial, the defendants were found to have committed several hijacking racketeering acts and acquitted of the murders; the case was then dismissed on the ground that none of the racketeering acts found by the jury fell within the applicable statute of limitations period.

**Co-Counsel:**

Helen Gredd  
Lankler, Siffert & Wohl  
500 5<sup>th</sup> Avenue  
New York, NY 10110  
(212) 921-8399

**Defense Counsel:**

For Joseph Massino

Samuel Dawson (Deceased)  
305 Madison Avenue  
New York, NY 10165  
(212) 922-1080

For Salvatore Vitale

Bruce Cutler  
41 Madison Ave., 34<sup>th</sup> Floor  
New York, NY 10010  
(212) 233-6100

10. **United States v. Ingber, et al.**

U.S. Dist. Ct., S.D.N.Y.

Dkt. No. 85 Cr. 795 (CLB)

Before the Honorable Charles L. Brieant (Bench Trial)

Tried - February - April, 1986 (intermittently)

Aff'd by order, U.S. Ct. Ap., 2d Cir., Feb. 4, 1987

See also Ingber v. Enzor, 841 F.2d 450 (2d Cir. 1988)

I was sole prosecutor in this corruption and fraud case which charged Brian Ingber, the Chairman of the Board of Supervisors of Sullivan County, New York, and three others with racketeering, mail fraud and false statements to EPA in connection with a federally-funded environmental (sewer plant) project. The case was the culmination of an 18-month investigation which I supervised. At the conclusion of trial, the trial judge found a second defendant, the project manager, guilty of false statements. Two other defendants were acquitted. Both convicted defendants were sentenced to jail terms. I was awarded the 1986 Annual Legal Award of the Association of Federal Investigators for this investigation and prosecution.

**Defense Counsel:**

For Brian Ingber	Elkan Abramowitz Morvillo & Abramowitz 565 5 <sup>th</sup> Avenue New York, NY 10017 (212) 880-9500
For Wayne Pimos	William I. Aronwald Aronwald & Pykett 925 Westchester Avenue White Plains, NY 10604 (914) 946-6565
For Howard Ingber	Frederick P. Hafetz 500 5 <sup>th</sup> Avenue New York, NY 10110 (212) 997-7400
For Thomas Peck	Frank Zeccola Levinson, Zeccola, Reineke Box 244 Central Valley, NY 10917 (845) 928-9444

10. **United States v. Brian Ingber**  
 U.S. Dist. Ct., S.D.N.Y.  
 Dkt. No. 85 Cr. 795 (CLB)  
 Before the Honorable Charles L. Bricant and a jury.  
 Tried January 6-16, 1986  
 Aff'd by order, U.S. Ct. App., 2d Cir., Feb. 4, 1987  
 See also Ingber v. Enzor, 841 F.2d 450 (2d Cir. 1988)

This trial proceeded on a charge severed from the overall Ingber case described above. Ingber was accused of violating the federal mail fraud statute by fraudulently tampering with absentee ballots for a local election. I was sole prosecutor and the defendant was convicted. The conviction was affirmed but subsequently overturned by collateral attack after the Supreme Court issued its McNally decision limiting the application of the mail fraud statute in corruption cases.

**Defense Counsel:**

For Brian Ingber

Elkan Abramowitz  
Morvillo & Abramowitz  
Suite 1500  
1120 Ave. of the Americas  
New York, NY 10036  
(212) 221-1414

20. **Criminal History:** State whether you have ever been convicted of a crime, within ten years of your nomination, other than a minor traffic violation, that is reflected in a record

available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the offense. **NONE**

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

I was a defendant in an automobile accident in which my car was struck from behind. The lawsuit was filed in 1998 and the court entered judgment in my favor in April 2000.

In 1981, I received a divorce on consent in Superior Court, D.C.

Additionally, in my official capacity as U.S. Attorney, I was named as a party in a number of civil suits. I was not found liable in any of them. (See attached).

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

I will consult with judicial ethics officials regarding any issues and follow the Code of Judicial Conduct 28 U.S.C. §455. I do not envision any categories of litigation likely to present near-term potential conflicts, except for any litigation

involving the Criminal Division of the Department of Justice, during my tenure.

23. **Outside Commitments During Court Service:** Do you have any plans, commitments, or arrangements to pursue outside employment, with or without compensation, during your service with the court? **NO** If so, explain.
24. **Sources of Income:** List sources and amounts of all income received during the calendar year preceding the nomination, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500.00. 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 Ethics in Government Act filing.

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

See attached Net Worth Statement.

26. **Selection Process:** Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? Not for Court of Appeals

- (a) If so, did it recommend your nomination?
- (b) Describe your experience in the judicial selection process, including the circumstances leading to your nomination and the interviews in which you participated.

I met with officials of the White House Counsel's Office and of the Department of Justice to discuss my interest in this judicial position, completed forms, underwent another FBI background investigation..

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

No.



Case Selection Page

55.

Case Selection Page

Case Number	Title	Filing Date	Last Updated
<u>1:97cv04792</u> ✓	DALENE v. GERRY	09/29/97	04/16/98
<u>2:91cv02426</u> ✓	SASSOWER v. CHERTOFF	06/04/91	09/23/91
<u>2:92cv04400</u> ✓	PALKHIWALA v. USA	10/20/92	05/24/93
<u>2:93cv02740</u> ✓	GAYDOS v. CHERTOFF	06/24/93	08/17/95
<u>2:93cv03684</u> ✓	CRUDUP v. UNITED STATES INC.	08/18/93	07/17/95
<u>2:93cv05588</u> ✓	BARLOW v. STATE OF NEW JERSEY	12/20/93	12/27/93
<u>2:94cv00026</u> ✓	EDMOND v. PARELL	01/03/94	10/03/94
<u>2:94cv00396</u> ✓	LYDEN v. IRS	01/24/94	06/22/94
<u>2:95cv05434</u> ✓	RIVERA v. WINTER	10/24/95	11/01/95
<u>3:94cv04741</u> ✓	BETHANCOURT v. RAFFERTY	09/21/94	12/13/99
<u>3:96cv02038</u> ✓	MAYLES v. LECHNER	05/02/96	10/30/96
<u>3:96cv04075</u> ✓	MAYLES v. LECHNER	08/19/96	01/26/98

There were 12 matching case records found.

PACER Service Center			
Transaction Receipt			
03/07/2001 11:33:22			
PACER Login:	us3697	Client Code:	us attorney s office
Description:	case select	Search Criteria:	CHERTOFF, MICHAEL
Billable Pages:	1	Cost:	0.07

MICHAEL CHERTOFF 136-38-6790

U.S. District Court  
 USDC District of Columbia (Washington)  
 CIVIL DOCKET FOR CASE #: 02-CV-1676

SMITH v. ASHCROFT, et al

Filed: 08/22/02  
 Assigned to: Judge UNASSIGNED  
 Demand: \$1,000,000  
 Nature of Suit: 440  
 Lead Docket: None  
 Jurisdiction: US Defendant  
 Dkt# in other court: None  
 Cause: 42:1983 Civil Rights Act

Case type: 1. civil 2. pro n  
 THOMAS W. SMITH  
 plaintiff

THOMAS W. SMITH  
 Apartment 168  
 ICCR LD NYC psel (PRO SE)  
 2117 L Street  
 Washington, DC 20037

v.  
 JOHN ASHCROFT, US Attorney  
 General  
 federal defendant  
 LARRY THOMPSON, Asst. Attorney  
 General  
 federal defendant  
 MICHAEL CHERTOFF, Director,  
 Criminal Division, DOJ  
 federal defendant  
 ROBERT S. MUELLER  
 federal defendant  
 JOHN P. JUMPER, Chief of Staff,  
 USAF  
 federal defendant  
 UNITED STATES AIR FORCE,  
 Correction of Military Records  
 federal defendant  
 METROPOLITAN POLICE DEPARTMENT  
 defendant  
 KATHY MCWILLIAMS  
 defendant  
 - CHEEMA, DR.  
 defendant

## DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
8/22/02	1	COMPLAINT filed by plaintiff THOMAS W. SMITH; attachments (cjp) [Entry date 08/27/02]
8/22/02	--	SUMMONS NOT ISSUED. (cjp) [Entry date 08/27/02]
8/22/02	2	APPLICATION by plaintiff THOMAS W. SMITH to proceed in forma pauperis (cjp) [Entry date 08/27/02]
8/22/02	3	MOTION filed by plaintiff THOMAS W. SMITH to stay order (cjp) [Entry date 08/27/02]
8/22/02	4	MEMORANDUM AND DISMISSAL ORDER by Judge Ellen S. Huvelle : granting motion to proceed in forma pauperis [2-1] by THOMAS W. SMITH dismissing complaint [1-1] without prejudice (N) (cjp) [Entry date 08/27/02]
8/22/02	5	FINAL JUDGMENT entered by the Clerk dismissing the complaint without prejudice. (N) (cjp) [Entry date 08/27/02]

Case Flags:  
TYPE  
L CLOSED

END OF DOCKET: 1:02cv1676

PACER Service Center  
Transaction Receipt

02/26/2003 09:02:40

PACER Login:	us7570	Client Code:	jlm
Description:	docket report	Search Criteria:	1:02cv01676
Billable Pages:	3	Cost:	0.21

Chairman HATCH. Justice Callahan, would you introduce the folks who are with you here?

**STATEMENT OF CONSUELO MARIA CALLAHAN, NOMINEE TO  
BE CIRCUIT JUDGE FOR THE NINTH CIRCUIT**

Justice CALLAHAN. Thank you, Mr. Chairman. I will introduce my family again and my husband, if they would stand, my husband, Randy; Will Nichols, a friend of the family; and I'd also like to introduce Ali Oromchian, who worked for me when he was in law school and has just graduated from George Washington with an LLM and is working in this area.

Chairman HATCH. Great. Congratulations. We are happy to have all of you here, all the family members here. Thank you for being here.

Justice CALLAHAN. Thank you, Mr. Chairman, for this opportunity, along with other Senators, to have this hearing today, and I would similarly like to express my great gratitude for the introductions by my home State Senators. it was a great honor for me to be introduced by them here before this Committee.

Chairman HATCH. Thank you.

[The biographical information of Justice Callahan follows:]

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

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

Consuelo Maria Callahan

Also used:

Connie Maria Callahan  
Connie M. Callahan  
Connie Callahan

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

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

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

Court of Appeal (State of California)  
Third Appellate District  
914 Capitol Mall  
Sacramento, California 95814  
916.654.0234

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

June 9, 1950  
Palo Alto, California

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

Married. Spouse: Randy C. Haight

Supervisory Special Agent  
Bureau of Alcohol, Tobacco and Firearms (ATF)  
San Francisco Field Division  
San Francisco Group IV  
221 Main Street, Suite 1250  
San Francisco, California 94105

I have no dependent children.

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

University of Virginia School of Law  
6/02 to Present  
LLM – Judicial Process  
(To be awarded upon completion - 2004)

McGeorge School of Law  
University of the Pacific  
8/72 to 5/75  
JD - May 31, 1975

Leland Stanford Junior University  
9/68 to 6/72  
AB – Honors English - June 11, 1972

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

Associate Justice  
Court of Appeal State of California  
Third Appellate District  
914 Capitol Mall  
Sacramento, California 95814

Associate Justice (Pro Tem)  
State of California  
Supreme Court  
350 McAllister Street  
San Francisco, California 94102  
Artiglio v. Corning Inc.  
18 Cal. 4<sup>th</sup> 604

Judge  
State of California  
Superior Court San Joaquin County  
222 E. Weber Avenue  
Stockton, California 95202

Court Commissioner  
Municipal Court of Stockton  
San Joaquin County  
222 E. Weber Avenue  
Stockton, California 95202

Supervisory District Attorney  
San Joaquin County District Attorney's Office  
222 E. Weber Avenue, Room 202  
Stockton, California 95202

Deputy District Attorney  
San Joaquin County District Attorney's Office  
222 E. Weber Avenue, Room 202  
Stockton, California 95202

Deputy City Attorney  
City of Stockton  
425 N. El Dorado Street  
Stockton, California 95202

Law Clerk – City Attorney's Office  
City of Stockton  
425 N. El Dorado Street  
Stockton, California 95202

Legal Intern  
Sacramento County  
Public Defender's Office  
700 H Street  
Sacramento, California 95814

McGeorge School of Law Alumni Board  
1999 to present

California Judges Association Executive Board  
1995 to 1996 and 1999 to 2002

San Joaquin County Child Abuse Prevention Council Board  
1987 to 1993

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

None.

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

Moot Court Finalist

San Joaquin County Juvenile Justice Commission,

Award for work in the field of child abuse/sexual assault

Commission on the Status of Women,

Susan B. Anthony Award – Woman of Achievement

San Joaquin County Mediation Center, Peacemaker of the Year

San Joaquin County Law Day Award Recipient

Action of Behalf of Children (ABC) – Stockton,

Child Advocate Award

Induction into the Stockton Mexican-American Hall of Fame

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

Women Lawyers of San Joaquin County

Treasurer and Board of Governors, 1980 to 1986

San Joaquin County Bar Association

Board of Governors, 1983 to 1985

Judicial Council of California

Executive Legislative Action Network, 1994 to 1996

California Judges Association

Executive Board

1995 to 1996 (Trial Court Representative)

1999 to 2002 (Appellate Court Representative)



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

State of California  
 All courts of California  
 United States District Court, Eastern District  
 December 1975  
 (No lapses in membership)

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

McGeorge School of Law  
 Alumni Board, 1999 to present  
 Secretary, 2001; Vice-President, 2002; and President, 2003

Anthony M. Kennedy Inn of Court  
 Member/Master of the Bench, 1997 to present  
 Inn President, 2000 to present

California Judges Association  
 Executive Board, 1995 to 1996 and 1999 to 2002

Rotary International  
 Downtown Stockton Chapter, 1993 to 1997  
 Prior to my membership in Rotary International, this was a men-only service organization.

Yosemite Club  
 Stockton, California  
 Member, 1993 to 1997  
 Prior to my membership in the Yosemite Club of Stockton, it was a men-only private club.

San Joaquin County Child Abuse Prevention Council  
 Board Member, 1987 to 1993  
 President, 1992 to 1993

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

In 1973 I authored a recruitment brochure entitled, "Women in Law" for the McGeorge School of Law. No copy available.

I am not a frequent public speaker. I recall giving the following speeches:

- 1) Keynote speaker for California Women Lawyers at a one day seminar – "How to Become a Judge," 2/23/02, Sacramento, California;
- 2) Speech to Women Lawyers of Sacramento – "Retention Elections," 5/24/01, Sacramento, California;
- 3) Keynote speaker for the Association of Police Training Officers – "Changes in the Legal Landscape: The Need for Ethics and Civility in the Workplace," 10/11/00, Sacramento, California;
- 4) Keynote speaker at the Diversity Forum, University of the Pacific, "Personal Success and Success in the Workplace," 4/23/99, Stockton, California;
- 5) Keynote speaker for McGeorge School of Law, Dean's Counsel – "The Value of My McGeorge Education," 6/9/98, Sacramento, California;
- 6) Keynote address to graduates of the Criminal Justice Program at California State University – "A 25 Year Retrospective on the Courts and Law Enforcement," 4/25/98, Sacramento, California;
- 7) Graduation speech, Humphreys School of Law (Inspirational theme)– 5/97, Stockton, California.

To my knowledge, none of my speeches was audio or video tape recorded. I do not have an actual text of any of my speeches. I have provided outlines of the subject matter I intended to cover in these speeches. I cannot be certain that I covered all outline points. I generally allow questions where time permits. I have no specific recollection of any of the questions asked and answers given. I have attached an article discussing the content of the 5/24/01 speech on retention elections in lieu of an outline.

I have also attached written material that I helped prepare for three different legal education programs occurring in April 1999, September 1999, and January 2002. In all three programs there were co-instructors. The materials contain summaries of law and cases that were relevant to the topics being discussed.

1) The April 1999 materials were part of a Continuing Legal Education (CLE) Program on the Court of Appeal and appellate practice. This program was done with Jay-Allen Eisen, a certified appellate specialist.

2) The September 1999 program was a "Civil Law Update" presented at a research attorney's conference. This program was done with Justice Haller and Justice Wiseman, California Court of Appeal justices.

3) The January 2002 program was a Continuing Legal Education Program held at McGeorge School of Law. The panel was composed of legal scholars, lawyers, and one judge.

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

None.

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

Excellent  
November, 2002

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

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

1. People v. Carmony (2002) 99 Cal.App.4th 317.  
Review denied August 28, 2002.

SUMMARY

Defendant, who had been sentenced to prison after being convicted of sexual offenses against minors and was scheduled for release on parole, became the subject of proceedings under the Sexually Violent Predators Act (SVPA; Welf. & Inst. Code, § 6600 et seq.). At the time of his convictions, he had been determined not to be a mentally disordered offender. In the SVPA proceedings, the trial court admitted two psychological evaluations that were based on interviews with defendant and that supported a finding that defendant was a sexually violent predator. Defendant's expert disagreed with those evaluations. The trial court found beyond a reasonable doubt that defendant was a sexually violent predator. (Superior Court of Sacramento County, No. 61422, Morrison C. England, Jr., Judge.)

The Court of Appeal affirmed. It held that litigation of the issue of defendant's mental health was not barred by the doctrine of collateral estoppel, despite the earlier determination that he was not a mentally disordered offender. The different purposes and procedural settings of the Mentally Disordered Sex Offenders Act (former Welf. & Inst. Code, § 6300 et seq.) and the SVPA required litigation of defendant's current mental condition in the SVPA proceedings. The court further held that the trial court did not err in admitting the two psychological reports that became the basis for the SVPA petition, even though defendant received no advance notice that he was being evaluated as a sexually violent predator and did not have assistance of counsel before proceeding with the interviews. The transfer of a prison inmate to a mental hospital for involuntary treatment is a deprivation of liberty that requires due process protection appropriate to the circumstances.

However, nothing in the SVPA suggests that the Legislature intended to require notice or representation by counsel before the petition is requested or filed, and due process does not require such notice or representation. (Opinion by Callahan, J., with Scotland, P. J., and Davis, J., concurring.)

People v. Carmony 99 Cal.App.4th 317 (Cal.App.3.Dist.,2002).

2. Simmons v. Allstate Ins. Co. (2001) 92 Cal.App.4th 1068.

SUMMARY

The trial court, after striking defendants' cross-complaint under the provisions of the anti-SLAPP (strategic lawsuit against public participation) statute (Code Civ. Proc., § 425.16), denied defendants' request to amend the cross-complaint to remove any allegations that might be objectionable under the anti-SLAPP statute. (Superior Court of Sacramento County, No. 99AS03379, John R. Lewis, Judge.)

The Court of Appeal affirmed. The court held that the trial court properly denied defendants' request to amend. The anti-SLAPP statute makes no provision for amending the complaint once the trial court finds the requisite connection to protected speech, and none should be implied. Allowing a SLAPP plaintiff leave to amend the complaint once the trial court finds the prima facie showing has been met would completely undermine the statute by providing the pleader a ready escape from section 425.16's quick dismissal remedy. This would totally frustrate the Legislature's objective of providing a quick and inexpensive method of unmasking and dismissing such suits. (Opinion by Callahan, J., with Nicholson, Acting P. J., and Raye, J., concurring.)

Simmons v. Allstate Ins. Co. 92 Cal.App.4th 1068 (Cal.App.3.Dist.,2001).

3. Adams v. Aerojet-General Corp. (2001) 86 Cal.App.4th 1324.  
Review denied May 16, 2001.

SUMMARY

The trial court, in a toxic waste disposal action filed by property owners against a corporation, granted defendant's motion to disqualify plaintiffs' attorney on the ground that, while he was a member, his former law firm had represented defendant in a similar action (Rules Prof. Conduct, rule 3- 310(E)). Invoking the rule that knowledge acquired by one member of a firm of lawyers is imputed to all members of the firm, the trial court ruled that the knowledge acquired by the attorney's former partners about defendant must be imputed to him.

The trial court also found there was a substantial relationship between the subject matter of the prior representation and the present suit, and it ruled that there was a conclusive presumption that confidential information passed to the attorney as a partner in his former firm. (Superior Court of Sacramento County, No. 98AS01025, John R. Lewis, Judge.)

The Court of Appeal reversed and remanded for further proceedings. The court held that the trial court abused its discretion in disqualifying plaintiffs' attorney, since disqualification was based not on a particularized analysis of the attorney's relationship to defendant while at his former firm, but on a conclusive presumption derived from the attorney's mere membership in the former firm. On remand, the trial court should focus not only on the relationship between the attorney and the former firm's representation of defendant, but on whether the attorney's responsibilities as partner and principal, as well as his relationship with other members of the firm, placed him in a position where he was reasonably likely to have obtained confidential information relating to the current case. The court also held that a rule that disqualifies an attorney based on imputed knowledge derived solely from his or her membership in the former firm and without inquiry into his or her actual exposure to the former client's secrets is inconsistent with the language and core purpose of Rules Professional Conduct, rule 3-310(E), and unnecessarily restricts both the client's right to chosen counsel and the attorney's freedom of association. (Opinion by Callahan, J., with Kolkey, J., concurring. Concurring and dissenting opinion by Scotland, P. J.)

Adams v. Aerojet-General Corp. 86 Cal.App.4th 1324 (Cal.App.3.Dist.,2001).

4. Wise v. Thrifty Payless, Inc. (2000) 83 Cal.App.4th 1296.

#### SUMMARY

A woman filed an action against a drugstore, alleging that while she was in the midst of an acrimonious separation from her former husband, defendant, wrongfully and without plaintiff's authorization, disclosed to her former husband in the form of billing printouts sensitive, private, and confidential information regarding plaintiff's medications and treatments, which her former husband used against her in their dissolution action and in a Department of Motor Vehicles (DMV) investigation. The trial court denied defendant's pretrial motion in limine to prohibit plaintiff or any of her witnesses from making any reference to damages or loss suffered by her as the result of her husband's use of the drug printout in either the dissolution action or in DMV proceedings, on the ground such disclosure was protected by the litigation privilege (Civ. Code, § 47, subd. (b)).

The jury returned a verdict for plaintiff. (Superior Court of Placer County, No. SCV6827, J. Richard Couzens, Judge.)

The Court of Appeal affirmed. The court held that although the former husband's use of the information was absolutely privileged, defendant's own tortious conduct was not. Non-participants and non-

litigants to judicial proceedings are never protected from liability under Civil Code section 47, subdivision (b). Defendant's disclosure did not satisfy any of the elements of the privilege: (1) it was not made in the course of judicial or quasi-judicial proceedings; (2) defendant was not a litigant or other participant authorized by law; (3) the disclosure was not made to further the object of litigation (defendant was told the information was for tax purposes); and (4) there was no logical relation to any ongoing or contemplated legal proceeding. (Opinion by Callahan, J., with Nicholson, Acting P. J., and Hull, J., concurring.)

Wise v. Thrifty Payless, Inc. 83 Cal.App.4th 1296 (Cal.App.3.Dist.,2000).

5. Mack v. Soung (2000) 80 Cal.App.4th 966.  
Review denied August 23, 2000.

#### SUMMARY

The surviving children of an elderly woman who had died in a nursing home brought an action for violation of the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, § 15600 et seq.) and for intentional infliction of emotional distress against their mother's former physician.

The trial court sustained demurrers to both causes of action without leave to amend. Plaintiffs alleged that defendant concealed the existence of the decedent's serious bedsore, opposed her medically necessary hospitalization, and then withdrew from her care while she was dying. (Superior Court of San Joaquin County, No. CV001511, Sandra Butler Smith, Judge.)

The Court of Appeal affirmed the judgment as to the ruling regarding the intentional infliction of emotional distress cause of action, and reversed as to the ruling on the elder abuse cause of action, remanding to the trial court with directions to enter a new order overruling the demurrer as to that cause of action only. The court held that the trial court abused its discretion in sustaining defendant's demurrer to the elder abuse cause of action, since a liberal construction of plaintiffs' pleadings disclosed a course of conduct that constituted elder abuse in the form of medical neglect under the act (Welf. & Inst. Code, § 15610.07). The court further held that it is not only nursing care custodians, but also health care providers, who are subject to liability under the act if their misconduct rises to the level of neglect, abuse, or abandonment. (Opinion by Callahan, J., with Scotland, P. J., and Nicholson, J., concurring.)

Mack v. Soung 80 Cal.App.4th 966 (Cal.App.3.Dist.,2000).

6. In re Conservatorship of Gregory (2000) 80 Cal.App.4th 514.  
As modified on denial of rehearing May 30, 2000.  
Review denied August 23, 2000.

SUMMARY

A nursing home resident brought an action against the nursing home alleging elder abuse under the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, § 15600 et seq.), and other causes of action, arising from plaintiff's injury in a fall. The trial court instructed the jury on elder abuse, based on Welfare and Institutions Code section 15610.07 (definition of abuse of elder or dependent adult), and based on state and federal regulations. The jury returned verdicts in favor of plaintiff. (Superior Court of Siskiyou County, No. 53756, James E. Kleaver, Judge. [FN] )

(FN Retired judge of the Siskiyou Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.)

The Court of Appeal affirmed the judgment in plaintiff's favor. In addition, for reasons stated in the unpublished portion of the opinion, the court reversed the trial court's order concerning plaintiff's request for fees and costs to the extent the order denied plaintiff compensation for paralegal fees, remanded the matter for further proceedings, and affirmed the order in all other respects. The court held that the trial court's instructions on elder abuse were not incorrect for omitting the definitions of physical abuse and neglect contained in Welfare and Institutions Code sections 15610.57 and 15610.63. The court held that defendants waived the right to such an instruction by failing to request it at trial, but that the instructions were correct in any event, and they did not mislead the jury. The court also held that the trial court did not err in reading the jury instructions that were based on state and federal regulations. An administrative agency cannot independently impose a duty of care if the Legislature has not delegated that authority to the agency. However, the regulations at issue were authorized by federal and state legislation, and thus they could be used to describe the care required under an existing statutory right of action for elder abuse. The court further held that the trial court's instructions based on state and federal regulations were not too vague to provide meaningful guidance to the jury. (Opinion by Callahan, J., with Scotland, P. J., and Blease, J., concurring.)

In re Conservatorship of Gregory 80 Cal.App.4th 514  
(Cal.App.3.Dist.,2000).



7. Pulaski v. California Occupational Safety and Health Standards Board (1999)  
75 Cal.App.4th 1315. As modified on denial of rehearing on  
November 24, 1999.

SUMMARY

The California Occupational Safety and Health Standards Board adopted standards for ergonomics in the workplace designed to minimize the instances of repetitive motion injuries (RMI) (Cal. Code Regs., tit. 8, § 5110), pursuant to the legislative mandate of Labor Code section 6357. Labor and employer groups filed petitions for writs of mandate arguing for invalidation of various portions of California Code of Regulations, title 8, section 5110. The trial court granted a writ of mandate requiring the board to refrain from enforcing the following portions of the regulations it found invalid: the exemption for small businesses; the requirement that the RMI's be predominantly caused by a work-related repetitive motion task; the requirement that a licensed physician objectively identify and diagnose the RMI's; and the safe harbor provision, protecting an employer that undertook good faith measures designed to minimize RMI's. (Superior Court of Sacramento County, No. 95CS00362, James Timothy Ford, Judge.)

The Court of Appeal reversed the judgment and remanded to the trial court. The court held that substantial evidence supported the trial court's findings that the board, in enacting California Code of Regulations, title 8, section 5110, substantially complied with requirements of the Administrative Procedure Act (Gov. Code, § 11340 et seq.). The court also held that the trial court abused its discretion in striking California Code of Regulations, title 8, section 5110, subdivision (c) (safe harbor provision), since the record showed that provision was not irrational, arbitrary, or in excess of the board's rulemaking authority. The court also held that the trial court abused its discretion in invalidating the portion of California Code of Regulations, title 8, section 5110, subdivision (a)(1), that imposed a requirement that the RMI's be predominantly caused by a work-related repetitive motion task, given the problematic nature of identifying RMI's as work-related. The court also held that the trial court abused its discretion in invalidating the provision that called for objective identification of an RMI by a physician, since that provision was a reasoned response to the lack of scientific consensus on the cause-effect relationship between RMI's and repetitive tasks in the workplace. The court also held that the trial court did not err in striking the provision that exempted small businesses from the regulations, since that exemption was inherently inconsistent with Labor Code section 6357, by which the

Legislature intended to impose upon the board the responsibility to promulgate standards for minimizing RMFs in all places of employment. (Opinion by Callahan, J., with Scotland, P. J., and Davis, J., concurring.)  
Pulaski v. California Occupational Safety and Health Standards Board, 75 Cal.App.4th 1315 (Cal.App.3.Dist.,1999).

8. Clemente v. Amundson (1998) 60 Cal.App.4th 1094.

#### SUMMARY

The trial court denied plaintiffs' petition for a writ of mandate to compel the Department of Developmental Services (DDS), its director, and a regional center to set aside a DDS administrative hearing decision authorizing parental co-payment for in-home respite services, defined as intermittent or regularly scheduled temporary non-medical care and supervision provided in the client's own home, for a regional center client who resides with a family member (Welf. & Inst. Code, § 4690.2, subd. (a)). (Superior Court of Sacramento County, No. 95CS02843, Thomas M. Cecil, Judge.)

The Court of Appeal reversed with directions. The court held that the regional center could not impose a parental co-payment for respite services in the absence of express statutory authorization, and the Legislature did not expressly authorize the co-payment in the Lanterman Developmental Disabilities Services Act (Welf. & Inst. Code, §§ 4500-4905). Welfare and Institutions Code section 4685 identifies respite and day care as separate types of assistance available to families caring for developmentally disabled children at home, but expressly authorizes parental co-payment only for day care. Had the Legislature intended to assess a co-payment for respite services it had every opportunity to do so in the 1992 amendment that added co-payment for day care. The vague language of the Legislature's directive in Welfare and Institutions Code section 4791, subdivision (c), that regional centers seek "alternative sources of payment for services" could not be read to authorize co-payment for respite services. Also, the DDS and its director had no authority to issue a policy that authorized regional centers to establish service standards requiring a parental co-payment for any service purchased for the minor or the minor's family if that service was similar to a service a child without a disability would need. (Opinion by Callahan, J., with Puglia, P. J., and Davis, J., concurring.)

Clemente v. Amundson 60 Cal.App.4th 1094  
 (Cal.App.3.Dist.,1998).

9. Connerly v. State Personnel Bd. (2001) 92 Cal.App.4th 16.

## SUMMARY

The Governor brought an action challenging five statutory affirmative action programs as violative of equal protection principles and Proposition 209 (Cal. Const., art. I, § 31). The statutes in question were Government Code section 8880.32 (State Lottery Commission), Government Code section 16850 et seq. (sale of state bonds), Government Code section 19790 et seq. (state civil service), Education Code section 87100 et seq. (community colleges), and Public Contract Code section 10115 et seq. (state contracting). A private citizen was permitted to join the lawsuit, and he continued the litigation after the Governor left office. The trial court found invalid a portion of the statutory scheme relating to the sale of bonds and all of the statutory scheme applicable to state contracting, but otherwise rejected plaintiff's constitutional challenges. (Superior Court of Sacramento County, No. 96CS01082, Lloyd Connelly, Judge.)

The Court of Appeal reversed and remanded to the trial court with directions to enter a judgment consistent with the Court of Appeal's conclusions.

The court held that under taxpayer and citizen standing rules, the private citizen had standing to maintain the suit. It held that the statutory scheme applicable to the state lottery was invalid, and that the scheme applicable to the sale of government bonds was also invalid, but that a portion of the data collection and reporting requirements of that scheme was severable and could be upheld. The court further held that the statutory scheme applicable to the state civil service was partially invalid, but that the remainder of the scheme could be severed and upheld. The statutory scheme applicable to the community colleges was invalid, the court held, and a portion of the data collection and reporting requirements of the scheme relating to state contracting was severable from the invalid portions and could be upheld. (Opinion by Scotland, P. J., with Morrison and Callahan, JJ., concurring.)

Connerly v. State Personnel Bd. 92 Cal.App.4th 16  
(Cal.App.3.Dist.,2001).

10. Catholic Charities of Sacramento, Inc. v. Superior Court (2001)  
90 Cal.App.4th 425, review granted September 26, 2001 (S099822).

## SUMMARY

A religion-based social services corporation filed an action against the state seeking declaratory and injunctive relief, challenging the

constitutionality of state statutes that require employers that provide health insurance prescription coverage to include coverage for contraceptives (Health & Saf. Code, § 1367.25; Ins. Code, § 10123.196). Because plaintiff provided social services without regard to religious affiliation and the majority of its employees did not subscribe to its religious tenets, the religious employer exemption of these statutes did not apply to it (Health & Saf. Code, § 1367.25, subd. (b); Ins. Code, § 10123.196, subd. (d)). The trial court denied plaintiff's motion for a preliminary injunction pending trial. (Superior Court of Sacramento County, No. 00AS03942, Joe S. Gray, Judge.)

The Court of Appeal denied plaintiff's petition for a writ of mandate. The court held that the trial court properly denied plaintiff's request for a preliminary injunction, since it was not reasonably probable that plaintiff's action would prevail on the merits. Health and Safety Code section 1367.25, and Insurance Code section 10123.196, which were enacted to eliminate discriminatory insurance practices that had undermined the health and economic well-being of women, are otherwise valid laws that are generally applicable and neutral with respect to religion. Accordingly, strict scrutiny did not apply, and the incidental effect that these statutes had on the religious beliefs of plaintiff did not violate either the federal or state free exercise clause (U.S. Const., 1st Amend.; Cal. Const., art. I, § 4) or any other constitutional provision. The religious exemption in these statutes (Health & Saf. Code, § 1367.25; subd. (b), Ins. Code, § 10123.196, subd. (d)) was sect-neutral and was not designed to burden only plaintiff's religion. Accordingly, the exemption was not subject to a strict scrutiny analysis. The religious employer exemption in these statutes was constitutional under the appropriate three-pronged test: the statutes have a secular purpose, they do not advance or inhibit religion, and they do not foster excessive government entanglement with religion. (Opinion by Scotland, P. J., with Morrison and Callahan, JJ., concurring.)

Catholic Charities of Sacramento, Inc. v. Superior Court.

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

I am aware of two cases where I have been reversed. One was a court trial I did as a Superior Court Judge; the other was a case I authored while on the Court of Appeal. There may be some criminal sentences that were remanded for a minor correction even though the judgment was otherwise affirmed. I would have no way of identifying such cases. Also, there may be some rulings from civil law and motion which required correction. I am not aware of any, but I have no way of tracking all law and motion rulings that I made while on the trial bench. The two reversals are:

1. Beck Development Co., Inc. v. Southern Pacific Transportation Company,  
San Joaquin County Superior Court No. 200393  
Court of Appeal, Third Appellate District, No. C015216 and No. C015905  
(The two cases were consolidated. I handled No. C015216 and another  
judge handled No. C015905)  
44 Cal. App.4<sup>th</sup> 1160

## SUMMARY

A development company brought an action against the State Department of Toxic Substances Control, a city, and a railroad company, seeking damages and declaratory and writ relief. The development company had purchased property in 1985 in order to subdivide and develop it for residential purposes, but was inhibited from doing so by the department and the city due to subsurface oil contamination caused by the railroad company prior to 1945. The development company had entered into a contract with the department and agreed to pay for investigation and evaluation of the contamination, but eventually demanded a hearing. The department instead advised the city to impose a moratorium on development of the property and refused to take further action.

Accordingly, the city refused to consider the company's application for approval of a tentative subdivision map. The trial courts, in bifurcated trials, granted a writ of mandate compelling the department to accord the development company a public hearing on whether its property should be designated hazardous waste property (Health and Safety Code, 25220 et seq.), ruled that the city did not have to accept and consider the development company's application for approval of a tentative subdivision map, and ruled against the railroad company for abatement of a nuisance and incidental damages of \$1,205,613.18 (Superior Court of San Joaquin County, No. 200393, Consuelo Maria Callahan and Michael N. Garrigan, Judges).

The Court of Appeal modified the judgment granting a writ of mandate to direct the department to make a reasonably prompt determination and then to either issue a no-known-hazard statement or proceed with hearing procedures, as required by the determination it would make, and affirmed that judgment as so modified; the court also reversed the judgment in favor of the city and remanded to the trial court with directions to issue a judgment granting declaratory relief in favor of the development company, and reversed the judgment in favor of the development company and against the railroad company and remanded to the trial court with directions to enter judgment in favor of the railroad company. The court held that the trial court properly issued a writ of mandate directing the department to conduct a public hearing on whether the property should be designated hazardous waste property. In order to

comport with requirements of due process appropriate to the department's quasi-judicial action in restricting the use of the company's property, the moratorium option utilized by the department, which guaranteed none of the appropriate due process procedural safeguards, could only be construed as a temporary measure; the property owner was entitled to a full hearing with procedural safeguards. The court further held that the company was not entitled to specific performance of its agreement with the department. In addition, the court held that the trial court erred when it ruled for the city, as the city was required to follow the statutorily mandated procedures by which the Legislature has carefully preserved procedural safeguards for affected parties, and multiple means and opportunities were available to the city to protect the public health and safety. The court also held that the trial court's findings did not support the judgment for plaintiff against the railroad company, since the court's finding that neither side adequately characterized or tested the site was a finding of a failure of proof that had to be held against plaintiff who bore the burden of proof.

The court further held that the trial court's findings in plaintiff's action against the railroad company that the oil contamination of the property constituted a nuisance per se, a public nuisance, and a private nuisance, which was continuing rather than permanent, were all legally insupportable. (Opinion by Sparks, Acting P.J., with Davis and Scotland, JJ., concurring.)

2. Hoechst Celanese Corporation v. Franchise Tax Board  
Court of Appeal, Third Appellate District, C030702  
Supreme Court of California No. S085091  
25 Cal.4<sup>th</sup> 508

#### SUMMARY

Plaintiff was an out-of-state corporation that conducted business operations and filed franchise tax returns in California. Plaintiff divided the assets of a pension plan it had funded for its employees among two newly created pension plans. Assets from one of the successor plans was used to purchase annuities to meet that plan's obligations. The surplus assets in that plan were placed in plaintiff's general fund for general corporate purposes. Plaintiff contended it did not have to allocate any of the reverted income from the surplus assets to California as business income. The Supreme Court found the income from the reversion was apportionable business income in California under Cal. Rev. & Tax Code 12150(a). The statutory definition of business income under 12150(a) established separate transactional and functional tests for business income. Plaintiff's reversion of surplus pension plan assets met the functional test and was therefore business income. Subjecting the apportionable share of

the reverted pension plan assets to taxation in California did not violate the federal due process or commerce clauses. Judgment of the appellate court was reversed as the reverted pension plan assets were business income and taxable in California.

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

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

1. In re Charles T., (2002) 102 Cal.App.4th 869.

#### SUMMARY

The juvenile court entered orders terminating a mother's parental rights and freeing her son for adoption. During the course of the proceedings, the son was represented by counsel appointed by the court, but the court never appointed a guardian ad litem for him, and the mother never objected. (Superior Court of Sacramento County, No. JD216982, Susan L. Aguilar, Referee.)

The Court of Appeal affirmed. The court held that the mother had standing to attack the failure to appoint a guardian ad litem, and that while she might have waived the issue by failing to object in the juvenile court, the issue was an important one that merited being resolved on appeal.

The court further held that the juvenile court, in failing to appoint a guardian ad litem, did not violate Welfare and Institutions Code section 326.5 (Judicial Council must adopt rule complying with requirement of Child Abuse Prevention and Treatment Act (42 U.S.C. § 5101 et seq.) for appointment of guardian ad litem). The court held that Congress intended only that an individual who is independent of the other parties and has the legal knowledge and experience to be found in an attorney or is a trained special advocate volunteer, be appointed to represent the minor's interests. By requiring legal counsel or in some cases a special advocate (Cal. Rules of Court, rule 1438), California has gone beyond Congress's minimum requirements. In most cases, counsel can properly act as a dependency guardian ad litem. Where counsel discovers interests of the minor that might result in separate adversarial proceedings, the juvenile court must appoint a separate guardian ad litem. The court further held that California Rules of Court, rule 1438, satisfies the direction of Welfare and Institutions Code section 326.5, to comply with Congress's requirements. (Opinion by Callahan, J., with Scotland, P. J., and Nicholson, J., concurring.)

In re Charles T., 102 Cal.App.4th 869 (Cal.App.3.Dist.,2002).

2. People v. Carmony (2002) 99 Cal.App.4th 317.  
Review denied August 28, 2002.

#### SUMMARY

Defendant, who had been sentenced to prison after being convicted of sexual offenses against minors and was scheduled for release on parole, became the subject of proceedings under the Sexually Violent Predators Act (SVPA; Welf. & Inst. Code, § 6600 et seq.). At the time of his convictions, he had been determined not to be a mentally disordered offender. In the SVPA proceedings, the trial court admitted two psychological evaluations that were based on interviews with defendant and that supported a finding that defendant was a sexually violent predator. Defendant's expert disagreed with those evaluations. The trial court found beyond a reasonable doubt that defendant was a sexually violent predator. (Superior Court of Sacramento County, No. 61422, Morrison C. England, Jr., Judge.)

The Court of Appeal affirmed. It held that litigation of the issue of defendant's mental health was not barred by the doctrine of collateral estoppel, despite the earlier determination that he was not a mentally disordered offender. The different purposes and procedural settings of the Mentally Disordered Sex Offenders Act (former Welf. & Inst. Code, § 6300 et seq.) and the SVPA required litigation of defendant's current mental condition in the SVPA proceedings.

The court further held that the trial court did not err in admitting the two psychological reports that became the basis for the SVPA petition, even though defendant received no advance notice that he was being evaluated as a sexually violent predator and did not have assistance of counsel before proceeding with the interviews. The transfer of a prison inmate to a mental hospital for involuntary treatment is a deprivation of liberty that requires due process protection appropriate to the circumstances. However, nothing in the SVPA suggests that the Legislature intended to require notice or representation by counsel before the petition is requested or filed, and due process does not require such notice or representation. (Opinion by Callahan, J., with Scotland, P. J., and Davis, J., concurring.)

People v. Carmony 99 Cal.App.4th 317 (Cal.App.3.Dist.,2002).



3. Howard Jarvis Taxpayers Ass'n. v. City of Roseville (2002)  
97 Cal.App.4th 637.

SUMMARY

A taxpayers association and related parties filed an action against a city, alleging that an "in-lieu franchise fee" of 4 percent imposed by the city on the annual budgets of each of the city's utilities (water, sewer, and refuse collection), paid by the utility ratepayers and transferred to the city's general fund, violated Proposition 218 (Cal. Const., art. XIII D), which requires voter approval of local government property-related assessments, fees, and charges. The trial court entered summary judgment for plaintiffs. (Superior Court of Placer County, No. SCV7831, Frances A. Kearney, Judge.)

The Court of Appeal affirmed. The court held that the fee was subject to, and violated Proposition 218, specifically California Constitution, article XIII D, section 6, subdivision (b), which provides that fee or charge revenues may not exceed what it costs to provide fee or charge services, and that no fee or charge may be imposed for general governmental services. The in-lieu franchise fee did not comply with either of these requirements. (Opinion by Davis, J., with Scotland, P. J., and Callahan, J., concurring.)

Howard Jarvis Taxpayers Ass'n v. City of Roseville  
97 Cal.App.4th 637 (Cal.App.3.Dist.,2002).

4. Lovejoy v. AT&T Corp. (2001) 92 Cal.App.4th 85.  
Rehearing denied October 5, 2001.

SUMMARY

The operator of a business brought a fraud action against the telephone carrier company that had terminated both his long-distance service and the toll-free service he used for his business after plaintiff disputed the long-distance charges on his bill. Plaintiff alleged that the telephone company with which he had originally contracted for the toll-free service had transferred his service to defendant based on defendant's false representation that plaintiff had authorized this transfer, and that defendant hid the charges for plaintiff's toll-free number service in plaintiff's long-distance bill. Plaintiff further alleged that he was unaware of both the transfer and of the termination of his toll-free number service, and that he lost his business, filed for bankruptcy, and suffered emotional distress.

The trial court denied defendant's motion for summary judgment, finding that plaintiff's action was not barred by the filed rate doctrine, but

granted defendant's motion for judgment on the pleadings and dismissed plaintiff's complaint. (Superior Court of Shasta County, No. 0133545, Richard A. McEachen, Judge.)

The Court of Appeal reversed and remanded to the trial court with directions to deny defendant's motion for judgment on the pleadings and for further proceedings. The court held that the trial court erred in granting defendant's motion for judgment on the pleadings. The court further held that, even though plaintiff failed to plead affirmative fraud, having failed to plead the element of reliance, since he was totally unaware of the misrepresentation, plaintiff adequately pleaded a valid cause of action for fraudulent concealment. A complete proximate cause relationship between defendant's concealment of a material fact and plaintiff's damage was readily deducible from the complaint. The court further held that the trial court did not err in denying defendant's motion for summary judgment, since compensating plaintiff for the tortious conduct pleaded would not contravene the filed rate doctrine. If proved, awarding damages for this conduct would fall within the savings clause of the Federal Communications Act (47 U.S.C. § 414), which permits state law actions against carriers that do not frustrate the act's purposes of uniformity and agency rate making. (Opinion by Callahan, J., with Nicholson, Acting P. J., and Raye, J., concurring.)

Lovejoy v. AT&T Corp. 92 Cal.App.4th  
85 (Cal.App.3.Dist.,2001).

5. People v. Leonard (2000) 78 Cal.App.4th 776.  
Review denied June 21, 2000.

#### SUMMARY

The trial court ordered that defendant be committed to a state hospital after a jury found true the allegation that he was a sexually violent predator within the meaning of the Sexually Violent Predators Act (Welf. & Inst. Code, §§ 6600-6609.3). During the proceedings, the trial court denied defendant's motion to appoint new counsel to replace his current appointed counsel. The trial court allowed psychologists who testified as expert witnesses to rely on material from previous interviews with defendant, and it allowed the district attorney to call defendant as a witness at trial. The trial court also modified the jury instruction defining a sexually violent predator to omit the reference to determinate sentencing. (Superior Court of Placer County, No. 0444, Larry D. Gaddis, Judge.)

The Court of Appeal affirmed. The court held that the trial court did not violate defendant's constitutional and statutory rights to counsel when it denied his motion to appoint new counsel to replace his current appointed counsel.

The trial court expressly found that defendant had vented all his concerns, and the lengthy discussion was sufficient to show that defendant's unhappiness with counsel was not based on his competence as an attorney. The court also held that there was no abuse of discretion or due process violation in the trial court's determination that defendant's lack of representation during jury selection was voluntary. The trial court admonished defendant on self-representation, and he decided to proceed without counsel. The court further held that the trial court did not deny defendant his constitutional right to remain silent by allowing the psychologists who testified as expert witnesses to rely on material from interviews he allegedly gave under duress, and allowing the district attorney to call him as a witness at trial, since proceedings under the act are not criminal within the meaning of the United States Constitution, 5th Amendment, guaranty against compulsory self-incrimination. The court further held that the trial court did not err in modifying the jury instruction. (Opinion by Callahan, J., with Blease, Acting P. J., and Morrison, J., concurring.)

People v. Leonard 78 Cal.App.4th 776 (Cal.App.3.Dist.,2000).

6. Trinkle v. California State Lottery (1999) 71 Cal.App.4th 1198.  
Review denied June 23, 1999.

#### SUMMARY

After the lottery games of Keno and Scratchers were ruled illegal, a vending machine operator brought an action against the California State Lottery (CSL), alleging that CSL engaged in unfair business competition under the Unfair Competition Act (UCA) (Bus. & Prof. Code, § 17200 et seq.) by operating Keno and Scratchers games that diverted patrons' funds from plaintiff's machines. The trial court sustained CSL's demurrer without leave to amend and entered a judgment of dismissal. (Superior Court of Sacramento County, No. 97AS05355, John R. Lewis, Judge.)

The Court of Appeal affirmed. The court held that since there is no statute making public entities such as CSL liable under the Unfair Competition Act, the general rule of governmental immunity prevailed. The trial court's ruling was also proper on the ground that a state agency such as CSL is not a person within the meaning of the UCA, as defined in Business and Professions Code section 17201. Although under Government Code section 815.2, a public entity may be liable for the acts of its employees if those acts are not otherwise immune from liability, the complaint did not identify any conduct by CSL employees that was not immune from liability. Finally, the facts pleaded in the complaint were not

susceptible of amendment to state a cause of action for public nuisance. (Opinion by Callahan, J., with Scotland, P. J., and Morrison, J., concurring.)

Trinkle v. California State Lottery 71 Cal.App.4th 1198 (Cal.App.3.Dist.,1999).

7. Jahr v. Casebeer (1999) 70 Cal.App.4th 1250.  
Review denied May 12, 1999.

#### SUMMARY

Local voters submitted a proposed initiative to amend a county ordinance establishing compensation for members of the county board of supervisors. County counsel filed an action seeking a declaration that the proposed initiative was unconstitutional. The trial court granted the relief sought by county counsel, finding that the language of California Constitution, article XI, section 1, subdivision (b) (county powers; "each governing body shall prescribe by ordinance the compensation of its members, but the ordinance prescribing such compensation shall be subject to referendum"), and decisional law compelled the conclusion that the proposed initiative was unconstitutional.

(Superior Court of Shasta County, No. 133713, Carroll A. Ragland, Commissioner.)

The Court of Appeal affirmed. The court held that the proposed initiative was not permitted by California Constitution, article XI, section 1, subdivision (b). The language of article XI, section 1, subdivision (b), clearly authorizes voters to challenge supervisors' salaries by referendum, but it does not suggest the California electorate intended to grant local voters initiative power for this purpose when they approved the constitutional amendment in 1970. The term "governing body" does not include "voters," but rather, refers to a local legislative body. Moreover, the right of initiative could not be implied where article XI, section 1, subdivision (b), adequately protects citizens' interests by way of referendum, and where voters may express their displeasure with supervisors at the ballot box. The legislative history and subsequent legislative action also supported the conclusion that the initiative was unconstitutional. A court need not imply the right to initiative where the right to referendum is expressly stated. The two powers are not corollary in all circumstances. Also, since the Legislature may bar local initiatives in matters of statewide concern, such as the process through which supervisor salaries are established, the California electorate may do so by way of constitutional amendment. (Opinion by Callahan, J., with Davis, Acting P. J., and Nicholson, J., concurring.)

Jahr v. Casebeer 70 Cal.App.4th 1250 (Cal.App.3.Dist.,1999).

8. Sunrise Retirement Villa v. Dear (1997) 58 Cal.App.4th 948.  
Review denied January 14, 1998.

#### SUMMARY

In 1986 a county assessor determined that there had been a change in ownership on property owned by plaintiffs to trigger a new "base year" for purposes of property valuation under California Constitution, article XIII A. The determination triggered a supplemental assessment and was reflected in valuations for succeeding years. In 1994 plaintiffs discovered facts that they claimed showed the assessor had erred in determining that ownership had changed, and, after failing to persuade the assessor, plaintiffs filed an appeal with the county assessment appeals board to change the assessment. The board ruled it had no jurisdiction because the application was filed more than four years after the assessor re-determined the base-year value (Rev. & Tax. Code, § 80, subd. (a)(3)). Plaintiffs thereafter filed a petition for writ of mandate, asking that the court either (1) direct the assessor to correct its 1986 base-year value to reflect no change in ownership, or (2) compel the board to set aside its order denying the application for lack of jurisdiction and set the matter for a hearing on the merits. The trial court granted the first prayer for relief. (Superior Court of Placer County, No. SCV-4408, James L. Rowdier, Judge.)

The Court of Appeal reversed and remanded, directing the trial court to enter a new judgment issuing a peremptory writ of mandate directing the board to vacate its decision denying plaintiffs' appeal on jurisdictional grounds, and to hear the appeal on its merits. The court held that while it is true that Revenue and Taxation Code section 80, subdivision (a)(3), on its face, imposes a four-year time limit on appealing base-year reassessments, the categorical language of Revenue and Taxation Code section 51.5 evinces a clear intent to remove any and all time restrictions on correcting nonjudgmental errors in determining base-year values: "Notwithstanding any other provision of the law," nonjudgmental errors "shall be corrected in any assessment year in which the error or omission is discovered." The statutes must be read together to achieve a result that is reasonable and practical and comports with the apparent intention of the Legislature. Since the purpose of Revenue and Taxation Code section 51.5 is to remove any time limits on correcting the roll based on nonjudgmental errors, reading a statute of limitations back into the law would run contrary to the express wording of the statute. Revenue and Taxation Code section 51.5 provides an independent mechanism for correcting base-year values apart from the normal appeals procedure. The court held that this substantive change in the law superseded any statutory time restriction on the taxpayer's right to a

correction in the tax roll that otherwise might apply. (Opinion by Callahan, J., with Raye, Acting P. J., and Sparks, J., [FN\*] concurring.)  
 (FN\* Retired Associate Justice of the Court of Appeal, Third District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.)

Sunrise Retirement Villa v. Dear 58 Cal.App.4th 948  
 (Cal.App.3.Dist.,1997).

9. Seegmiller v. County of Nevada (1997) 53 Cal.App.4th 1397.

#### SUMMARY

A taxpayer whose business property was located in the taxing county as of the statutory assessment lien date sought a partial refund of ad valorem property taxes for the period after he relocated to another state during the next fiscal tax year. The county denied the refund, and the trial court sustained the county's demurrer without leave to amend and dismissed the taxpayer's action against it. (Superior Court of Nevada County, No. TS96/384, C. Anders Holmer, Judge. [FN\*] )

(FN\* Judge of the Nevada Municipal Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.)

The Court of Appeal affirmed. The court held that the county's right to the taxes became fixed as of the lien date of the fiscal year to which they related (Rev. & Tax. Code, § 2192). The tax lien date is simply a practical method for determining that the taxpayer enjoyed the benefit of governmental services during the year preceding the assessment. The fact that the county permitted the taxpayer to pay the taxes in a subsequent fiscal year did not mitigate the fact that he was subject to the opportunities, benefits, and protection afforded by the county and the state during the year in which the tax was assessed. Accordingly, due process did not require any proration. No commerce clause violation occurred since the taxpayer's business was not an interstate operation. Also, since personal property continuously in interstate transit, unlike stationary property with a permanent home, has multiple tax situs in any given year, requiring apportionment as a matter of constitutional imperative for such property, but not the taxpayer's property, did not violate the taxpayer's right to equal protection. (Opinion by Callahan, J., with Puglia, P. J., and Sims, J., concurring.)

Seegmiller v. County of Nevada 53 Cal.App.4th 1397  
 (Cal.App.3.Dist.,1997).

10. Connerly v. State Personnel Bd. (2001) 92 Cal.App.4th 16.

## SUMMARY

The Governor brought an action challenging five statutory affirmative action programs as violative of equal protection principles and Proposition 209 (Cal. Const., art. I, § 31). The statutes in question were Government Code section 8880.32 (State Lottery Commission), Government Code section 16850 et seq. (sale of state bonds), Government Code section 19790 et seq. (state civil service), Education Code section 87100 et seq. (community colleges), and Public Contract Code section 10115 et seq. (state contracting). A private citizen was permitted to join the lawsuit, and he continued the litigation after the Governor left office. The trial court found invalid a portion of the statutory scheme relating to the sale of bonds and all of the statutory scheme applicable to state contracting, but otherwise rejected plaintiff's constitutional challenges. (Superior Court of Sacramento County, No. 96CS01082, Lloyd Connelly, Judge.)

The Court of Appeal reversed and remanded to the trial court with directions to enter a judgment consistent with the Court of Appeal's conclusions. The court held that under taxpayer and citizen standing rules, the private citizen had standing to maintain the suit. It held that the statutory scheme applicable to the state lottery was invalid, and that the scheme applicable to the sale of government bonds was also invalid, but that a portion of the data collection and reporting requirements of that scheme was severable and could be upheld. The court further held that the statutory scheme applicable to the state civil service was partially invalid, but that the remainder of the scheme could be severed and upheld. The statutory scheme applicable to the community colleges was invalid, the court held, and a portion of the data collection and reporting requirements of the scheme relating to state contracting was severable from the invalid portions and could be upheld. (Opinion by Scotland, P. J., with Morrison and Callahan, JJ., concurring.)

Connerly v. State Personnel Bd. 92 Cal.App.4th 16  
(Cal.App.3.Dist.,2001).

11. Catholic Charities of Sacramento, Inc. v. Superior Court (2001)  
90 Cal.App.4th 425, review granted September 26, 2001 (S099822).

## SUMMARY

A religion-based social services corporation filed an action against the state seeking declaratory and injunctive relief, challenging the constitutionality of state statutes that require employers that provide health insurance prescription coverage to include coverage for contraceptives

(Health & Saf. Code, § 1367.25; Ins. Code, § 10123.196). Because plaintiff provided social services without regard to religious affiliation and the majority of its employees did not subscribe to its religious tenets, the religious employer exemption of these statutes did not apply to it (Health & Saf. Code, § 1367.25, subd. (b); Ins. Code, § 10123.196, subd. (d)). The trial court denied plaintiff's motion for a preliminary injunction pending trial. (Superior Court of Sacramento County, No. 00AS03942, Joe S. Gray, Judge.)

The Court of Appeal denied plaintiff's petition for a writ of mandate. The court held that the trial court properly denied plaintiff's request for a preliminary injunction, since it was not reasonably probable that plaintiff's action would prevail on the merits. Health and Safety Code section 1367.25 and Insurance Code section 10123.196, which were enacted to eliminate discriminatory insurance practices that had undermined the health and economic well-being of women, are otherwise valid laws that are generally applicable and neutral with respect to religion.

Accordingly, strict scrutiny did not apply, and the incidental effect that these statutes had on the religious beliefs of plaintiff did not violate either the federal or state free exercise clause (U.S. Const., 1st Amend.; Cal. Const., art. I, § 4) or any other constitutional provision. The religious exemption in these statutes (Health & Saf. Code, § 1367.25; subd. (b), Ins. Code, § 10123.196, subd. (d)) was sect-neutral and was not designed to burden only plaintiff's religion. Accordingly, the exemption was not subject to a strict scrutiny analysis. The religious employer exemption in these statutes was constitutional under the appropriate three-pronged test: the statutes have a secular purpose, they do not advance or inhibit religion, and they do not foster excessive government entanglement with religion. (Opinion by Scotland, P. J., with Morrison and Callahan, JJ., concurring.)

Catholic Charities of Sacramento, Inc. v. Superior Court.

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

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

None.



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

No.

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

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

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

I did not serve as a clerk to a judge.

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

I have never practiced law alone.

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

City of Stockton  
City Attorney's Office  
425 N. El Dorado Street  
Stockton, California 95202  
Law Clerk  
8/75 to 11/75

City of Stockton  
City Attorney's Office  
425 N. El Dorado Street  
Stockton, California 95202  
Deputy City Attorney  
12/75 to 2/76

San Joaquin County  
District Attorney's Office  
222 E. Weber Avenue, Room 202  
Stockton, California 95202  
Deputy District Attorney/Supervisory District Attorney  
2/76 to 8/86

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

The general character of my law practice, prior to joining the Bench, was criminal. I was employed as a Deputy District Attorney for San Joaquin County from 1976 to 1986. In this capacity I prosecuted major felonies including, but not limited to, homicide, sexual assault and child abuse cases.

I was employed as a Deputy City Attorney and a Law Clerk for the City of Stockton, City Attorney's Office, from 8/75 to 2/76. In this capacity I functioned as the legal advisor to various departments within the City of Stockton. My primary duties involved doing legal research on City issues, advising and counseling clients on legal ramifications, and handling any resultant court hearings.

While in law school, I worked for the Sacramento County Public Defender's Office as a law clerk from 6/74 to 5/75. In this position, I did legal research, interviewed clients, evaluated cases, negotiated cases with the District Attorney's Office, and handled court calendars.

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

As a Deputy District Attorney, my client was the People of the State of California.

As a Deputy City Attorney, my client was the City of Stockton, with primary responsibility to the Civil Service Commission and "Manpower," a city organization charged with the responsibility of monitoring federal funds.

While working for the Sacramento County Public Defender's Office, my clients were indigent persons charged with criminal offenses.

Prior to leaving the San Joaquin County District Attorney's Office, I was a Supervisory District Attorney supervising the Child Abuse Sexual Assault and the Career Criminal Units. In these positions, I developed an expertise in the prosecution of child abuse and sexual assault cases and the prosecution of career criminals.

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

As a former prosecutor, I appeared in court on nearly a daily basis. Approximately 90% of my cases involved jury trials. In some instances, defendants would waive their right to have a jury trial and would agree to a court trial.

As a former Deputy City Attorney, I appeared monthly in administrative hearings for the Civil Service Commission. As well, I appeared occasionally in Municipal Court handling civil matters.

- (2) Indicate the percentage of these appearances in

- (A) federal courts; 0%  
 (B) state courts of record; 99%  
 (C) other courts. 1%

- (3) Indicate the percentage of these appearances in:

- (A) civil proceedings; 1%  
 (B) criminal proceedings. 99%

These percentages pertain to my experience as a practicing attorney prior to my appointment to the Superior Court and Appellate Court Bench.

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

Approximately 60 criminal cases. I handled these trials as the sole counsel (Deputy District Attorney).

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

Approximately 90%.

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

I have never had the privilege of appearing before the United States Supreme Court.

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

Prior to my appointment to the Bench, I was a member of the San Joaquin County District Attorney's Office in Stockton, California. As a Deputy District Attorney, I developed an expertise in the area of child abuse and sexual assault. In that capacity, I devoted my time, free of charge, to organizations or individuals interested in addressing this serious problem. Primarily, my time was spent providing training and education to the public, various organizations, and other interested groups.

I have given presentations and provided training to the Women's Center of San Joaquin County; administrators, teachers, and staff members of the Stockton Unified School District; sworn and non-sworn members of the San Joaquin County Sheriff's Department; and I have been a "guest lecturer" in several community college courses in Stockton, California.

As a Deputy District Attorney, I devoted my time and services to the San Joaquin County Victim-Witness Unit and assisted this unit in establishing a "Victim-Witness Mobile Unit" Program. This Mobile Unit Program won a Governor's award for its accomplishments.

I have worked individually to assist crime victims. Specifically, I assisted the Beatrice Mendez family in effecting the return of murdered members of their family to California from Mexico. This involved a complicated situation wherein members of the family were murdered in Mexico, and the Mexican Government refused to return the bodies of the murdered family members. Ultimately the bodies were returned to the family in California.

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

- (a) the citations, if the cases were reported, and the docket number and date if unreported;
- (b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;
- (c) the party or parties whom you represented; and
- (d) describe in detail the nature of your participation in the litigation and the final disposition of the case.

The ten litigated matters were cases that I prosecuted while in the San Joaquin County District Attorney's Office. All cases were tried in the San Joaquin County Superior Court which is located at 222 E. Weber Avenue, Stockton, California, 95202. I was the sole prosecutor in all cases; I represented the People of the State of California in each of the cases. In all cases, the defendants were convicted. The cases were tried from 1981 to 1986. Because the cases were tried approximately twenty years ago, records are on microfiche or in storage. I ordered files from storage and visited the San Joaquin County Courts to review records and have provided the most accurate information available.

1. People v. Arthur Jackson  
 SC 32619, SC 32621, and SC 32665  
 1981 to 1983  
 Hon. Duane Martin (Retired) San Joaquin County Superior Court  
 Hon. K. Peter Saiers San Joaquin County Superior Court  
 Douglas Jacobsen, Attorney at Law  
 7574 Shoreline Drive  
 Stockton, California 95219  
 209.952.9274

This case involved a series of four different residential rapes. The issue(s) at trial included proving the defendant's identity based upon scientific evidence and eyewitness testimony. Each rape case involved the analysis of physical evidence and the extensive cross-examination of scientific witnesses. The defendant was convicted by jury trial. Because of newly discovered evidence, the defendant was granted a new trial. Upon retrial, the defendant accepted a negotiated plea settlement. During the service of defendant's prison sentence, additional evidence was discovered exonerating the defendant on at least one rape conviction. Upon discovery of this new evidence, the defendant's negotiated plea agreement was modified.

2. People v. Clyde Hoover Enge  
 SC 33844  
 1982 to 1984  
 Hon. William Dozier (Retired) San Joaquin County Superior Court  
 James Larsen, Assistant Public Defender  
 San Joaquin County Public Defender's Office  
 102 South San Joaquin Street, Room 1  
 Stockton, California 95202  
 209.468.2730

This case began as a capital murder case and involved the death qualification of a jury. The primary issue was one of identity. The facts involved the murder of a local librarian who was attacked by an unknown intruder in her home. The victim was found nude and strangled in her bathtub. The investigation focused upon the defendant after an anonymous caller identified the defendant as the murderer. A latent fingerprint lifted from the forced entry to the crime scene was then matched to the defendant. The fingerprint evidence, while important, was not dispositive of identity because of its location. In limine motions in this case were extensive because of the defendant's history of sexually assaultive behavior. The defendant had two prior sexual assaults and had previously made a statement to the Probation Department that if he were to do anything differently on his prior crime, he would have killed his victim so that she would not testify in court. There were extensive motions determining what past conduct would be admitted in the defendant's murder trial. The defendant was ultimately convicted of first degree murder and sentenced to prison for life.

3. People v. Tony Terrell Smith  
 SC 34324  
 1983 to 1984  
 Hon. Stephen Demetras San Joaquin County Superior Court  
 Marvin Marks, Attorney at Law  
 343 East Main Street  
 Stockton, California 95202  
 209.941.4813

Defendant was convicted of a series of four residential sexual assaults where all of the victims were University of the Pacific coeds. The Stockton community was on extreme alert due to nature and frequency of the attacks occurring in a university setting. I was involved in the case from the defendant's arrest. I was contacted to be present when the defendant was initially interrogated by law enforcement. The law enforcement community was shocked to learn that the defendant was a juvenile because of the sophistication and boldness of the crimes. The defendant was ultimately sentenced to 53 years in state prison. In this case, I petitioned the court to try the defendant as an adult and made a

concentrated effort, due to the gravity of the offenses, to insure that the defendant would be isolated from society until such time that recidivism would be unlikely.

4. People v. Gregory Zachary  
 SC 35125  
 1984 to 1985  
 Hon. Duane Martin (Retired) San Joaquin County Superior Court  
 Charles Henry, Deputy Public Defender  
 San Joaquin County Public Defender's Office  
 102 South San Joaquin Street, Room 1  
 Stockton, California 95202  
 209.468.2730

This case involved a series of residential rapes wherein the defendant was ultimately convicted and sentenced to approximately 20 years in state prison. The central issue was one of identity. Effective prosecution involved the use of modus operandi evidence.

5. People v. Walter Azure  
 SC 34374  
 1983 to 1984  
 Hon. Kenneth Ferguson (Deceased)  
 Roger Ross, Deputy Public Defender  
 San Joaquin County Public Defender's Office  
 102 South San Joaquin Street, Room 1  
 Stockton, California 95202  
 209.468.2730

The defendant in this case was the grandfather of the victims. He was charged with molesting his three grandchildren who ranged in age from four to nine years old. The defendant denied the molests in his trial testimony; the case turned on the credibility of the witnesses. I was faced with the difficulties of qualifying very young witnesses to testify and the dynamics of in-family molests. Two of the three victims had also been previously molested. The defense attempted to impeach the young witnesses with the fact that they had been previously molested. As well, this case made significant law on appeal in its discussion of the standard of proof required in California regarding "voluntariness" as it relates to admissibility of confessions. The defendant was convicted as charged. My recollection is that the defendant did not complete a significant sentence due to his age and ailing health.

6. People v. Kenneth Tiboni  
 SC 33879  
 1982 to 1983  
 Hon. K. Peter Saiers San Joaquin County Superior Court  
 Peter Pumphrey, Deputy Public Defender  
 San Joaquin County Public Defender's Office  
 102 South San Joaquin Street, Room 1  
 Stockton, California 95202  
 209.468.2730

The defendant was convicted of second degree murder and felony child abuse. He was sentenced to a life sentence. The defendant has been denied parole on two occasions. The murder involved the death of a two-year-old boy who died as a result of child abuse. The defendant was the mother's live-in boyfriend. The defendant did not have a significant prior record and denied both abusing and murdering the victim. At the time that the victim lapsed into unconsciousness, there were two other people present, the defendant and the victim's four-year-old sibling. The defense was that the victim's sibling inflicted the fatal injuries. The defense was rebutted by medical evidence discrediting the defendant. The medical evidence also established that the victim had been abused over a six-week period of time. Prosecution also involved a grant of immunity to the mother who was required to testify against the defendant.

- 7, 8. People v. Robert Eugene Ford and Robert Lee Jones  
 SC 32916 a & b (two separate trials)  
 1981 to 1983  
 Hon. James Darrah (Retired) San Joaquin County Superior Court  
 Hon. Duane Martin (Retired) San Joaquin County Superior Court  
 David Atkinson, Attorney at Law  
 3620 West Hammer Lane  
 Stockton, California 95219  
 209.951.8143  
 William Wallace, Attorney at Law  
 115 North Sutter Street  
 Stockton, California 95202  
 209.466.4627

The defendants in this matter were charged with the brutal sexual assault of a woman after the defendants had forced their way into the victim's home. The defendants both raped the victim; the rapes were accompanied by robbery. Prosecution was complicated because the defendants had to be tried separately since one defendant was found incompetent to stand trial, delaying his trial for a period of time. After two trials and three years, both defendants were ultimately convicted and sentenced to twenty years in prison. The defense in each trial was



one of identity. In each trial, the defense was rebutted by the victim's identification as well as other corroborating evidence. Prosecution also required granting immunity to a witness that was with the defendants immediately before and after the commission of the crimes.

9. People v. John Brecht

SC 36187

1983 to 1984

Hon. Nels B. Fransen (Retired) San Joaquin County Superior Court

Roger Ross, Deputy Public Defender

San Joaquin County Public Defender's Office

102 South San Joaquin Street, Room 1

Stockton, California 95202

209.468.2730

John Brecht was charged with various offenses relating to the sexual assault, pimping and pandering of a young female who was a runaway from a girl's detention home. Witnesses called by the prosecution were prostitutes and convicted felons. Brecht was convicted by a jury and sentenced to state prison. The defense was a general denial and an attack on the credibility of the victim and witnesses.

10. People v. Bernard Patrick Gordon

SC 35456

1985 to 1986

Hon. William Dozier (Retired)

Eric Ratner, Research Attorney

California Supreme Court

350 McAllister Street

San Francisco, California 94102

415.865.7000

Bernard Patrick Gordon and his two brothers were involved in a series of armored car robberies throughout the State of California. In two of the robberies, the suspects shot and killed the armored car guards during the robbery. Gordon and his two brothers were eventually arrested and tried in Stockton on capital murder charges stemming from one of the robbery-murders. All three defendants were tried separately. As the Deputy District Attorney assigned to the Gordon case, I handled all of the extensive law and motion and pretrial preparation. One month prior to the inception of trial, I was appointed to the bench. Bernard Gordon was tried, convicted, and sentenced to life without possibility of parole.

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

I have never been convicted of any offense, nor have I ever received a traffic citation.

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

I have been sued in my capacity as a judge along with other judicial officers. The lawsuits are:

1. Croci v. Cheadle et al.; Lawsuit brought by the San Joaquin County Marshall after he was removed from office by the judges for dereliction of duty; San Joaquin Superior Court No. 212503; dismissed March, 1996.
2. Hylton v. Puglia et al.; United States District Court No. S-97-1003; dismissed July, 1997.
3. Karen Anderson v. Don Hoverson et al.; United States District Court for the District of Columbia, No. 1:98CV00115; dismissed November, 1998.
4. Rowden v. State of California et al.; Sacramento Superior Court No. 02AS02858; dismissed September, 2002.

The lawsuits described in numbers 2, 3, and 4 above involved litigants suing judges for their decisions after an adverse ruling. All three lawsuits were dismissed, based upon judicial immunity.

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

I will resolve any potential conflict of interest pursuant to the Code of Conduct for United States Judges.

I am unaware of any financial arrangements that are likely to present a potential conflict of interest.

My husband is a federal agent.

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

No.

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

See attached financial disclosure report.

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

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

No.

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

N/A

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

I received a telephone call from White House Counsel's Office requesting an interview. I was interviewed by members of White House Counsel's Office, the Justice Department, and the Federal Bureau of Investigation.

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

No.

Chairman HATCH. Judge Coogler?

**STATEMENT OF L. SCOTT COOGLER, NOMINEE TO BE  
DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ALABAMA**

Judge COOGLER. Mr. Chairman, I don't have an opening statement, but I would like the opportunity to introduce my family: my wife, Mitzi, if she'll stand, and my daughter, Allie, Allison, the 5-year-old; and then beside her is Carlson, who is my 12-year-old daughter; and my daughter, Hannah, who is 10.

Chairman HATCH. Well, I tell you, what a beautiful family you have. We are really happy to have you all here. You all have very nice families, and we are grateful to have them here.

[The biographical information of Judge Coogler follows:]

## I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)  
Lawrence Scott Coogler
2. Address: List current place of residence and office address(es).  
Tuscaloosa, Alabama  
714 Greensboro Avenue, Tuscaloosa, Alabama 35401
3. Date and place of birth.  
October 3, 1959  
Nantucket, Massachusetts
4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).  
Mitzi H. Coogler (Hayes)  
Certified Public Accountant  
Michael H. Echols & Associates  
1629 McFarland Blvd. N.  
Tuscaloosa, Alabama 35406
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.  
The University of Alabama School of Law  
August 1981 through May 1984  
Juris Doctor, May 12, 1984  
Class Rank 19<sup>th</sup> out of 161  
  
The University of Alabama  
August 1977 through May 1981  
Bachelor of Arts, May 10, 1981  
Cum Laude
6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Circuit Court Judge  
State of Alabama  
Sixth Judicial Circuit  
714 Greensboro Avenue  
Tuscaloosa, Alabama 35401  
01/1999 through present

Adjunct Professor (Trial Advocacy Instructor)  
The University of Alabama School of Law  
Paul Bryant Drive  
Tuscaloosa, Alabama 35487  
Spring 2000, Fall 2002, and Spring 2003

Attorney  
L. Scott Coogler, P.C.  
Attorneys at Law  
2121 14<sup>th</sup> Street  
Tuscaloosa, Alabama 35401  
10/1996 through 01/1999

Attorney  
Coogler & Copeland, P.C.  
Attorneys at Law  
2121 14<sup>th</sup> Street  
Tuscaloosa, Alabama 34501  
10/1991 through 10/1996

Attorney  
Coogler, Copeland & Lisenby, P.C.  
Attorneys at Law  
2209 9<sup>th</sup> Street  
Tuscaloosa, Alabama 35401  
10/1990 through 09/1991

Attorney  
L. Scott Coogler, P.C.  
Attorney at Law  
2501 Sixth Street  
Tuscaloosa, Alabama 35401  
01/1990 through 09/1990

Attorney  
Prince, Coogler, Turner & Poole, P.C.  
Attorneys at Law  
2501 6<sup>th</sup> Street  
Tuscaloosa, Alabama 35401  
08/1989 through 01/1990

Attorney  
Prince, McGuire & Coogler, P.C.  
Attorneys at Law  
2501 6<sup>th</sup> Street  
Tuscaloosa, Alabama 35401  
05/1985 through 08/1989

Attorney  
Prince & McGuire, P.C.  
Attorneys at Law  
2501 6<sup>th</sup> Street  
Tuscaloosa, Alabama 35401  
01/1985 through 05/1985

Attorney  
David B. Ellis  
Attorneys at Law  
610 Lurleen Wallace Blvd. N.  
Tuscaloosa, Alabama 35401  
10/1984 through 12/1984

Law Clerk  
Honorable Paul Conger  
Circuit Court Judge  
State of Alabama  
Sixth Judicial Circuit  
714 Greensboro Avenue  
Tuscaloosa, Alabama 35401  
05/1984 through 10/1984

Law Clerk  
David B. Ellis  
Attorneys at Law  
610 Lurleen Wallace Blvd. N.  
Tuscaloosa, Alabama 35401  
10/1982 through 05/1984

Investment Entities

Coogler, Copeland and Dorroh (2002 through present)  
Joint Venture Real Estate Rental  
Member

IHOP, LLC (1999 through present)  
Member  
Commercial Real Estate Rental

Comprop No. 2, LLC (1997 through present)  
Member  
Commercial Real Estate Rental

Comprop No. 1, LLC (1997 through 1999)  
Member  
Commercial Real Estate Rental  
Dissolved and liquidated in 2000.

Coker Properties, LLC (1997 through 1999)  
Member  
Real Estate Development  
Dissolved and liquidated in 1999.

Sherwood East, Ltd. (1995 through present)  
Limited Partner  
Real Estate Rental

Peter Pawn, Inc. (1993 through 1995)  
Served as an officer but I don't recall which position.  
Corporation was liquidated and dissolved in 1995.

Coogler and Copeland (1991 estimated through present)  
Joint Venture  
Member  
Real Estate Rental

Service without pay:

Wellington Homeowners' Association (Director since  
March 2003)  
American Christian Academy (Director since 2001)  
A Woman's Place, Drug Treatment Facility (Director  
since 2001)  
FOCUS on Senior Citizens (Director since 2000)  
Tuscaloosa County Boys and Girls Club (Director since  
1999 and more than ten Years ago)  
Miracle Riders (Director more than five years ago)  
The University of Alabama Law Enforcement Academy  
Alumni Association (President 1980 - 1981)

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

Alabama Army National Guard  
03/1988 through 05/1991  
Captain JAG



05/14/1991 Transfer to Inactive Army National Guard  
07/21/1997 Honorable Discharge

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

2002 Recipient of the PRIDE President's Award In Recognition of Valuable Contributions to Drug Abuse Prevention

Recipient of an Alabama Judicial College Certificate for the Completion of One Hundred Hours of Continuing Judicial Education, July 1, 2002

Nominated and selected to the position of Barrister, American Inns of Court, 1996

Recipient of the Army Achievement Medal, February 23, 1991

Member of the University of Alabama School of Law National Trial Advocacy Team, Spring 1984

Member of the University of Alabama School of Law Trial Advocacy Board, Fall 1983 through Spring 1984

Best Paper, Advanced Evidence, University of Alabama School of Law, Fall 1983

Honor Graduate  
The University of Alabama Law Enforcement Academy  
Alabama Peace Officers' Minimum Standards and Training Course  
1979

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

American Bar Association

Tuscaloosa County Bar Association (Member)

Alabama Bar Association (Member)

Alabama Circuit Judges Association (Member)

Elected by the Circuit Judges of the Sixth Judicial Circuit to the position of Presiding Judge of the Circuit in December 2000 served through February 2003

Appointed by the Alabama Supreme Court and serves as a member of the Advisory Council of the Alabama Sentencing Commission

Appointed by the Alabama Supreme Court and serves as a member of the Alabama Civil Pattern Jury Instruction Committee

Appointed by the Alabama Administrative Office of Courts and serves as a member of the Alabama Court Technology Committee

Appointed by the Alabama Administrative Office of Courts and serves as the chairman of the Alabama Time Standards Reporting Review Committee

Elected by the members of the Tuscaloosa County Bar Association to and served as Secretary of the Tuscaloosa County Judicial Selection Commission 1992 through 1998

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

American Christian Academy (Director since 2001)  
FOCUS on Senior Citizens (Director since 2000)  
Tuscaloosa County Boys and Girls Club (Director since 2000 and Past Director more than ten years ago)  
A Woman's Place, Drug Treatment Facility (Director since 2001)  
Brewer Porch Children's Center (Continuous Sponsor since 1993)  
Indian Hills Country Club (Member since 1999)  
Tuscaloosa County Cattlemen's Association (Member since 1998)  
First United Methodist Church of Tuscaloosa (Moved Membership to this church 2001)  
Wellington Homeowners' Association (Director since 2003)

The University of Alabama Alumni Association (Member since 1993)

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

Admitted to Practice Law by the Alabama Supreme Court  
September 27, 1984

Admitted to Practice as an Attorney in the United  
States District Court for the Northern District of  
Alabama on February 26, 1985.

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

*Jury Selection*

Presented at an Alabama Continuing Legal Education  
Seminar  
12/04/2002

*Civil Pattern Jury Instruction Update*

Presented at the Alabama Circuit and District Judges  
Annual Conference  
2001

*From the Bench*

*The Alabama Lawyer*, Vol. 62, No. 2  
March 2001

There are no copies of the speeches I have given and no  
press reports of my speeches.

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

Good. My last physical examination was February 7, 2003.

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

Circuit Court Judge  
State of Alabama  
Sixth Judicial Circuit  
714 Greensboro Avenue  
Tuscaloosa, Alabama 35401  
1/1999 through present

The Circuit Court in Alabama is an elected court of general jurisdiction. All felonies as well as major civil cases fall within the jurisdiction of the Circuit Court.

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

- (1) citations for the ten most significant opinions you have written;

As a trial judge, I make most of my rulings on the record in the courtroom without issuing written orders or opinions. I have attached ten of the written orders I have entered.

- i. W. David Nichols, et al., v. Robert L. Bockrath, et al.  
CV-1999-385

This case involved a suit filed by an attorney from Birmingham against Robert Bockrath, the University of Alabama Athletic Director, and the University of Alabama. In his suit, Mr. Nichols attempted to assert a class action against the Defendants for alleged misconduct in the athletic office, including, but not limited to, ticket sales. The order I have attached is one of two I entered in the case dismissing his claims. After reviewing the order, Mr. Nichols did not appeal the dismissal.

- ii. Tony M. Richardson, et al., v. Patriot Homes, Inc.  
CV-1998-1072

This case involved the sale and subsequent claim for breach of warranty on a manufactured home. The Defendant moved to transfer venue, and the Plaintiffs opposed the transfer. In the attached order, I denied the motion. The Defendant did not seek review by a higher court and the case was ultimately settled.

- iii. Annie Blakeney v. Tree Top - Timberlane II, Sealy Realty, et al.  
CV-1998-389

This case involved a Plaintiff who claimed she had been injured in a fall in her apartment. The Plaintiff claimed that the fall was due to the negligence of the Defendants. This order granted a summary judgment in favor of the Defendants. I do not recall if this case was appealed, but if it was, it was affirmed.

- iv. Barbara Sanders as mother and next friend of Kristen Danielle Sanders, et al., v. Shoe Show, Inc.  
CV-1998-421

This case involved a claim by the Plaintiffs that the minor children were shopping along with their mother at a local mall when the employees of one of the Defendants and an off-duty Tuscaloosa

police officer confronted the children. The Defendants suspected the children of shoplifting. The Plaintiffs asserted claims of false imprisonment, discrimination, the tort of outrage, negligent hiring, and general negligence. In this order, I granted summary judgment to the Defendants on all counts. The Plaintiffs appealed the ruling, and I was affirmed. *Sanders v. Shoe Show, Inc.*, 778 So. 2d 820 (Ala. Civ. App. 2000).

- v. Ronnie Snow, et al., v. J.A. Moon, et al.  
CV-1997-31-C (In the Circuit Court of Washington County, Alabama)

This case was assigned to me, because the judges in Washington County had a conflict in the case. In this case, the Plaintiffs claimed that the Defendants had breached a contract and committed various types of fraud. In this order, I granted summary judgment for the Defendants. This ruling was not appealed.

- vi. Clyde Michael Fields, et al., v. Ricks Hardware, Inc., et al.  
CV-1998-108

This case involved a dispute between adjacent property owners in the city limits of Tuscaloosa. The Defendants had placed obstructions across an alley located adjacent to the property of the parties. The Plaintiff asked that the Court order the removal of the obstructions and grant further relief. This is my order following the trial of the case. The case was not appealed.

- vii. James Haywood, et al., v. MGSR Corporation, et al.  
CV-1998-61

This case involved a claim made by the representatives of the estates of two deceased individuals. The parents of the decedents claimed damages from the Defendants based on negligence, wantonness, and due to the alleged violation of the Alabama Dram Shop Act. The Plaintiffs claimed that the alcoholic beverages served by the Defendants were the cause of the damages they sustained. This is the summary judgment order I

entered on this case. The ruling was not appealed.

- viii. Steve Allen Sullivan v. State Farm Mutual Automobile Insurance Company  
CV-2002-250

This case involves a claim by the Plaintiff that the Defendant should be required to pay a judgment based on an insurance policy it had written. The Defendant asserted a driver exclusion clause in the policy, and the Plaintiff argued that because the underlying liability was based on negligent entrustment, the exclusion did not prevent liability. In the attached order, I ruled for the Defendant. This is a matter of first impression in Alabama. I do not know if the Plaintiff will appeal my ruling.

- ix. Mark Edwin Caffee v. State of Alabama  
CC-1991-539.61

This is a petition for relief from conviction and sentence filed by the Defendant pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. In his petition, the Defendant asserted various grounds for his claim that he should be relieved of his previous conviction and sentence. I denied the petition. The Defendant appealed the ruling, and I was affirmed. I have also attached the memorandum opinion of the Alabama Court of Criminal Appeals.

- x. Richard Leon Henderson v. State of Alabama  
CC-1995-816.60

This is a petition for relief from conviction and sentence filed by the Defendant pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. In his petition, the Defendant asserted various grounds for his claim that he should be relieved of his previous conviction and sentence. I denied the petition.

- (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings;

Civil Reversals:

- i. Barger v. Oakwood, 773 So 2d 454 (Ala. 2000)

In this case, the Defendants sought to compel arbitration. I denied the motion, and the Defendants appealed. I was reversed. The case settled when it came back to my court.

- ii. Georgia Harris, et al., v. State of Alabama, 821 So. 2d 177 (Ala. 2001)

This case involved the condemnation of \$165,501 and an automobile alleged to be profits from illegal drug sales. I condemned the money and the automobile. The Alabama Supreme Court affirmed my ruling as to the money, but reversed my ruling on the automobile.

- iii. Cox v. Franklin Homes, Inc., 828 So. 2d 295 (Ala. 2002)

In this case, the Defendants sought to compel arbitration. I granted the motion to compel arbitration, and the Plaintiffs filed petition for writ of mandamus. The writ was granted, and I set aside my ruling on the motion to compel arbitration.

Criminal Reversals:

- i. Timothy Wayne Thomas v. State of Alabama, 2002 WL 31628898 (Ala. Crim. App. 2002)

In this case, the Defendant, who is serving a life sentence for robbery in the first degree, filed a Rule 32 Petition, and I denied it. It appeared from the certificate of judgment in the Circuit Court file that the limitation period had expired. The Court of Criminal Appeals found that the original certificate of judgment was stayed by operation of law or otherwise issued by mistake, thus the Rule 32 petition should not have been dismissed. The Defendant's petition is set for trial.

- (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.



Most of the criminal cases I have handled involved decisions about constitutional issues such as motions to suppress evidence.

These rulings are often made on the record rather than in written form. I have, however, located the following rulings and opinions on appeals for cases in which such issues were addressed.

- (1) Barbara Sanders as mother and next friend of Kristen Danielle Sanders, et al., v. Shoe Show, Inc., CV-1998-421

This case involved a claim by the Plaintiffs that the minor children were shopping along with their mother at a local mall when the employees of one of the Defendants and an off-duty Tuscaloosa police officer confronted the children. The Defendants suspected the children of shoplifting. The Plaintiffs asserted claims of false imprisonment, discrimination, the tort of outrage, negligent hiring, and general negligence. In this order, I granted summary judgment to the Defendants on all counts. The Plaintiffs appealed the ruling, and I was affirmed. Sanders v. Shoe Show, Inc., 778 So. 2d 820 (Ala. Civ. App. 2000).

- (2) State of Alabama v. Cedric D. Jenkins, CC-1998-1900

The Defendant was charged with unlawful possession of marijuana in the first degree. The Defendant filed a motion to suppress. I denied the motion to suppress. The Defendant appealed my ruling, and I was affirmed. I have attached the memorandum opinion from the Alabama Court of Criminal Appeals.

- (3) City of Northport v. Walter Oliver Sanders, CC-1996-758

The Defendant in this case was charged with DUI. The police department received an anonymous call from a citizen that described a vehicle with a certain tag number that was being driven by an intoxicated driver. A

police officer located the vehicle, confirmed the tag, and then stopped the vehicle. After having the driver perform various field tests, he was arrested. The Defendant filed a motion to suppress. I denied the motion to suppress. The Defendant did not appeal the ruling.

- (4) State of Alabama v. Derrick D. Collins, CC-1999-260

The Defendant was charged with unlawful possession of marijuana in the first degree. The Defendant filed a motion to suppress. I denied the motion to suppress.

- (5) State of Alabama v. Earl Lee Barnes, CC-2000-71

The Defendant was charged with unlawful possession of a controlled substance. The Defendant filed a motion to suppress. I entered an order suppressing the evidence on the record rather than by written order. The State did not appeal.

- (6) State of Alabama v. Joe Lewis Price, CC-2000-790

The Defendant was charged with unlawful possession of a controlled substance. The Defendant filed a motion to suppress. I denied the motion to suppress.

- (7) State of Alabama v. Derrick D. Williams, CC-2000-1413

The Defendant was charged with unlawful possession of marijuana in the first degree. The Defendant filed a motion to suppress. I denied the motion to suppress.

- (8) State of Alabama v. Elbert Ellis Sessions, CC-2000-1562

The Defendant was charged with receiving stolen property in the first degree. The

Defendant filed a motion to suppress. I denied the motion to suppress.

- (9) State of Alabama v. Deboris M. Thomas, CC-2001-768

The Defendant was charged with discharging a firearm into an occupied dwelling. The defendant claimed, as part of his defense, that his prosecution was a violation of the protection against double jeopardy afforded by the Fifth Amendment to the United States Constitution. The Defendant had, previous to his prosecution, pled guilty to the offense of reckless endangerment in Tuscaloosa Municipal Court. I ruled that his prosecution did not violate the protection against double jeopardy afforded by the Fifth Amendment to the United States Constitution. The Defendant appealed the case, and I was affirmed. I have attached a copy of the memorandum opinion of the Alabama Court of Criminal Appeals.

- (10) State of Alabama v. Darrien Dewayne Madison, CC-1999-1300

The Defendant was charged with unlawful distribution of a controlled substance. The Defendant, as part of his defense, sought to obtain the personnel records of the police officer who arrested him. The Defendant asserted various grounds including constitutional grounds for being allowed to review the officer's file. I denied the motion. The Defendant appealed the ruling, and I was affirmed. I have attached a copy of the memorandum opinion of the Alabama Court of Criminal Appeals.

- (11) State of Alabama v. Cerron R. Colley, CC-2000-1185

The Defendant was convicted of trafficking in cannabis. As part of his defense, the Defendant made a motion to suppress certain evidence seized at the time of his arrest. I denied the motion. The Defendant appealed

the ruling, and I was affirmed. I have attached a copy of the memorandum opinion of the Alabama Court of Criminal Appeals.

- (12) State of Alabama v. Mario G. Centobie, CC-1999-1225

The Defendant was charged with the attempted murder of a police officer in Tuscaloosa County. In addition, he was charged with burglary and theft. The Defendant was also convicted of capital murder when he left Tuscaloosa County and killed a police officer in another county. As part of his defense, the Defendant argued that the admission of evidence of other alleged crimes in other areas violated various provisions of law of the State of Alabama and the Constitution. I allowed the evidence to be admitted in the trial. The Defendant was convicted, and he appealed my ruling. I was affirmed. I have attached a copy of the memorandum opinion of the Alabama Court of Criminal Appeals.

- (13) State of Alabama v. Dee Cee Skinner, CC-94-1024

The Defendant was charged with attempted distribution of a controlled substance. As part of his defense, the Defendant argued that his sentence should not have been enhanced citing Apprendi v. New Jersey, 530 U.S. 466 (2000). I was affirmed. I have attached a copy of the memorandum opinion of the Alabama Court of Criminal Appeals.

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

None

17. Legal Career:

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

including:

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

I was a law clerk for Circuit Judge Paul S. Conger from May 1984 through October 1984. Judge Conger was a Circuit Court Judge in the State of Alabama, Sixth Judicial Circuit.

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

I practiced alone on two occasions:

10/1996 through 01/1999  
2121 14<sup>th</sup> Street  
Tuscaloosa, Alabama 35401

01/1990 through 09/1990  
2501 6<sup>th</sup> Street  
Tuscaloosa, Alabama 35401

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

Part-time City Prosecutor  
Town of West Blocton  
West Blocton, Alabama 35184  
Approx. 10/1984 through 5/1985

Attorney  
David B. Ellis  
Attorneys at Law  
610 Lurleen Wallace Blvd. N.  
Tuscaloosa, Alabama 35401  
10/1984 through 12/1984

Attorney  
Prince & McGuire, P.C.  
Attorneys at Law  
2501 6<sup>th</sup> Street  
Tuscaloosa, Alabama 35401  
1/1985 through 5/1985

Attorney, Shareholder and Vice-President  
 Prince, McGuire & Coogler, P.C.  
 Attorneys at Law  
 2501 6<sup>th</sup> Street  
 Tuscaloosa, Alabama 35401  
 5/1985 through 8/1989

Attorney, Shareholder and Vice-President  
 Prince, Coogler, Turner & Poole, P.C.  
 Attorneys at Law  
 2501 6<sup>th</sup> Street  
 Tuscaloosa, Alabama 35401  
 8/1989 through 1/1990

Attorney, Shareholder and President  
 L. Scott Coogler, P.C.  
 Attorneys at Law  
 2501 6<sup>th</sup> Street  
 Tuscaloosa, Alabama 35401  
 1/1990 through 9/1990

Attorney, Shareholder and President  
 Coogler, Copeland, & Lisenby, P.C.  
 Attorneys at Law  
 2209 9<sup>th</sup> Street  
 Tuscaloosa, Alabama 35401  
 10/1990 through 09/1991

Attorney, Shareholder and President  
 Coogler & Copeland, P.C.  
 Attorneys at Law  
 2121 14<sup>th</sup> Street  
 Tuscaloosa, Alabama 34501  
 10/1991 through 10/1996

Attorney, Shareholder and President  
 L. Scott Coogler, P.C.  
 Attorneys at Law  
 2121 14<sup>th</sup> Street  
 Tuscaloosa, Alabama 35401  
 10/1996 through 1/1999

Circuit Court Judge  
 State of Alabama  
 Sixth Judicial Circuit  
 714 Greensboro Avenue  
 Tuscaloosa, Alabama 35401  
 1/1999 through present

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

My law practice was of a general nature involving extensive litigation. I represented both individuals and businesses. While most of my practice involved trial work in criminal and civil courts, I also had a significant practice in business law.

In early 1996, I was retained to represent a group of doctors in forming a company to own and operate cancer treatment facilities. This resulted in a change to my practice. From that point, I spent at least half of all my time working with that one client and its various entities. I became its outside general counsel. The company grew to have several facilities providing cancer care to patients outside, as well as throughout the State of Alabama.

I was elected to the position of Circuit Court Judge in November of 1998. As a Circuit Judge, I preside over both major civil and felony criminal cases. I have handled over 1,600 civil cases and over 2,500 felony criminal cases since becoming a judge. I hold seventeen jury weeks per year and average trying two to three jury cases per jury week. I am in my fifth year as a Circuit Judge and have tried most every case imaginable from medical malpractice cases to murder and drug trafficking cases.

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

As an attorney, my typical client was an individual with a legal dilemma or a small business owner in need of legal services. I did not specialize except possibly in general litigation.

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

I frequently appeared in court for various motions. I was in court for trials often, but I would not say frequently. I was in depositions very frequently.

2. What percentage of these appearances was in:

(a) federal courts;

2% (estimated)

(b) state courts of record;

88% (estimated)

(c) other courts.

10% (estimated)

3. What percentage of your litigation was:

(a) civil;

80% (estimated)

(b) criminal.

20% (estimated)

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

Sole counsel, 35 (estimated)

Chief counsel, 10 (estimated)

Associate counsel, 20 (estimated)

5. What percentage of these trials was:



- (a) jury;  
40% (estimated)
- (b) non-jury.  
60% (estimated)

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

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

(1) State of Alabama v. Paul Anthony Johnson

In the Circuit Court of Pickens County, Case Number CC-1985-001

This case was before the Honorable Clatus Junkin, now retired (205-932-4300). The State was represented by the Honorable Pep Johnston, (now retired). The Honorable Robert F. Prince served as co-counsel (205-345-1234; The Prince-Patterson Law Firm, 2501 6<sup>th</sup> Street, Tuscaloosa, Alabama 35401).

In this case the Defendant was charged with the murder of his wife in a rural area of Pickens County, Alabama. The Defendant was white but the prosecution made significant use of evidence indicating that he had dated in the past and, in fact, had a child by a black woman who lived in Mississippi. There were many issues involved in this case. It was a case comprised of circumstantial evidence. The State attempted to tie the Defendant to the murder with trace evidence consisting of metal fragments that the State argued had been left by the Defendant due to his employment as a metal fabricator.

After being tried one time, the Alabama Court of Criminal Appeals reversed the conviction of the Defendant and the case was tried again. Each trial lasted two weeks. It was discovered in the second trial that the investigators for the State had crucial evidence concerning tire tracks on the grass the morning of the murder. This evidence had been kept from the Defense despite appropriate requests. This evidence was clearly exculpatory as the tracks did not match any vehicle that was available to the Defendant. The Defendant was again convicted in the Circuit Court.

The Alabama Court of Criminal Appeals ultimately agreed with our position that there was insufficient evidence to try the Defendant and reversed and rendered the case.

Johnson v. State of Alabama, 594 So. 2d 1245 (Ala. Crim. App. 1991)

I did the majority, if not all, the research. I also located and prepared the expert witnesses utilized in the defense. In the two trials, I examined several of the witnesses and argued many of the motions.

(2) Sherry Hamner v. Cletis D. Hand, et al.

In the Circuit Court of Tuscaloosa County, Case Number CV-1984-792

This case was before the Honorable Joseph A. Colquitt (205-348-1145). The Honorable Robert F. Prince was co-counsel. He is an attorney at The Prince-Patterson Law Firm, 2501 6<sup>th</sup> Street, Tuscaloosa, Alabama (205-345-1234). The Honorable Robert B. Harwood, now Associate Justice on the Alabama Supreme Court at 300 Dexter Avenue, Montgomery, Alabama 36104-3741, 334-242-4593, represented Dr. Steve Hill. The Honorable J. Russell Gibson, III represented Dr. Cletis D. Hand. Mr. Gibson can be reached at Phelps, Jenkins, Gibson & Fowler, L.L.P., 1201 Greensboro Avenue, Tuscaloosa, Alabama 35401, 205-345-5100. The Honorable J. Gusty Yearout, located at Yearout, Myers & Traylor, P.C., 800 Shades Creek Parkway, Suite 500 in Birmingham, Alabama 35209, 205-414-8160, represented West Alabama General Hospital, Inc.

This was a medical malpractice case. In this case, it was alleged that the Defendants had committed malpractice in surgery performed on the Plaintiff that left her injured and disfigured. There were many legal issues in this case, as in all medical malpractice cases. In addition to the typical issues of liability, the defendants had pled consent, but we were

successful in proving a failure of disclosure in the release process. The consent was ultimately found to be ineffective. The case was settled in the middle of the trial, after the Defendants each discovered that the device they and their experts had testified was utilized in the surgery was not utilized, but was instead created after the surgery.

I conducted many of the depositions, argued most, if not all, the motions before the court and examined various witnesses in the trial.

(3) Cecil Causey, et al., v. Jim Walter Resources, Inc., et al.

In the Circuit Court of Tuscaloosa County, Case Number CV-1988-309

This case was before the Honorable Joseph A. Colquitt, (205-348-1145). Serving as co-counsel were the Honorable Robert F. Prince (The Prince-Patterson Law Firm, 2501 6<sup>th</sup> Street, Tuscaloosa, Alabama 35401, 205-345-1234) and the Honorable Cephas Knox McLaney, III, McLaney & Associates, 509 South Court Street, Montgomery, Alabama 36103, 334-265-1282). Jim Walter Resources, Inc. was represented by the Honorable Jarred Otis Taylor, III (Maynard, Cooper & Gale, P.C., 1901 6<sup>th</sup> Avenue North, Birmingham, Alabama 35203, 205-254-1061).

In this case, the Plaintiffs were the residents of a small community in North East Tuscaloosa County. The Defendant had built and operated a coal drying and stacking operation beside the homes of the Plaintiffs. The coal dust and pollution from the facility covered the homes, clothes, and other items of the Plaintiffs causing them many difficulties.

In the case, a lot of depositions were taken, and many experts on both sides were prepared and examined. The case was tried, and a verdict rendered for the Plaintiffs. The Defendant, Jim Walter Resources, went into bankruptcy (not because of this case) immediately after the verdict. I think the case was ultimately settled, but I had left the firm before that point. There were many legal issues dealing with trespass, nuisance, and the proof and proximate cause of damages.

I conducted most of the depositions, prepared, and examined most of the experts and participated extensively in the trial, including making arguments and examining witnesses.

(4) Mary Frances Sabich v. Deborah R. Coggins, et al.

In the United States District Court for the Northern District of Alabama, Western Division, Case Number CV-87-G-0343-W

This case was tried before the Honorable J. Foy Guin, United States District Judge (205-278-1830). The Honorable Robert F. Prince served as co-counsel. He can be reached at The Prince-Patterson Law Firm, 2501 6<sup>th</sup> Street, Tuscaloosa, Alabama 35401, 205-345-1234. The Defendants were represented by the Honorable Robert B. Harwood, now Associate Justice of the Alabama Supreme Court, at 300 Dexter Avenue, Montgomery, Alabama 36104-3741, (334-242-4593).

In his case, the Plaintiff claimed that the Defendant failed to diagnose cancer of the brain. The Plaintiff, a doctor herself, contended that the failure to diagnose prevented her from having any chance to obtain treatment and a chance of a cure. The Plaintiff alleged that she had been treated by the Defendants on a regular basis when sufficient symptoms were present. When the cancer was ultimately discovered, it was too late for any significant treatment.

A verdict was returned in the favor of the Defendants. The Defendants argued that it would not have mattered if she had been diagnosed earlier because of the type cancer. There were many legal issues of liability, as well as legal issues concerning the question of damages.

In the trial, I participated in arguing motions. Also, I examined a few of the witnesses, although I do not recall which ones.

(5) W.C. Wiggins v. International Harvester, et al.

In the Circuit Court of Tuscaloosa County, Alabama, Case Number CC-1987-19

This case was before the Honorable T. Steve Wilson (205-349-3870). The Defendant, Martin Truck & Tractor Company, Inc., was represented by the Honorable John A. Russell, III (202 Broad Street, Aliceville, Alabama 35442, 205-373-8714). The Defendant, International Harvester, was represented by the Honorable D. Alan Thomas of Huie, Fernambucq & Stewart, L.L.P., 417 20<sup>th</sup> Street North, 8<sup>th</sup> Floor, Birmingham, Alabama 35203, 205-251-1193.

In this case the Plaintiff, a farmer in Tuscaloosa County, alleged that the Cyclo planter he had purchased from the Defendants was defective. The Defendants had attempted on many occasions to repair the equipment, but were unsuccessful. The

plaintiff alleged that the defective equipment resulted in his crops being under-planted and planted late. Various experts were retained and examined on issues dealing with the operation of the equipment and the estimation and calculation of damages to crops as a result of late planting. I represented the Plaintiff in the various summary judgment motions that were filed and in all other proceedings including depositions. The case was settled right before trial in the plaintiff's favor.

(6) James F. Johnson, et al. v. Klumb Company, Inc., et al.

In the Circuit Court of Tuscaloosa County, Alabama, Case Number CV-86-792

This case was before the Honorable John M. Karrh, now retired (205-349-2009). The Defendants were represented by the Honorable Robert B. Harwood, now Associate Justice of the Alabama Supreme Court (300 Dexter Avenue, Montgomery, Alabama 36104-3741, 334-242-4593) and others, including the Honorable R. Stanley Morris (1232 Blue Ridge Boulevard, Birmingham, Alabama 35226, 205-823-8916) and the Honorable Christopher L. McIlwain (Hubbard, Smith, McIlwain, Brakefield & Browder, 808 Lurleen Wallace Boulevard North, Tuscaloosa Alabama, 205-345-6789).

In this case, the plaintiffs were residents in a neighborhood that was adjacent to property upon which the Defendants set up and operated a bark processing and storage facility. It was alleged that the bark, because of the method in which it was stacked and stored, burned spontaneously. On many occasions, the smoke was so bad in the neighborhood that the fire department was called and occasionally had to fight fires at the Klumb facility. It was further alleged that the burning was such that it generated not only smoke and ash that covered the neighbors homes, but also resulted in the release of extremely harmful carcinogens.

I performed most of the legal work on the case until I left the firm. I took or defended the majority of the depositions, as well as defended various motions for summary judgement. This case was extremely complicated and involved several legal issues including trespass, nuisance, and proximate cause of damages.

After I left the firm, the case was tried and then settled. The Defendant moved its operation to a more appropriate site and now utilizes many of the storage methods we argued would prevent the burning.

(7) David E. Gerald v. Townsend Ford, Inc.

In the Circuit Court of Tuscaloosa County, Alabama, Case Number CV-1990-27

This case was before the Honorable Joseph A. Colquitt, now retired (205-348-7865). The Honorable Silas G. Cross, Jr. of Cross, Poole & Fischer, L.L.C., 1416 Greensboro Avenue, Tuscaloosa, Alabama 35401, 205-391-9932, was co-counsel. The Defendant was represented by the Honorable William J. Donald, III of Donald, Randall & Donald, 2330 University Boulevard, 9<sup>th</sup> Floor, Tuscaloosa, Alabama 35403, 205-758-2585.

In this case, the Plaintiff alleged that he had purchased an automobile that was represented to him as having been utilized and driven by an executive of the Ford Motor Company. The Plaintiff discovered after having some problems with the car that it had instead been leased to a rental car company and used as a normal rental car. The jury returned a verdict in favor of the plaintiff. There were issues concerning the elements of liability in a fraud case, as well as damages.

I handled most all of the depositions, as well as most of the witnesses and legal arguments in this case.

(8) William O. Pace vs. Titus Judah, Case Number CV-89-181 D  
Durward Hunt, et al., vs. Titus Judah Realty, Inc., et al.,  
Case Number CV-89-182 B

These cases were before the Honorable John B. Bush in the Autauga County Circuit Court (334-567-1148).

I represented the Defendants in these cases. The Plaintiffs were represented by the Honorable George P. Walthall, Jr. at 125 West Main Street, Prattville, Alabama 36067, 205-365-2255.

The Defendants were land developers who built a neighborhood adjacent to property owned by the Plaintiffs. The Plaintiffs alleged that the Defendants had trespassed and continued to trespass upon their land by the runoff of water, soil and other materials from the development. The Plaintiffs sought various relief, including money damages.

After several depositions, summary judgment was granted in favor of the Defendants. I handled all of the representation of the Defendants.

- (9) Signa Mining, Inc., et al., vs. Tuscaloosa County Commission, et al.

In the United States District Court for the Northern District of Alabama, Western Division, Case Number CV-88-G-1468-W

This case was tried before the Honorable J. Foy Guin, United States District Judge (205-278-1830). The Tuscaloosa County Commission was represented by the Honorable Michael D. Smith of Hubbard, Smith, McIlwain, Brakefield & Browder, 808 Lurleen Wallace Boulevard North, Tuscaloosa, Alabama 35401, 205-345-6789.

In this case I represented the Plaintiff, a coal company that had the right to mine coal from a particular parcel of property in Tuscaloosa County. The Tuscaloosa County Commission decided that the company should not be allowed to mine the coal, and to prevent the mining passed a weight restriction on the roads leading to and from the property. The restriction had the effect of prohibiting all but passenger cars from utilizing the roads. When the county refused to rescind its action, a suit was filed in the United States District Court for the Northern District of Alabama, Western Division. The Plaintiff prevailed in a motion for summary judgment, and the weight restriction was set aside.

I handled all the representation of Signa Mining, Inc., in the case.

The Defendants subsequently appealed the case to the Eleventh Circuit, and Judge Guin was affirmed.

- (10) Bobby Park Truck and Equipment, Inc. v. Jesco, Inc., et al.

In the Tuscaloosa County Circuit Court, Case Number CV-1995-944

This case was before the Honorable Gay M. Lake, Circuit Judge, now retired (205-553-8437). I represented the Plaintiffs. The Defendants were represented by the Honorable Wilbor J. Hust, Jr. of Zeanah, Hust, Summerford, Davis & Williamson, L.L.C., 2330 University Boulevard, 7<sup>th</sup> Floor, Tuscaloosa, Alabama 35401, 205-349-1383, and the Honorable Randall Edwards of Smith, Curry & Hancock, 233 Peachtree Street Northeast, 2600 Harris Tower/Peachtree Center, Atlanta, Georgia 30303-1530, 404-521-3800.

In this case, the Plaintiff, a company I represented on a frequent basis, contracted with the Defendants to build a large

truck and equipment retail and repair facility in Tuscaloosa County. The Plaintiff alleged that the work was deficient and that the Defendants had breached their agreements. After numerous depositions and some motions, the case was settled.

I handled all of the representation of the Plaintiff.

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

In early 1996, I was retained to represent a group of doctors in forming a company to own and operate cancer treatment facilities. I became its outside general counsel. The company grew to have several facilities providing cancer care to patients outside, as well as throughout the State of Alabama. As its attorney, I conducted or supervised all corporate work. In representing this company, I completed the negotiation and drafting of many contracts. I also spent a significant amount of time advising the company on employment issues as well as medical and non-medical liability issues.



## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

I do not have an interest in any law firm. I am not owed anything from anyone for my previous interest in any law firm or services with any law firm. I do not have any stock options of any type with any corporation.

I do not know of any work or contract that remains unpaid except the note receivable from PTS, Inc., described in the attachments to the Financial Statement. The payments on the note receivable are set forth in the note. PTS, Inc., owns one or more newspapers. The note is one of many notes that make up a financing package utilized by PTS, Inc., in its purchase of one or more newspapers. The terms of the note include a fixed interest amount.

I have a deferred compensation account with the State of Alabama. This account is described in the attachments to the Financial Statement. I expect to follow the rules of the account and the law with respect to that account. I have no control over the investments in that account and do not know when I will draw anything out of the account.

With regard to my real estate investments, I expect to receive the value of the investment when it is sold. I expect to receive my share of the rents after expenses, as long as I remain an owner of the investment. I do not know when I will sell the investments.

I own some publicly-traded stocks, all of which are listed in my attached Financial Disclosure Report. I expect some of those stocks to continue to pay dividends and I expect to receive the value of the investment when I sell the stock. I do not know when I will sell the stock or receive dividends.

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

As a Circuit Judge in the State of Alabama, I have exercised restraint in becoming involved in any matters which could result in litigation or create a conflict of interest. I would continue that practice. In addition, I have not practiced as an attorney since the end of 1998. This would prevent most, if not all, potential conflicts of interest. In the event I have a conflict of interest, I would recuse myself from the case.

Because of my service as a Circuit Judge I do not anticipate any areas that are likely to present potential conflicts-of-interest during my initial service in the position to which I have been nominated. However, I will follow the guidelines of the Code of Judicial Conduct.

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

The University of Alabama, School of Law, has requested that I continue as an adjunct professor (one evening per week) but that would depend on my schedule and work load should I be appointed.

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

See attached Financial Disclosure Report.

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

See attached Statement of Net Worth.

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

I was the candidate in my successful campaign to be elected Circuit Judge in November, 1998.

## III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I accepted several cases through the years on a pro bono basis. Some of these cases were at the request of a judge and some resulted from individuals who contacted my office. In addition, I participated in the Alabama State Bar Volunteer Lawyers Assistance Program representing indigent clients in civil cases.

Most of the pro bono cases were civil in nature mainly dealing with domestic relation issues.

I do not recall the amount of time spent with each client but I do know that I spent many hours in pro bono service.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

I do not now nor have I ever belonged to an organization that invidiously discriminates on the basis of race, sex, or religion.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

There is not a selection commission in my jurisdiction to recommend candidates for nomination to the federal courts. Senator Richard Shelby asked me to prepare a resume for him and then asked me to come to Washington to meet with himself and Senator Sessions. I met with Senator Shelby and then Senator Sessions. I was then asked to return to Washington in order to meet with members of the White House Staff. I returned and met with them. I have since that point completed all the forms and provided all the information requested.

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

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The principle of separation of powers is very important. The role of the judicial branch is to impartially apply the Constitution, laws enacted by the legislative branch and implemented by the executive branch, and any Supreme Court or circuit court decisions that apply to the issue. Judges must fairly apply the law to the case or controversy with which it is properly presented.

If a judge were to utilize his position to implement his personal views on policy matters, he would be substituting his own views for those of the elected representatives of the people. If this were to occur, individuals and entities, who are expected to comply with the law would have no way of knowing what is required of them. Adherence to precedent and the principle of stare decisis are important because they provide stability to our jurisprudence.

Chairman HATCH. Well, to be honest with you, I know all three of you and know your reputations, so I am not going to ask any questions. So I will turn to Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman. And let me congratulate all of you and your families on your nominations. I will only have questions for Mr. Chertoff, but I congratulate all of you. And I certainly am happy to see Mr. Chertoff here. I have been impressed with him in a lot of different contexts and have enjoyed our work together. So I just want to ask you some questions about some issues that you already know I care a great deal about and I know you know a lot about.

As Assistant Attorney General for the Criminal Division, you have had a central role in the development of the Justice Department's anti-terrorism initiative since September 11th, and one measure of the Department's success and one measure of the success of all of this is the fact that we have not seen a terrorist attack on U.S. soil since then. But some of these initiatives have been controversial, and I would like to focus for a moment on the PATRIOT Act.

Section 215 of the PATRIOT Act grants the FBI broad authority to ask businesses, including libraries and booksellers, to turn over their records on customers, employees, or library patrons. You wanted the FBI to have that power, but obviously you must know that since its implementation, there has been a growing outcry from many Americans who believe that the Government has no business gaining access to the library, medical, travel, or financial records of law-abiding Americans.

If you are confirmed and someone challenges the information gathered under the PATRIOT Act as a violation of his or her constitutional rights, what assurances can you give this Committee and the American people that you would give fair and impartial review to the case when you have essentially already judged, in effect, that the PATRIOT Act is lawful?

Mr. CHERTOFF. Senator, first of all, it's a pleasure to appear before you, and as you've noted, we have had the occasion to work together in the past.

I also obviously am mindful of the fact that, although we have been thus far successful in not having had another terrorist attack on this country, of course, we always want to remain vigilant lest that happen again.

I appreciate the question because it gives me the opportunity to clarify something which I am not sure the public is always aware of, which is the difference in the role one plays as an advocate or as a member of the executive branch and the role one plays as a judge. I've been privileged in my legal career to be both a prosecutor and a defense attorney, and sometimes in representing either the United States or in representing private clients, I have argued for positions that were, to some degree, diametrically opposite because that is what I do in the service of my client or in the discharge of my responsibility.

The role of a judge, of course, is yet a different perspective. It is a neutral perspective in which your obligation is to apply the law. So that I have no hesitation in saying that, presented with any issue in which there is a legal challenge to a statute or a regula-

tion, I will approach it in a neutral fashion, notwithstanding the fact that I may have advocated as a defense attorney for a position with respect to the statute or in some other manner during the course of my life as an advocate.

Senator FEINGOLD. How about specifically the fact that you were pretty involved with the promotion of the passage of the USA PATRIOT Act? Can you give me specific assurance that you will be able to be impartial with regard to challenges concerning the USA PATRIOT Act?

Mr. CHERTOFF. Absolutely, Senator.

Senator FEINGOLD. Thank you, Mr. Chertoff.

If confirmed as a judge on the Third Circuit Court of Appeals, you would be in a position to review challenges to plea agreements entered into between defendants and the Government in criminal cases. Recently in the Buffalo Six case and in the John Walker Lindh case in Virginia, as part of the plea discussions, I am told that the Department of Justice used the threat of being declared an enemy combatant to induce the accused to plead guilty. Now, the phrase "enemy combatant" is more than just a label. If the President chooses to declare someone an enemy combatant, it is a potential life sentence that is imposed without a trial, without a right to counsel, and so far without any meaningful judicial review. We have been told that those declared to be enemy combatants pose too great a risk to the security of the country to risk trial and release. Yet the Government seems to be using possible enemy combatant status as a bargaining chip. I think the Department of Justice goes too far when it uses the threat of declaring the accused an enemy combatant to force a plea. This is not like using any other potential sentence or other inducement to encourage a defendant to plead guilty. In this case if the accused rejects a plea, he loses his rights to defend himself in court and to prove his own innocence, because he will be deemed to be an enemy combatant who has no rights.

How do you justify using enemy combatant status as just another tool in the arsenal of Federal prosecutors? Do you believe that the use of the threat of having the accused be declared an enemy combatant if they refuse to enter a plea of guilty violates a prosecutor's ethical obligations? In fact, does not the commentary ABA Model Rule 3.8, on the special responsibilities of a prosecutor, state that, quote, "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate?"

Mr. CHERTOFF. Well, I certainly agree, Senator, with that precept, and I am obviously constrained in discussing specific cases where there were particular plea discussions, but I'm comfortable that I can say this about the policy of the Department. First of all, as you correctly point out, the decision to make someone an enemy combatant is not a decision that occurs within the criminal justice process. It is really a decision taken by the Defense Department, and I guess ultimately resides in the President's authority under the war power. It is most emphatically not a bargaining chip, and it is not the policy of the Department to use it as a bargaining chip or to threaten the use of enemy combatant status as a way of leveraging a plea. It is the case that there are individuals who have both committed criminal offenses and are also enemy combatants,



and in those circumstances, frankly, well-educated attorneys themselves will often raise the issue or consider the possibility of enemy combatant status as a matter they will want to address in the course of a plea negotiation.

So in that sense, I think it is foreseeable that for some defendants the lawyers themselves will want to have an assurance that if there is going to be a plea, that it is going to resolve all of the issues. And as you know, Senator, that's common even in other contexts. For example, in securities cases, often before there's a plea there will be some desire to have the SEC resolve with respect to SEC matters.

So I completely agree that it is inappropriate to use it as leverage and it is not the policy of the Department to do that.

Senator FEINGOLD. Well, I appreciate that answer and it is something that I wanted to have on the record, not particularly with regard to you, of course, but to make sure that the public is aware of this potential danger if this is used inappropriately.

Let me talk about racial profiling because I know you have a lot of experience on this difficult issue. Prior to your current job you played a critical role as an adviser to the New Jersey State Senate Judiciary Committee as it addressed the use of racial profiling by New Jersey State Troopers. New Jersey has been at the forefront of the Nation in addressing racial profiling. The State troopers entered into a consent decree and agreed to ban racial profiling. Earlier this year the State enacted a law making racial profiling by public officials a crime. Some of the antiterrorism initiatives conducted by the Justice Department, however, since September 11th have been criticized because they in effect smack of racial profiling. For example, the decision to interview Arab and Muslim male visitors, the roundup and detention of hundreds of mostly Arab and Muslim males, and the FBI's directive to field offices to count the number of Muslims and mosques have all targeted a group of people based on their race, ethnicity or religion.

I believe that the need to ban racial profiling has not changed since September 11th. I believe it is more important than ever that law enforcement officials not rely on race, ethnicity, national origin or religion as false proxies for real intelligence, real suspicious behavior, and good investigative work based on following real leads. One need look no further than Zacarias Moussaoui, a French citizen, Richard Reed, a British citizen, or Timothy McVeigh and the alleged D.C. snipers, all U.S. citizens, to see that terrorists are not one of race, ethnicity, national origin or religion.

So I have a few questions for you on this. What has been your involvement in the development of Federal law enforcement policies to target certain communities for heightened scrutiny based on race, ethnicity or religion, and how would you distinguish these policies from those that you actively worked to correct in New Jersey?

Mr. CHERTOFF. Senator, as you point out, I have been committed for a long time to the notion that racial profiling is completely unacceptable in our justice system. It's unacceptable because it's wrong. It's unacceptable also because it is actually, as you point out, a very poor proxy for doing real investigative work and intelligence work. And in fact, I have been very emphatic when I speak

on what we do to make it clear that we do not as a Department pursue racial profiling. We don't look at people's ethnic background or religion as a proxy for determining whether they pose a threat.

You raised several initiatives. I want to deal with each in turn very briefly. I don't generally deal with the immigration policy issues. I don't know that I'm the correct person to address with respect to the issue of registration of people who are aliens, but I can speak to the first two issues.

With respect to the interviewing project, although this was not a project I was personally involved in, my understanding is that ethnic background or religion were not the determining factors, that it was a series of immigration status-related issues. For example, countries one had traveled from, nature of visa, various characteristics which were developed based on specific intelligence information derived from analyzing the travel patterns of the hijackers, where Al-Qaeda had training camps in certain countries and that things of that sort.

With respect to the issue of the pursuit of investigative leads after 9/11 there is a misconception that the people who were targeted were again people of a particular ethnic group. In fact, as I recall, there was an individual named Lopez Martinez, who was one of the original people who was investigated and ultimately convicted for document fraud because he had some tangential relationship with the illegal documents which some of the hijackers used. The process in that instance was to look at connections with hijackers, telephone links, if a hijacker had pocket litter, for example, with an address, the FBI would go to the address and interview the people at the address.

As you point out, Senator, it would be counterproductive to rely upon ethnic background as a proxy for intelligence because some of the people we have seen who have been charged or convicted have not been people that you might presume, based on ethnic background, would be terrorists. Richard Reed was a British citizen. Moussaoui I think was a French citizen. And we would be foolish indeed if we hampered our own enforcement efforts by relying on outmoded and incorrect stereotypes.

Senator FEINGOLD. Let me ask you if the Federal Government can actually play by a different set of rules than State or local law enforcement when it comes to nondiscriminatory enforcement of the laws. Is there a different standard for assessing the Department of Justice's policies?

Mr. CHERTOFF. I'm not sure that we—we all obviously operate under the Constitution. Certain State laws or certain State constitutions have provisions that may be different, may go beyond what the Federal Constitution provides, and obviously those would be not applicable to the Federal Government.

Senator FEINGOLD. What is the role of the Federal Courts in protecting Americans from racial profiling by law enforcement officials?

Mr. CHERTOFF. Well, I do think the Federal Government obviously does not enforce State laws but does enforce Federal laws, and the laws against invidious discrimination, for example, are applied with full vigor by the Federal courts. If the Federal courts were to find, for example, that invidious motivation were involved

in law enforcement matters, that could result in dismissal of charges or other kinds of sanctions.

Senator FEINGOLD. Thank you, Mr. Chertoff.

Chairman HATCH. Thank you, Senator.

We will turn to Senator Craig first. Excuse me. Senator Craig, excuse me. The distinguished Democrat leader is here, and he would like to make a statement, and I would like to give him that time.

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

Senator LEAHY. Thank you, Mr. Chairman, and I welcome all of the nominees.

This is the ninth hearing for judicial nominees we have had this year. As of today the Committee will have held hearings for 37 judicial nominees and 10 circuit court nominees. It is interesting that we are in May. I know in 1996, of course it was a different President, we only held six hearings. Those hearings were for five circuit court judges, so it shows how quickly we can act I guess with a different President, not that there be any suggestion of partisanship there, nor is that a question for either one of you. I will put my full statement in the record.

Chairman HATCH. Without objection.

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

Senator LEAHY. But I would also note that both Judge Callahan and Mr. Chertoff come to us with the support of their home State Senators, and I have a great deal of respect for them, and I think that that helps a lot. I would urge again, knowing that this will fall on deaf ears on the other end of Pennsylvania Avenue, but I wish the White House would spend more time in looking for nominees where there is such a consensus, because they can move far quicker when that happens.

I wonder, Mr. Chairman, if I could ask Mr. Chertoff a couple questions at this point?

Chairman HATCH. Sure.

Senator LEAHY. Mr. Chertoff, I am not going to ask you questions about the racial profiling. Senator Feingold has. We keep reading reports in the paper about a sequel to the U.S. PATRIOT Act on review by the Executive Branch. In fact, copies have been printed. What is the status of this bill?

Mr. CHERTOFF. Senator, first, it is again a pleasure to appear before you again.

I guess let me answer the question in this way. I'm here today in a capacity which is different than that in which I have appeared previously. I am appearing in my personal capacity. I'm not authorized to speak to when or if something will emerge from the Justice Department as a proposal. So I think that it is not a subject I can address except to make the general observation that at any given point in time a lot of proposals circulate around the Department, and the graveyard of discarded ideas has many bones in it. So I think in due course the Department will produce what it is going to produce, and they will pick the appropriate spokesperson for it.

Senator LEAHY. Let me ask you this. We do have the sworn testimony of the Attorney General that there is no such proposal, and we have your testimony that you cannot answer whether there is or not, and that is fair. I accept that, just as I assume even though it is printed in the press at great length, that the Attorney General, in his testimony before this, has been telling the truth, that there is no such proposal anywhere in the Justice Department because he would certainly not mislead us, I am sure.

In February there was a 2-year Freedom of Information court battle that ended. The Syracuse University's transactional records access clearinghouse released data of Federal prosecutions of terrorism cases, showed that while the number of prosecutions have increased, half those prosecutions were initiated by INS and Social Security Administration for minor offenses resulting in medium terms of one to 2 months. It also found that terrorism related prosecutions count for about 1.3 percent of all Federal criminal cases in 2002, the first full year after September 11th. And it says that, it raises the question of whether resources are being tied up on minor cases that have nothing to do with terrorism. Now, this report was based on Department data, brought under FOIA. So I ask you this question because this does relate to what you have been doing. What do you think about that report?

Mr. CHERTOFF. Well, I have seen—

Senator LEAHY. Are there too many minor things that are being listed sort of as terrorism to make us look like we are doing good things, but not? And I remember the days of J. Edgar Hoover, where he was desperate to have his FBI agents out to be involved in minor stolen car cases. I remember when I was a prosecutor, if the sheriff recovered a stolen car, within two minutes there would be an FBI agent there saying, "We will take over this case now," no matter what condition, the car is listed as full value. This had been recovered for the taxpayers and Mr. Hoover would then use those statistics. Are we doing something similar now?

Mr. CHERTOFF. I don't think so, Senator. I've read reports about that study. Obviously, of course, the cases we have brought under the Material Aid to Terrorism Statute, where people have been charged or pled guilty were matters of public record, and there have not been an enormous number of those. There is a second category of cases where we may investigate people who we have some basis to believe are involved with terrorism or may have aided and abetted terrorists, or may be connected to terrorists, but at the end of the day the charge that is available is a charge involving what would seem to be a lesser offense.

In addition, part of our program, based on analyzing what happened prior to 9/11 is to recognize that many offenses which we previously treated as really low priority actually are important to prosecute in order to prevent the kinds of networks in illegal trafficking, in documents and licenses that terrorists are capable of exploiting as they did in 9/11. That's not to say that everybody who traffics in these items is a terrorist or wants to help terrorists, but the availability, ready availability, for example, of phony ID or phony driver's licenses, is a circumstance that terrorists can exploit, and so our use of antiterrorism resources to pursue those

cases and dry up those networks actually has I think a real disruptive effect.

The final observation I would make about all of these kinds of statistical studies is it's very hard, as you know from your own experience as a prosecutor, to break a complicated case down into a statistical analysis. Sometimes a case may begin as a terrorist case, for example, and it may wash out. Sometimes a terrorist may ultimately be prosecuted under a statute that is not listed as a quote, "terrorist statute." For example, we might prosecute a terrorist ultimately under a narcotics statute. We've indicted, for example, I think individuals from the FARC, the Colombian left-wing terrorist group, for narcotics trafficking. We could consider that a terrorist case because that organization has been identified as a foreign terrorist organization, but the charge itself is not a terrorist charge, it's a narcotics charge.

so I guess I would say that these kinds of statistical studies, while sometimes provocative, I think are a one or two-dimensional way of looking at the three-dimensional analysis.

Senator LEAHY. As aside to this, insofar as FARC is now apparently acquiring shoulder-fired missiles, I think I would be very concerned of what is happening with them.

I understand that Syracuse has been blocked now from gathering statistics. Do you agree with that?

Mr. CHERTOFF. I have no—I don't do the FOIA activities. I have no idea what the situation with Syracuse is. I assume they stand like anybody else in terms of their ability to use FOIA to get statistics, so I would be guessing about what's going on.

Senator LEAHY. In an article in the New Jersey Law Journal in 1992, you are quoted as saying, quote, "My experience has led me to respect most people, but I also know there's a minority of people who do not deserve respect because they will not conform to the natural order of things, and I want to lock them up," close quote.

Now, I think back what Senator Thurmond used to say when he used to chair this committee. He would ask judicial nominees if they promised to be courteous if confirmed as a judge. He made it very clear that a lot of people, the only involvement really they have with the Federal Government, direct involvement, is in a Federal courtroom, and he said that is very easy for a judge with all the power and everybody standing and rising, bowing and scraping and so on, they might forget to treat people with respect and patience, something that can be said to all of us, I suppose, but especially those lifetime jobs.

How are you going to instill such public confidence in the Federal Government and our judicial system, that it truly is that it makes no difference whether you are a Republican or a Democrat, coming in there, whether you are white, black, plaintiff, defendant, rich, poor, whatever you might be? How do you instill that? You have been involved in some very partisan things, the Clinton impeachment, things like that. As you know, I voted for you confirmation before. But on this, on this lifetime thing, how are you going to convince us—and that will be my last question—but how do you convince us that when somebody comes into your courtroom, they are not going to see a Judge Chertoff the partisan, or Judge Chertoff

the prosecutor, or defense attorney, but Judge Chertoff, the fair arbitrator of the matters before him?

Mr. CHERTOFF. Senator, when I took the oath in 1990 as United States Attorney for New Jersey, I think the one pledge I made was that in the exercise of my power as United States Attorney, I would treat rich, poor, white, black, Republican, Democrat, all people the same and hold them to one standard, and I think I applied that and I lived up to that pledge.

I've been lucky in that the course of my legal career has given me an opportunity to experience the courts from a number of different perspectives. I have been a prosecutor, but I've also been a defense attorney. I have represented some very powerful people in institutions and I've also represented some people who were not powerful and who were poor. And I've had the benefit of developing a lot of perspectives on the process, so that I think anyone looking at my background can be very confident that I come to the job of a judge, if I'm confirmed, as one who has an appreciation for all sides of what is involved in the legal process, a belief that all sides deserve a fair hearing, and a commitment to making sure that the public face of justice is one that all citizens draw a lot of comfort from.

Senator LEAHY. Well, I would urge you to think about that, because I suspect you will be confirmed, but I would urge you to every so often just stop and think, "Am I doing this?" And I am not saying this for you individually. I say the same thing to Justice Callahan, to Judge Coogler, because there is no place—and Senator Thurmond was absolutely right in asking this question, and I have asked it of just about everybody—there is no place where it is so easy to get out of touch with reality and out of touch with fairness than in the Federal Court system, and no place where it is more important to stay in touch.

Thank you, Mr. Chairman.

Senator KYL. [Presiding] Thank you, Senator Leahy.

If Mr. Chertoff is confirmed then, he can forever be known as "Chertoff the Fair," per you. Is that—

Senator LEAHY. I am saying I am urging him to be.

Senator KYL. We understand.

Senator Sessions?

Senator SESSIONS. Thank you, Senator Kyl.

Judge Coogler, one of the things that are important I think in a judge is being able to manage and make decisions promptly when the time is right to make them, do not let them dawdle, do not leave litigants hanging out there for months. I understand from some of my inquiries that you have worked on that in your court. Would you explain how you work with the caseload that you inherited, how it is doing now, and your philosophy about moving cases in an expeditious manner?

Judge COOGLER. Yes, Senator. When I took the position as circuit judge, and circuit judge, the position I'm in, handle both criminal and civil cases, basically the same type of cases, felony, as the Federal District position would handle. And when I took the job there was approximately 1,100 and some odd cases that had not make it to plea stage yet at that particular court, assigned to me, and I don't know any way how they got there. But in my circuit each

particular judge gets about 60 cases, criminal cases a month, and about 40 to 50 civil cases a month.

When I got there I noticed that I had people who had been waiting for their trials for three and 4 years and had gotten numerous other offenses charged to them when they were waiting. And we simply started managing the cases effectively, bringing the cases up for trial, implementing some rules that were always available and were able to move the cases up for trial. We met with both the prosecution and the defense attorneys to orchestrate and manage dockets that would not conflict with other settings so that we could handle the big dockets. Gave notice to law enforcement so that officers would be available and wouldn't be in training, and wouldn't have those conflicts. And then we moved the cases through in an orderly fashion, being fair to everybody.

Now my average caseload is about 250 cases. I think since this procedure started it's actually gone up a little bit because I'm having to do other things as well, but I keep about 250 criminal cases pending at any one time, down from about 1,000, and civil cases are also about that same level. The criminal cases are moving and that's about an average of three to 4 months from indictment to disposition, which we feel like is a good number and a good point to be at.

Senator SESSIONS. Well, you are going to a court that has one of the Nation's best records of moving criminal cases, the Northern District of Alabama, and I know that the caseload is heavy there. They have one of the highest caseloads in America, so your management skills and work ethic will be important for sure.

With regard to your general philosophy of the law, how would you distinguish between a district judge's personal, political, legal views and how he or she sees the law as it is written?

Judge COOGLER. Well, there is really no position for a personal view in a judge, and that is the same with a circuit trial bench as well as a Federal District bench. The law is the law, and when people are trying to follow the law, they have to be able to read it and understand it. So a judge has to also be able to read and apply the law as it is written. We also follow precedent, other cases which are binding upon us. When we do that and follow the law, rather than attempting to decide what would we like to happen, and then try to interpret the law into what we would want to be the result, if we do that, we are getting into difficulties. We are not doing our job. A judge should simply take the law, apply it fairly to everybody that is properly before the court, and make a decision. That way people can orchestrate their lives and get through life and get through the system, the justice system, feeling like they've been fairly treated. They might not win their case. They might lose their case, but they know that the judge has followed the law, and they won't think that they have been mistreated.

Senator SESSIONS. Well, I think you stated that very, very well, and the reputation you have gained through good hard work, both as a practitioner and as a judge, form a good basis for the American Bar Association to give you their highest rating. I am real proud of you for that. I am confident that you have the determination and skill that is needed to meet the big challenge in the Northern District of Alabama. They have got a great court and a

series of great judges, and I am confident that you will be one of those.

Judge COOGLER. Thank you, sir.

Senator SESSIONS. Thank you, Mr. Chairman.

Senator KYL. Senator Durbin.

**STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR  
FROM THE STATE OF ILLINOIS**

Senator DURBIN. Thank you very much, Mr. Chairman. Let me say at the outset what a refreshing hearing this is. These are three extraordinarily good nominees. Maybe I am tipping my hand on how I might vote, but we have been so often sent nominees that are embroiled in political controversy, questionable pedigrees, controversial statements in their background, questionable qualifications, and it has led to a lot of pain in this Committee. This panel does not represent any of those things. Quite the opposite is true. I want to just salute all three of you for your willingness to stand before this process, because some who have gone before you have had their hands full, but you will not, none of you. I think each of you brings strong bipartisan support to his, as well as strong academic, legal and personal credentials.

And, Judge Coogler, I was wondering, when I looked at your financial statements, why they were so good and done so well, and then I checked out who your CPA is. I believe she is sitting behind you.

Judge COOGLER. Yes, my wife.

Senator DURBIN. I just want to give high marks to you in that regard as well.

If I could ask a few questions, let me start with Mr. Chertoff. In the course of American history when we have been confronted with times of national security crises, we try to respond with all of our skill to protect America and decisions are often made which do not survive history in terms of a positive judgment—Abraham Lincoln, from my State of Illinois, suspending habeas corpus during the Civil War, the Alien and Sedition Acts of World War I, the Japanese internment camps of the Second World War, the McCarthy hearings of the Cold War, some of the efforts by J. Edgar Hoover and the FBI during the Vietnam War. All of these things, as we reflect on them, were evidence of a perhaps over-zealous effort to protect America.

We are still, I think, in the swirl of 9/11. We don't have the historical perspective, but can you step back from your time of service here and point to areas where you think we went too far in terms of trying to protect the security of America, perhaps at the expense of liberties and rights which are so dear to us?

Mr. CHERTOFF. Well, Senator, I agree. I mean, in the wake of 9/11, as in the wake of other crises that the country has faced, it is very difficult sometimes to strike the appropriate balance. And that is, of course, largely because it is only with the benefit of history that we have the hindsight to know how things turn out. And we can never really know whether, if we had done something differently, it would have not made a difference or whether it might have resulted in, in fact, a greater catastrophe.



I do think we have tried very hard to look at history and learn the lessons of history. There are clearly things that were done facing historical crises that we recognize were wrong and we have stayed away from. I mean, we think back to *Korematsu*, for example, and the internment of Japanese American citizens, the suspension of habeas corpus. Perhaps Lincoln at the time believed he was justified. The judgment of history suggests perhaps it went too far.

I don't know that I am in a position to render the judgment of history because, as you point out, we are still in the swirl of things. I do think, though, that we all benefit from discussion and debate about these matters, and maintaining an open mind, I think, is a very important part of having this process go forward.

Senator DURBIN. Maybe you can't tell me this, but I will ask anyway. We are about to celebrate the 40th anniversary of *Gideon v. Wainwright*, where we enshrined the right to legal counsel. We have just gone through a recent episode relative to two U.S. citizens being detained by this Government and being denied the right to counsel because they are characterized as enemy combatants.

I would like to know your thoughts on that decision and perhaps your reflection on the debate within the Department of Justice and whether there was a serious debate as to the decision to deny the right to counsel to two American citizens.

Mr. CHERTOFF. Well, let me say first of all, Senator, I think *Gideon v. Wainwright* and the right to counsel in the criminal justice process is a fundamental right. I mean, it may be in some ways the cornerstone of the way the criminal justice process operates.

I know as a defense attorney, you know, even a defense attorney would need a defense attorney if they were facing the criminal justice process. In fact, I represented attorneys from time to time when I was in practice.

I can't speak about individual cases that are currently under litigation. I can say, though, that, of course, as you know, the military process is a different process; it is not the criminal justice process. For example, there are people apprehended in Iraq now who we would not normally think would be getting lawyers or participating in the kinds of process that one sees in the Federal courts. And, of course, the determination about what procedures are used in the military process is typically a Defense Department determination because that is within their purview.

I think what I can say, though, is this. I think, again, these are serious matters which are seriously debated and there are arguments on both sides. Reasonable people can sometimes disagree. There is precedent in this area, of course, Supreme Court precedent and precedent from an old case from the Ninth Circuit and a more recent one from the Fourth Circuit. And I think that ultimately the courts will determine where the right balance on that issue is.

Senator DURBIN. You have been a prosecutor in criminal cases and undoubtedly are sensitive to gun violence. In my home State of Illinois, in the city of Chicago that I love, the murder rate has reaching alarming numbers. It is lower than the historical high, but still leads the Nation and causes us great pain. And a lot of it has to do with the proliferation of guns and drug gangs and street violence and innocent victims who are often children who are caught in this crossfire.

I have been critical of this Department of Justice and this Attorney General when it comes to the issue of guns. I think that they have taken a pass on important opportunities, like keeping gun records for a long enough period of time so that they can be investigated to find out if there is any criminal wrongdoing.

Attorney General Ashcroft said destroy the records as quickly as possible. That is good news to the National Rifle Association. I don't think it is good news to law enforcement.

Do you think this Justice Department has been as aggressive as it should be in dealing with guns used in crime?

Mr. CHERTOFF. Well, speaking from my area, I think the illegal use of guns has been a very high priority for the Department. Every U.S. Attorney candidate who comes through the Department and is interviewed is always given some kind of a summary of what the Department's principal priorities are and stamping illegal gun trafficking and illegal gun violence is always one of those priorities.

I don't have the statistics with me, but my understanding is that gun prosecutions have increased. Across the country, prosecutors know how important it is not only to attack individual illegal use of guns by felons through some of the programs like Project Exile in Virginia, but also to focus on the trafficking networks. We, in fact, did a good deal of work with the Mexicans in terms of cross-border trafficking in firearms.

Senator DURBIN. But what about the destruction of these records that come in as evidence of sales of guns, the destruction of records in such a short period of time? And this has been approved by Attorney General Ashcroft?

Mr. CHERTOFF. I have to say, Senator, again the issue of record-keeping under the Brady Act is not an area that I particularly am involved in, so it is not an issue I can address.

Senator DURBIN. I won't pressure you on it.

Judge Coogler, let me ask you a question which is not an easy one, I understand. I read your comments here and heard the questions asked by my friend and fellow colleague, Senator Sessions about judicial philosophy. I think what you said is what we would expect to hear and hope to hear from every judicial nominee.

In your written statement, you said if a judge were to utilize his position to implement his personal views on policy matters, he would be substituting his own views for those of the elected representatives of the people. That is a reasonable response and one we hear quite often.

But I was struck, as I have said to Senator Sessions, in my first visit to your State just a few months ago when Congressman John Lewis, of Atlanta, Georgia, took us down to visit in Birmingham and Selma and Montgomery, and relive some of the moments in the civil rights movement and some of the great events that took place in your State.

Congressman Lewis said to us at one point, as much as we put into this, we never would have gotten anywhere in the effort of civil rights in Alabama were it not for one courageous Federal district court judge, Frank Johnson.

Judge Johnson really, I think, broke away from the popularly held views even of the elected representatives at that point, and he

stood up for civil rights and liberties at a time when it wasn't popular. He faced death threats and was shunned by the society in his area.

I would like, if you can, for you to put that in some perspective. Do you believe Judge Johnson went too far in imposing his personal views on civil rights and should have been more conservative and more restricted in his rulings?

Judge COOGLER. Well, Senator, let me say this. I am greatly concerned with the particular issues that Judge Johnson was as well, and Alabama has come leaps and bounds from back when those times were. And so it is difficult for someone like me—I came to the University of Alabama in 1977 and the State of Alabama had made great leaps and great strides at that point.

So it is very difficult for me, even though I lived in Alabama when I was a very small child, to place myself back in that position. It is also difficult for me to second-guess a Federal district judge, especially one of his stature.

I can say this. Hindsight is always 20/20 and there are certain situations where people do things and make decision that, in hindsight, absolutely worked out for the best. I don't think there is anyone who would question that.

However, I think as a judge my primary role will be to allow those kinds of decisions to be made by the political structure, including the Senators and Congress, who are best suited to taking testimony, seeing the overall big picture, and making laws relevant and relative to those situations and enforcing those laws.

So I can say that, in hindsight, absolutely it was an admirable thing and took a lot of courage in Alabama at that time. But to extrapolate that out and say that I—as I have said before, people have to be able to rely on the laws and they have to take the appropriate action to challenge the laws when they need to be challenged and bring it to the attention of their legislators so their legislators can make appropriate changes when they need to be changed. If a judge does it, then the judge is substituting himself in an area that he shouldn't be substituting himself, generally speaking.

Senator DURBIN. Thank you very much, Judge, and I prefaced it by saying it was a tough question because I don't know that there is a right answer there. But others—and I will conclude, Mr. Chairman, by saying others, including one of the nominees just recently approved this week by the Senate, I think stated very succinctly and clearly that if you stick with the strict constructionist standard, it is not likely that *Brown v. Board of Education* would have been decided the way it was, or *Miranda* or *Roe v. Wade*, or that Judge Frank Johnson's decisions would have been made. And I look back and think what America would be like if those decisions had gone the other way over the last 50 years.

So I am sorry, Justice Callahan, we don't have time to ask a few questions of you, but I want to again say, Mr. Chairman—

Justice CALLAHAN. I am sure you have me in your thoughts.

Senator DURBIN. I do, I do, and maybe this is a good sign.

Senator KYL. Senator Durbin, if you would like to take a couple of more minutes, I would be happy to yield some of my time to you, if you would like.

Senator DURBIN. I just have one question, if I might, of Justice Callahan.

Because you come from such a diverse State, I would like your thoughts on the fact that we see a disproportionate number of people of color being arrested, tried, convicted and incarcerated in America. This is not lost on minority populations that our justice system, which is supposedly blind to color and religion and ethnic background, in fact, generates more prosecutions and more incarcerations of people of color.

I would like to know what your thoughts are, based on your legal experience, in terms of what a judge's responsibility is in light of that fact.

Justice CALLAHAN. Well, I think you raise a very complicated issue and there isn't one simple answer to it, and it is something that the minority communities have a great deal of concern about.

As a judge, one of the things that I have been involved in where I live in San Joaquin County and also where I sit in Sacramento County are programs, focus groups with the minority communities and citizens academies with the minority communities to have them become involved with the system and get their input, because access to justice are very important decisions, and to hear why they think some of the problems are occurring and getting that input when you are not dealing with a specific case.

So I think we do have to—I think we have to very much stay in touch with what is going on in our communities and be in contact with our minority communities to find out why they think this is happening, because even if justice is done in a particular case, if the perception of justice is not there, the system badly suffers and as a judge, you have to work very hard.

And so I think we always have to be getting input, look into alternatives and make sure that that is not, in fact, happening, and also, too, involving ourselves in things in the community if there are groups that are particularly at risk, and there are. And either by virtue of their family status or they are impoverished or the areas that they grow up in, they are subjected both as victims and to become involved in crime because of where they have to live.

It is very important to have the community support to address these issues, so hopefully young people that may by virtue of their birth be destined to have more likely contact with the criminal justice system hopefully do not.

Senator DURBIN. Let me just add parenthetically, and I will close with this, I think your nomination can be a step in that direction, too. As I have tried to bring forward Hispanic nominees in my State of Illinois so that those who are standing before the bench feel that they are not completely adrift, that they have someone who at least has an ethnic background which will help make them more comfortable with the system.

I don't know what your background has been in dealing with Hispanic issues in your area, Hispanic legal issues, but you certainly with this new appointment will have an excellent opportunity to do that.

Justice CALLAHAN. Thank you, Senator.

Senator DURBIN. Thank you very much. Thanks, Mr. Chairman.

Senator KYL. Thank you.

Senator SESSIONS, did you have one other question before I turn to Senator Kennedy?

Senator SESSIONS. Well, just briefly, I know on the gun question it is something I asked you about at confirmation. I was with one of your United States Attorneys and they told me their gun prosecutions have gone up 50 percent.

I think you are having something close to that nationally. I believe this Department of Justice, under Attorney General Ashcroft—and I asked him about that when he was confirmed—has, in fact, really set a high standard for aggressive prosecution of gun laws, have they not?

Mr. CHERTOFF. That is correct, Senator.

Senator SESSIONS. I just think that is important. Ultimately, you are focusing on criminals who are out threatening people and killing people.

You know, Senator Durbin, on Frank Johnson, he was indeed a great judge. He was a prosecutor in his early life and he had a fierce hostility to wrong. He did not like to see wrong, and people who dealt with him knew that. It wasn't anger so much as just a deep conviction that wrongdoing shouldn't be accepted.

You could say those were activist opinions, but really I think the better judgment may be—and you and I can talk about this some as we go along, but I think the better judgment of that ought to be that the Constitution and the laws were not being followed correctly.

We had allowed social and political pressures to justify interpreting the constitutional protections of equality and due process—to be interpreted in a way that did not allow that and it was not occurring in reality, and he did, in fact, step up courageously. I think he would say that he merely affirmed the great principles contained in the Constitution.

“Strict construction” is a phrase the President has used. I am not sure that is the best phrase. Miguel Estrada in his hearing was asked about it and he said, well, he thought maybe “fair construction” would be the right phrase. Maybe that is a better phrase. What is strict construction or fair construction? I don't know, but you raised some good points and I just wanted to make those comments.

I think these people have demonstrated a high degree of fidelity to the highest ideals of our Constitution and liberties.

Senator KYL. Senator Kennedy.

**STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR  
FROM THE STATE OF MASSACHUSETTS**

Senator KENNEDY. Thank you very much, Mr. Chairman, and I welcome our nominees. I apologize. I was necessarily absent earlier, but I appreciate the chance now to ask Mr. Chertoff some questions dealing with the Criminal Division. I am grateful for your presence here.

In late March, as the House of Representatives was about to vote on important child abduction legislation, a controversial amendment on sentencing was added to the bill. This amendment, called the Feeney amendment, had nothing to do with the protection of

children and everything to do with handcuffing judges and eliminating fairness in our Federal sentencing system.

The reaction to the Feeney amendment was immediate and very critical. Chief Justice Rehnquist, not known as a coddler of criminals, said that the Feeney amendment would do serious harm to the basic structure of the Sentencing Guidelines system and seriously impair the ability of the courts to impose just and responsible sentences.

The Judicial Conference of the United States, the American Bar Association, the Sentencing Commission, and many prosecutors and defense attorneys, law professors, civil rights organizations and business groups vigorously opposed it. Then, on April 4, the Justice Department sent a five-page letter to Senator Hatch expressing its strong support for Congressman Feeney's amendment to the House version of S. 151.

Mr. Chertoff, as Assistant Attorney General in charge of the Criminal Division, you are chiefly responsible for formulating criminal enforcement policy and advising the Attorney General and the White House on matters of criminal law.

Your letter of April 4, issued a few days before the House-Senate conference on the child abduction legislation, was very influential in getting the provision enacted. So I would like to ask you a few questions about your support for that particular provision.

One of the provisions in the Feeney amendment overturned a unanimous Supreme Court decision, *Koon v. United States*, which established a deferential standard of review for departures from the Guidelines based on the facts of the case.

In *Koon*, the Court ruled that the text of the Sentencing Reform Act reflected an intent that the district courts retain much of their traditional sentencing discretion. While the courts of appeals certainly have the authority to correct mathematical and legal errors made below, the Supreme Court ruled that it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.

The *Koon* decision has been praised by judges, prosecutors and scholars on both the left and the right. The Justice Department, on the other hand, argued that *Koon* should be overturned by the Feeney amendment because doing so would make it easier for the Government to appeal illegal downward departures.

Now, if you are confirmed as a judge to the circuit court, you and your fellow judges will have to review de novo every instance in which a district court decides that a departure from the Guidelines was justified.

Why do you believe that all nine Justices of the Supreme Court got this issue wrong in *Koon*?

Mr. CHERTOFF. Well, first, let me say, Senator, I think an important point as I sit here in a confirmation hearing is to make it clear that positions I have taken on behalf of the administration should not necessarily be taken as a predictor of how I would rule on a case, were I to be confirmed as a judge.

I have had the opportunity to be both a prosecutor and work for the Department, and frankly to be a defense attorney. I remember times as a defense attorney that I argued very vigorously against

what I considered to be an unfair application of the Guidelines, and I remember times as a prosecutor I argued very vigorously for—

Senator KENNEDY. Well, didn't you support this? You can tell us whether you supported it or differed. "Senator, I differed with this, but this was the administration's position and so I signed off or I supported it."

Mr. CHERTOFF. What I think would be inappropriate for me to do is to relate internal discussions about positions within the Department, or even to talk about how I might approach something in the role of a prosecutor which, of course, would be different in the way that I would approach something in the role as a defense attorney. And that, in turn, would be different from how I would approach something as a judge.

That being said, I think this is a very complicated area. I know, Senator, you were involved in the original Sentencing Reform Act.

Senator KENNEDY. Very much so.

Mr. CHERTOFF. I was a prosecutor actually for a time before the Act came into effect, so I lived under the old system and under the new system and they are both systems which have pluses and minuses.

Under the old system, there was a tremendous amount of discretion in the judges. Sometimes, that was good in terms of achieving justice. Sometimes, that led to unfairness. Some judges, for example, particularly in the area of white-collar crime, philosophically believed white-collar criminals shouldn't go to jail, and I think that was one of the impetuses for having the Guidelines to try to equalize that out.

Guidelines create different kinds of unfairness. Sometimes, there are circumstances in which the Guidelines appear to apply a cookie-cutter to very different individual circumstances.

I think that the process of going back and forth with Congress and the Commission in tuning the Guidelines is a process of trying to strike the right balance between a system that will give a certain amount of determinacy and equality, and also one that will allow a certain amount of flexibility in cases where fairness requires it.

Senator KENNEDY. Well, why wouldn't it have made sense, then, to say that we ought to have some hearings? I mean, why didn't you write to the Chairman of the Judiciary Committee, if you are so concerned about this in the Criminal Division, and say we ought to take another look at this?

This was passed and there was seven minutes of debate in the House of Representatives. It basically virtually undermined the sentencing provisions, all of which were legislated. We had the hearings on it, we made the judgments on it, we made the decisions on it.

The reference that you made about white-collar crime—as you may remember, my former Governor, Bill Weld, and Wayne Budd quit the Justice Department because Ed Meese was reluctant to apply it to white-collar crimes. I have followed this. I understand. I know what is going on there.

Where the Congress has taken a great deal of time to consider this whole issue in terms of fairness in sentencing—we might not have it right; we may have to strengthen and improve it. But basi-

cally to undermine this and to support undermining it without a single day of hearings about this as the head of the Criminal Division in the Department of Justice just puzzles me.

And to have an answer of, well, I can't really say I was for it or against it and I might rule differently if I am a judge—

Mr. CHERTOFF. Well, I think, Senator, what I can say is this.

Senator KENNEDY. Not to be more forthcoming than that is, quite frankly, troublesome.

Mr. CHERTOFF. I think what I can say is this. The issue of how one manages legislation through the legislative process and whether there should be hearings or not is not a matter that I was involved in or was consulted about. That is not my area. I only get involved in taking positions as to substantive issues.

So I can't speak to the question of whether the Department's position in terms of how things move through Congress should be different because that frankly is not in the area that I deal with. I can only say that, as a judge, I will have to—and I will be ready to apply the law as it is enacted by Congress.

I do recognize these are matters as to which reasonable people can disagree. It is a complicated area. I understand the Chairman indicated at some point there probably would be some kind of hearings, and I imagine these issues will continue to be addressed in the future.

Senator KENNEDY. Well, here we had a unanimous vote by the Supreme Court, on a divided Court. Most decisions that are hotly contested these days are 5–4. This was a unanimous vote on this.

This decision by the Justice Department and your division basically overrode that decision without any other kind of follow-up. This was in your department. You are the head of the Criminal Division. This is sentencing for criminal activities. Not to be able to have some kind of view by you whether you agree or differ with the *Koon* case—what is your position on the *Koon* case?

Mr. CHERTOFF. Senator, the issue with *Koon*—*Koon* interpreted the Sentencing Guidelines under the legislative provision as it then existed. The issue, I think, was not whether *Koon* was rightly or wrongly decided as interpreting the statute.

I think the Department and everybody else understood that the Court had definitely ruled on it. I think the question was whether the legislation ought to be changed. And, of course, that is not so much a question of saying that *Koon* was correct or incorrect as it was saying that, given the way the statute has been interpreted, should the statute be changed.

I think the concern underlying the Department's position was this, that the legitimate desire to allow judges to depart downward in extraordinary circumstances not become a vehicle for basically making a major overhaul in the Sentencing Guidelines themselves, so that in some districts there might be situations where, in effect, departures were being granted at such a high rate for extraordinary reasons that it effectively transformed the Guidelines into a system that was more haphazard than I think originally intended.

I understand that there are different positions. I have to say, as a defense attorney, sometimes I argued very vigorously for departures and felt hamstrung because there were none available. So I



think it was a decision on the part of the Department as a whole that some kind of adjustment was necessary in terms of the availability of downward departures.

Senator KENNEDY. Well, of course, the existing judges all comment on Feeney. You have the Chief Justice talking about Feeney, you have other judges talking about Feeney, but you feel that you can't talk about it.

On this issue of departures, there is good evidence that about 80 percent of the departures are at the request of the Government itself. I never really understood, when we were in that conference and trying to make some sense out of it on an issue of the complexity that this had, the arguments.

Because the Feeney amendment was presented without discussion or debate at the last minute, Congress was deprived of full and balanced information concerning the issue of whether departures are made in appropriate instances.

The Justice Department compounded the problem by submitting a highly misleading letter on April 4. For example, the Justice Department argued that the Feeney amendment was justified because an epidemic of lenient sentences was undermining the Sentencing Reform Act.

It failed, however, to note that the Committee report accompanying the 1984 Act anticipated a departure rate of about 20 percent. Today, the rate at which judges depart over the objection of the Government is slightly more than 10 percent, well within the acceptable rate.

While the Department claimed that there are too many downward departures, it failed to note that according to the American Bar Association, almost 80 percent of downward departures are requested by the Justice Department.

In arguing for the abrogation of the Supreme Court's ruling in *Koon*, the Department failed to mention that it wins 78 percent of all sentencing appeals, and it has never acknowledged that 85 percent of all defendants who receive non-cooperation downward departures are nevertheless sentenced to prison.

To quote a letter from eight highly respected former U.S. Attorneys from the Eastern and Southern Districts of New York, "What these statistics reveal is a relatively limited exercise of sentencing discretion of the sort contemplated by Congress when it authorized the promulgation of the guidelines."

It is important to understand your views on the issue. There are over 2 million Americans in prison or jail, including 12 percent of all African-American men between the ages of 20 and 34. One out of three young African-American men born in the United States will spend time behind bars in their lifetime. The Federal prison population has quadrupled in the last 20 years and it is now larger than any State system. Dozens of new Federal prisons are under construction.

Do you really think that there is a problem with excessive leniency in the Federal criminal justice system?

Mr. CHERTOFF. I don't know that I think there is a problem with excessive leniency, and again I want to be careful to distinguish, because I think it is important, between my views as an advocate or a policymaker within the executive branch, which is, of course,

focused on these matters from a prosecutorial standpoint, as distinguished from views I advocated as a defense attorney, and which are distinguished yet again from the perspective of a judge, which is different from the prior two.

Again, I don't know that the issue is leniency. I know that there are debates about the issue of extraordinary departures. I am not talking about cooperation departures, which are a different issue. I also know that there are tremendous regional variations. In some districts, they are quite infrequent. In some districts, they are, in fact, much more regular.

I understand these are matters as to which reasonable people can disagree. Within the Department, the policymaking process involves getting input from a wide variety of people—line prosecutors, United States Attorneys, people from the Criminal Division, people from the appellate sections, all of whom weigh in. And ultimately the Department formulates a position, which it did in this case.

As I say, I mean I think leniency is not so much the issue as it is the extent to which one wants to allow departures for extraordinary reasons and whether that at some level can become inconsistent with the overall thrust of the Guidelines.

Senator KENNEDY. Well, all the other attorneys in the Justice Department are not up for a judgeship here. Other judges are commenting on these; they don't feel restricted in commenting. The Justice Department's April 4 letter stated, "Too many judges ignore the Guidelines in favor of ad hoc leniency." That is what the Department said on this.

Another provision in the Feeney amendment requires the Attorney General to effectively establish a judicial black list by informing Congress whenever a district judge departs downward from the Guidelines, imposes new burdensome recordkeeping and reporting requirements on Federal judges, and requires the Sentencing Commission to disclose confidential court records to the House and Senate Judiciary Committees upon request.

Just this Monday, Chief Justice Rehnquist criticized these provisions as potentially amounting to an unwarranted and ill-considered effort to intimidate individual judges in the performance of their judicial duties.

We are talking about a matter of enormous importance and consequence. To get that kind of involvement of the Chief Justice of the Supreme Court who has been as involved and concerned about this and its impact in terms of justice in this country is extraordinary.

And to have the Department just dismiss all of these activities and to support an effective dismissal—no hearings in terms of the United States Senate on this, no hearings in the House of Representatives, a seven-minute discussion on the floor of the House of Representatives—and then to embrace this completely in terms of the conference on this, in the department that you were the head of—

Mr. CHERTOFF. Well, Senator, the issue of whether there should be hearings or how legislation is managed is a matter I have really not only nothing to do with, but frankly no knowledge about.

Senator KENNEDY. Well, it seems to me that you could have said we ought to have hearings on this. We are talking about sentencing. You are the head of the Criminal Division and you are bothered by this. It would seem to me that we could have expected you to write to the Chairman of the Committee and say the Justice Department is bothered by this, we hope you will have hearings about it, and ask that we go ahead and have them in the House and the Senate and appear up here and make the case for it.

But we have gotten now into a situation where, as a result of the actions on sentencing, which is effectively out of your Department, we have the Chief Justice criticizing these. He is not known as a criminal coddler, certainly. Rehnquist criticized it as "amounting to an unwarranted, ill-considered effort to intimidate individual judges in the performance of their judicial duties."

It is a fair question for any of us to ask where were you during this time, when you have the Chief Justice mentioning this. Where were you during this time?

Mr. CHERTOFF. Well, I am not aware that the Chief Justice's remarks—I don't think they preceded the legislation. Again, Senator—

Senator KENNEDY. No, no. This is with regard to the Feeney amendment. This is with regard to the Feeney amendment and the provisions in the Feeney amendment that require that the judges are going to have to list and they will have their names sent to the Justice Department and effectively you will have a judicial black list. Those are my words, "judicial black list," about judges that are going to stray from this.

I used the words "judicial black list," but this is what Rehnquist said just this past Monday: "an unwarranted, ill-considered effort to intimidate"—this is the Chief Justice saying that the effect of this, he believes, is it will intimidate individual judges in the performance of their judicial duties. He said the provisions could be used to undertake a witch hunt against judges who appear soft on crime, and cautioned that they should not be used to trench up judicial independence.

In its letter dated April 4, the Justice Department didn't object to these new recordkeeping and reporting burdens on the Federal judiciary. To the contrary, it argued that the Feeney amendment was a necessary response to what it described as the well-known problem of judges ignoring the Guidelines in favor of ad hoc leniency.

Is Chief Justice Rehnquist wrong to be concerned about the threat of the Feeney amendment?

Mr. CHERTOFF. Well, I will say this, Senator. I think the Chief Justice is completely correct, and I completely agree that no tool ought to be used in an effort to try to intimidate judges or pressure judges to rule in individual cases.

Judges are obliged to follow the law, and they are obliged to do it to the best of their ability. But I certainly don't endorse the idea of hauling judges up and questioning them about decisions that they have made because I think that can be problematic.

I think the reason judges, though, are given life tenure is precisely to give them the ability to withstand the kind of pressure that sometimes is brought to bear. Sometimes, being a judge re-

quires making unpopular decisions and a judge has to have the ability to withstand that. Part of that comes from the life tenure and part of that comes from the judge's own internal character.

So I do agree that the executive process is not a place where judges ought to be called to answer or explain what they have done, outside, of course, what they explain in the course of their opinions, which is the way in which judges express themselves.

Senator KENNEDY. Well, I think you have answered this question, which is do you believe it is appropriate for the Justice Department and Members of Congress to single out Federal judges who they believe are soft on crime or engage in ad hoc leniency? I think you have answered that.

I will ask that the full letter be put in the record. I won't take much more time.

In the letter, in the last paragraph, it says, "As stated in the April 3 letter, the Judicial Conference believes that this legislation, if enacted"—this is Justice Rehnquist's letter—"would do serious harm to the basic structure of the Sentencing Guidelines system and seriously impair the ability of the courts to impose just and responsible sentences. Before such legislation is enacted, there should at least be a thorough, dispassionate inquiry on the consequences of such action."

I don't expect you to turn on the Department, but I certainly would have thought that, given certainly your own review of this situation and the actions and statements, you would have expressed some greater kind of concern on this issue and proposal, Mr. Chertoff, than you have.

Let me move just quickly to this on the death penalty. In January 2003, Attorney General Ashcroft ordered Federal prosecutors in New York to seek the death penalty for defendant Zario Zapata, even though the prosecutors had negotiated a deal in which Zapata had agreed to testify against others in a Colombian drug ring in exchange for a sentence of life imprisonment.

One former prosecutor, Jim Walden, said it was a remarkably bad decision that will likely result in fewer murders being solved because fewer defendants will choose to cooperate.

Did you advise the Attorney General to make this decision?

Mr. CHERTOFF. No. The way the process works with the Department, I was not personally involved in that decision. But I do think that news accounts—without getting into matters which I think are non-public, I think news accounts are sometimes misleading.

And I should clarify two general issues about plea negotiations. One is—and this was certainly the rule when I was a line prosecutor—even when an Assistant U.S. Attorney negotiates a tentative agreement with a defense attorney, it is always subject to approval by more senior people in the Department. That is always understood.

So there really should never arise a situation, frankly, in which a deal is actually agreed upon and then it gets reversed. And if that ever does happen, that is because the assistant perhaps didn't make it clear that whatever they were able to offer was subject to some further approval.

Second, we completely agree cooperation is important in any plea negotiation. You always, of course, have to weigh the value of the

cooperation and the credibility of the person who wants to cooperate, whether, in fact, they have any information of value to give. So those are general considerations. As to this particular decision, I am not generally in the process of—and I don't believe I was in the process of that particular decision.

Senator KENNEDY. If you would talk for a minute about how you view the balance in terms of in this case having the Federal prosecutors going for the death penalty, what does that do in terms of the possibility of defendants being willing to talk, maybe, with the idea that they get life imprisonment, the area of cooperation?

This former prosecutor was indicating that at least it was his judgment that you could get a lot more by going for life imprisonment rather than if you go for the death penalty. The message it was sending to others is that it will be harder to get the kind of information that might be useful and helpful in terms of undermining these drug rings.

Senator KYL. Excuse me just a second, Mr. Chertoff.

Senator Kennedy, you are welcome to take all the time. I am going to have to recess the hearing in a couple of minutes just so we can get somebody else to replace me here, but you are welcome to take more time. I just wanted you to be aware of that, but go ahead and proceed with your question right now.

Mr. CHERTOFF. I can be very quick in answering by saying that I think cooperation, including negotiating something less than the maximum penalty, is often helpful, but it is not always helpful. It depends on the quality and nature of the cooperation. It also depends, frankly, on the nature of the crime. Sometimes, people commit crimes that are so heinous that one would not want to give them an accommodation even with some cooperation.

Senator KENNEDY. I have about five more minutes of questions, so I will do whatever—I do want to ask about crack and powder and racial disparities.

Senator KYL. Thank you. Then, Senator Kennedy, what I would like to do is to recess the hearing. I think that Senator Hatch or someone else can be here in about 5 minutes or maybe a little bit longer, perhaps not until 11:30. That would give everybody an opportunity to take a quick break and then come back.

So, therefore, this hearing will be recessed until the call of the Chair.

[The Committee stood in recess from 11:20 a.m. to 11:27 a.m.]

Senator KENNEDY. [Presiding.] We will come back to order.

Mr. Chertoff, for years the civil rights groups and sentencing experts have been concerned about the substantial sentencing disparities that result from the different Federal mandatory minimums for crack cocaine and powder cocaine trafficking offenses. For example, 5 years' imprisonment is mandated for 500 grams of powder cocaine worth \$40,000 on the street, and 5 grams of crack, worth about \$500.

Because African-Americans comprise 84 percent of those convicted on crack cocaine charges, only 31 percent of those convicted of powder cocaine charges, the lower standard for crack cocaine has the effect of disproportionately punishing the African-American defendants.

In December 2000, Senator Sessions and Senator Hatch introduced a bill to reduce the disparity for 5-year mandatory by increasing the crack threshold substantially and lowering the powder threshold by a small amount. Most authorities view the Sessions-Hatch proposal as a positive first step, though perhaps one that doesn't go far enough.

In March 2001, the administration announced it will oppose any reduction in drug sentences, including those in the Sessions-Hatch bill. While acknowledging that the actual sentences for crack are more than 5 times longer than sentences for the equivalent amounts of powder cocaine, the administration argued that any reduction in penalties would send the wrong message on drugs.

Mr. Chertoff, as Assistant Attorney General in charge of the Criminal Division, you had an important role in developing the administration's position on the case, and I am very concerned about the administration's dismissive view of this serious, longstanding problem. Do you deny that there is any racial injustice in the 100-to-1 crack/powder disparity?

Mr. CHERTOFF. Well, Senator, first of all, I don't think the Department's view is dismissive. In fact, I know this matter has been discussed and studied, was debated at very senior levels. There's been a lot of analytical work done, and it continues to be discussed. And I think the Department's position was not opposed to reducing the disparity, but was opposed to reducing the disparity by lowering penalties at one end. In other words, I think the Department's position was consistent with the idea of reducing the disparity by raising the powder—or adjusting the powder numbers to bring them closer.

I do recognize that there is a serious issue—

Senator KENNEDY. Do I understand you, you want then the powder to go up where it is to crack and—

Mr. CHERTOFF. I don't mean to suggest a specific proposal. What I mean to say is I don't think the Department opposed any closure of the disparity. I think what the Department opposed was a closure that was achieved by lowering the penalties for crack.

This was a subject, I think, the U.S. Attorney in D.C. testified about before the Sentencing Commission, and his testimony, as I understand it, basically reminded the Commission of how serious a problem crack is in poor neighborhoods. I remember when crack first came on the scene back when I was a young prosecutor, and it clearly led to a more violent type of behavior in terms of crack dealers and people who were using crack than had been the case with powder alone.

I have seen many studies, many arguments and analyses about how to reduce this disparity. I know there is a serious and legitimate concern about the appearance of injustice when it seems that people in certain communities wind up disproportionately feeling the sting of a certain type of punishment. I think we have to keep working on a way to reduce that appearance of unfairness without diminishing the serious punishment for a type of criminal conduct that can be very, very damaging to our poor communities.

Senator KENNEDY. Well, I think there is—no one is suggesting that it isn't a serious crime and that there shouldn't be serious punishment. What we are focusing on is this area of disparity, and

if we are saying that we are not going down in terms of the crack, that means you have to go up in terms of the powder, with all of its implications in terms of room and the various prisons of this country. I don't know what that would do, but it would certainly appear to be a very substantial expansion.

I don't think it is just the appearance of equal justice for all Americans. I think it really comes down to the—not just the appearance but in terms of the reality of this. And just to have the—as you well know, the Sentencing Commission has tried over very considerable time. Another time we had a very prominent former Deputy Attorney General, Wayne Budd, from my own State of Massachusetts, a Republican, worked with the Sentencing Commission, tried to work out a series of recommendations with that because of its importance. Serious people have really attempted to try and find some way to deal—make sure that we are going to have the tough penalties, but also deal with the real disparity in terms of the justice on this question.

I am just troubled that it is the position of the Criminal Division effectively to stonewall, to maintain the existing current situation, and without really attempting to work through. No one assumed that it was going to be easy, but I must say I want to give credit to Senator Sessions as well as Senator Hatch for at least trying to think of ways of addressing this. These are serious Senators who are attempting to try and deal with this. I am not sure I agree with all the things they are going about, but they are attempting to come up with—recognizing this extraordinary disparity and the real injustice that it provides. So it is troublesome.

Let me go to a—in a book review published by the Michigan Law Review in 1995 titled “Chopping *Miranda* Down to Size,” you criticized the Supreme Court's decision on *Miranda v. Arizona* as a rule too far and described the right to have counsel present at police interrogation as insupportable. You argued that it was improper for the Supreme Court to import adversarial constitutional protections into the non-adversarial pre-indictment police investigation process. And since then, of course, the Supreme Court reaffirmed the *Miranda* decision, holding in *U.S. v. Dickinson* that a Federal statute that purported to undo *Miranda* was unconstitutional.

Do you acknowledge that *Miranda* remains the law of the land and must be enforced?

Mr. CHERTOFF. Absolutely.

Senator KENNEDY. In March, New Yorker magazine reported that in December 2001, officials from the Criminal Division solicited, then disregarded advice from the Professional Responsibility Advisory Office regarding the legality of interrogating John Walker Lindh outside the presence of counsel. Specifically, an attorney from that office advised prosecutors that Attorney James Brosnahan, who had been retained by Lindh's father, had sent the Attorney General a letter stating that he represented Mr. Lindh and wanted to meet with him, and that a pre-indictment custodial interview was not lawful under the circumstances. Nevertheless, the FBI proceeded with its interrogation of Lindh.

On January 15, 2002, the Attorney General stated that the Lindh interrogation was proper because the subject here is entitled

to choose his own lawyer, and to our knowledge, has not chosen a lawyer at this time.

Under this reasoning, Brosnahan was not Lindh's attorney at the time of the interrogation because Lindh had not personally retained him, even though Government officials had blocked Brosnahan's effort to speak with Lindh.

Were you involved in the decision to proceed with Lindh's interrogation over the advice of the Professional Responsibility Office?

Mr. CHERTOFF. I have to say, Senator, I think that the Professional Responsibility Office was not asked for advice in this matter. I'm familiar with the matter. I was involved in it. I can say that there was advice about the law that was solicited from parts of the Department that are expert in it. There is a Supreme Court decision—it may be *Moran v. Irvine*, but I may have the case wrong—which actually addresses the issue of whether someone is held to be under the right to counsel where they have not asked for counsel but where someone else has hired counsel for them, and the Court there held that, in fact, the person does not—is not treated as if they're covered by counsel in that circumstance.

Senator KENNEDY. Well, this is a father. Was that case dealing with a father as a member of the family?

Mr. CHERTOFF. I believe it was a relative. Now, I should say, Senator, there's a different issue presented when you're dealing with minors. Lindh was not a minor, however. I understand minors, you get—there's a somewhat different rule, perhaps, about whether a parent seeking to invoke counsel has a role to play. But Lindh was not a minor.

One thing I should point out is that I believe in the motions that Mr. Brosnahan filed in the case, he did not challenge—

Senator KENNEDY. How was justice sort of served by not following the request of the father of Mr. Lindh in terms of—how was the justice served by going ahead and having the interview after the father had indicated that he wanted him to at least be able to talk to counsel?

Mr. CHERTOFF. I think as you'll recall, Senator, this, of course, occurred I think in December of 2001, literally in the battlefield in Afghanistan. And it would have been—had the Department not accepted the position of the Supreme Court and treated Mr. Brosnahan's request to meet with Lindh as invocation of right to counsel, in practical terms it would have meant there could have been no questioning of Lindh since it was quite obviously not the case that a lawyer was going to be flown into the battlefield in Afghanistan.

Senator KENNEDY. Well, you are not suggesting that he was being held in a battlefield? I mean, this was—that's not your testimony—I mean, it's not—they were outside of where Lindh was. I mean, it's my memory he was taken away from the conflict, and he was moved around in the different secure locations. You are not suggesting that the battlefield conditions were such that an attorney couldn't have had some access to him?

Mr. CHERTOFF. I think at some—

Senator KENNEDY. How long does it take to fly over there, 18, 19 hours, maybe, to go to Afghanistan?



Mr. CHERTOFF. I know he was held in various places in Afghanistan and then ultimately removed to a war ship. You know, I have never flown to Afghanistan, but I think it would have been impractical to imagine that an individual held under these conditions in the middle of a conflict would be meeting with an attorney. So I think the consequence of treating it as an invocation of the right to counsel would have been essentially to terminate any questioning.

I should say, though, that Mr. Lindh was Mirandized, and had he requested counsel or requested to invoke his right to silence at the point at which the FBI was involved, they would have honored that request. And this was a matter which was—certainly Mr. Brosnahan could have raised this issue before the district judge. I don't believe that he actually sought to suppress based on that ground.

Senator KENNEDY. Well, what was the—do you remember what the Professional Responsibility Advisory Office, what their position was on this?

Mr. CHERTOFF. I think I've been—I have to be careful to not get into matters that are not public. The Professional Responsibility Office normally is not—well, let me put it this way: I was not consulted with respect to this matter. There are other parts of the Department that generally render opinions in this area of the law and other expertise that was consulted.

Now, it may be that there are people who disagree with the legal analysis we undertook, and that's not infrequently the case.

Senator KENNEDY. Well, your statement that the Professional Responsibility Advisory Office did not have an official position on this—

Mr. CHERTOFF. I don't believe they had an official position on this.

Senator KENNEDY. Well, I want to thank you very much, Mr. Chertoff. Justice Callahan, Judge Coogler, I apologize I didn't have a chance to inquire. I know that others did, and we want to thank you for your patience here this morning. I commend you for your nominations, as well as Mr. Chertoff, and I am grateful for the chance to be able to ask these questions.

Since there is no other business before the Committee, it will stand in recess. Thank you very much.

[Whereupon, at 11:41 a.m., the Committee was adjourned.]

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

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

SENATOR EDWARD M. KENNEDY'S  
WRITTEN QUESTIONS FOR MICHAEL CHERTOFF

1. At your hearing, I asked you about a report in the March 10, 2003 issue of *The New Yorker* on advice that the Professional Responsibility Advisory Office provided regarding the legality of interrogating John Walker Lindh outside the presence of counsel. You stated that the Office did not take an official position on this matter.

On June 15, 2002, *Newsweek* magazine published a series of e-mails between Jesselyn Radack, an attorney at PRAO, and John De Pue, a counterterrorism prosecutor, on the Lindh case. The e-mails included the following message from Radack, sent on Friday, December 7, 2001, at 1:06 p.m.:

John,

The FBI wants to interview American Taliban member John Walker some time next week. The interview would occur in Afghanistan. Walker's father retained counsel for him. The FBI wants to question Walker about taking up arms against the U.S.

I consulted with a Senior Legal Advisor here at PRAO and we don't think you can have the FBI agent question Walker. It would be a pre-indictment, custodial overt interview, which is not authorized by law. . . .

On Monday, December 10, 2001, at 11:29 a.m., Ms. Radack wrote Mr. De Pue:

You just advised that the Deputy Legal Advisor of the FBI stated that an agent went and interviewed Walker over the weekend, not knowing that Walker was a represented person. Please keep me in the loop as you learn more details. . . .

Mr. De Pue responded at 1:54 p.m.:

Ugh. We are trying to figure out what actually transpired and what, if anything, Walker said. It may well be that the questioning

was for intelligence purposes and that he was questioned as any other prisoner of war would be.

Mr. De Pue then wrote at 2:11 p.m.:

If what you are telling us is true – and I am sure that it is – the FBI needs to b [sic] alerted at once.

How are these e-mails consistent with your testimony that PRAO never took a position on the legality of Lindh's interrogation?

**Response:** As I indicated during my testimony, those at the Department responsible for the Lindh matter before and during the time of Lindh's interrogation did not to my knowledge seek PRAO's advice, because other experienced lawyers were considering the legal issues raised by overseas interrogation of combatants by the FBI. Before and during the time of these interrogations, I was informed of no opinion expressed by any individual at PRAO about the Lindh interrogation. Even now, I am not aware that PRAO ever took an official position about the Lindh interrogation or that any views expressed by an individual PRAO attorney were documented, factually and legally substantiated, reviewed and authorized, as I would expect before an official opinion was rendered. The e-mail traffic that you cite appears to be the impressions of a single PRAO attorney, without factual analysis and case law discussion, and therefore would not constitute an official opinion.

2. The *New Yorker* article also reported that two weeks after the Department filed charges against Lindh, Radack, a highly qualified employee who had received a merit bonus the previous year, received a "blistering" performance evaluation which severely questioned her legal judgment, and she was advised to get a new job. After Ms. Radack notified Justice Department officials that they had failed to turn over several e-mails requested by the federal court, Justice Department officials notified the managing partners at Ms. Radack's new law firm that she was the target of a criminal investigation.

a. Was Ms. Radack forced to leave her position at the Justice Department because of the advice she provided on the interrogation of Mr. Lindh?

**Response:** I have no knowledge of the facts surrounding Ms. Radack's employment, performance or departure. PRAO is not within my area of responsibility, and does not report to me.

b. Has any investigation been conducted into the alleged withholding of emails from the federal court in the Lindh case? Was Claudia I. Flynn, Director of PRAO, investigated in relation to these events? Have any Justice Department employees other than Ms. Radack been reprimanded or disciplined in any way?

**Response:** I am not involved in any investigation into the above allegations, and to my knowledge the court did not express any dissatisfaction with the way in which the prosecution in the case conducted discovery. It would be improper for me to comment on whether Ms. Flynn was investigated. See USAM § 1-7.530. I do not know whether employees were reprimanded or disciplined.

c. Is Ms. Radack the target of a criminal investigation by the U.S. Attorney's office? For what conduct is she being investigated?

**Response:** It would be improper for me to comment on whether Ms. Radack is under investigation and, if so, about what her status might be. See USAM § 1-7.530.

3. As we discussed at the hearing, the Justice Department sent a five-page letter to Senator Hatch on April 4th expressing its "strong support for Congressman Feeney's amendment to the House version of S. 151." As Assistant Attorney General in charge of the Criminal Division, you are chiefly responsible for formulating criminal law enforcement policy and advising the Attorney General and the White House on criminal law. The Department's letter was sent only a few days before the House-Senate conference on the bill and was influential in persuading the conferees to accept the Feeney Amendment.

The Feeney Amendment imposes burdensome new record-keeping and reporting requirements on federal judges, and requires the Sentencing Commission to disclose confidential court records to the House and Senate Judiciary Committees upon request. It also requires the Attorney General to establish what some have called a "judicial blacklist," by informing Congress whenever a district judge departs downward from the guidelines.

Chief Justice Rehnquist criticized these provisions as potentially amounting “to an unwarranted and ill-considered effort to intimidate individual judges in the performance of their judicial duties.” He said that the provisions could be used to undertake a witch hunt against judges who appear soft on crime, and cautioned that they should not be used to “trench upon judicial independence.”

At your hearing, you stated, “I think the Chief Justice is completely correct, and I completely agree that no tool ought to be used in an effort to try to intimidate judges or pressure judges to rule in individual cases. . . . I certainly don’t endorse the idea of hauling judges up and questioning them about decisions that they have made because I think that can be problematic.”

Given this view, and in light of the Chief Justice’s continuing concern about these provisions, do you believe that Congress should repeal these sections of the Feeney Amendment: *i.e.*, sections (h) and (l)? If not, please explain why you believe these provisions should remain in effect.

**Response:** As a current Department of Justice official my professional obligations make it inappropriate for me to communicate a personal opinion to Congress on a specific legislative proposal as to which the Department takes an official position.

**I know that Department of Justice officials have continued to discuss these provisions, and pay serious attention to concerns expressed by members of Congress, judges, and others. As with any legislation, should Congress determine that there are problems arising from the implementation of these provisions, they may be revisited in the future.**

4. The Justice Department’s letter of April 4th also cited with approval the hearings held in the House Judiciary Committee in response to the so-called “growing leniency problem.” As you know, these hearings involved a bitter and unprecedented attack against a federal judge in Minnesota, James Rosenbaum. A former prosecutor and Reagan appointee, Judge Rosenbaum had testified against a bill that would have reinstated longer sentences against certain first-time drug offenders. Republicans on the House Judiciary Committee later published a committee report containing a 22-page diatribe against Judge Rosenbaum, accusing him of misleading Congress and threatening to subpoena his sentencing records.

Throughout this bizarre and unseemly incident, the Justice Department did not utter a single word in defense of Judge Rosenbaum. Instead, it worked closely with the House Committee to develop and pass the Feeney Amendment, which the Department described in its April 4th letter as an appropriate response to the “well known” problem of judges “ignoring the Guidelines in favor of ad hoc leniency.”

What is your opinion of this matter? Is Judge Rosenbaum a judge you believe has engaged in “ad hoc leniency”? Do you believe that the House Judiciary Committee was justified in taking the steps it did in response to Judge Rosenbaum’s testimony? If so, please explain how this position is consistent with your testimony that you “don’t endorse the idea of hauling judges up and questioning them about [sentencing] decisions that they have made.” And do you share Chief Justice Rehnquist’s concern that the Feeney Amendment may lead to additional attacks against federal judges who appear “soft on crime” in the future?

**Response:** I have not read Judge Rosenbaum’s testimony or any committee report on that testimony, and I am unfamiliar with Judge Rosenbaum’s record. Accordingly, I have no basis to offer an opinion on Judge Rosenbaum’s record or on what the House Judiciary Committee did. Again, I do not endorse the idea of requiring judges to testify in order to justify their decisions; justification should be set forth in the reasoning of their opinions. At the same time, judges are not – and should not be – free from criticism, and must accept that some decisions they make will be unpopular.

5. At your hearing, you stated that before formulating a position on the Feeney Amendment, the Justice Department received input from a wide variety of people. You also referred to “tremendous regional variations” in how federal judges depart from the Sentencing Guidelines. You stated, “In some districts there might be situations where, in effect, departures were being granted at such a high rate for extraordinary reasons that it effectively transformed the Guidelines into a system that was more haphazard than I think originally intended.”

I would like to know more about how thoroughly the Justice Department studied this problem before it decided to express its “strong support” for the Feeney Amendment. What kind of analysis did you or other Justice Department officials perform? Did you: (a) compare the exercise of prosecutorial discretion with the exercise of judicial discretion, determining what percentages of total

downward departures were requested by the government or made over the government's objection; (b) analyze how often downward departures occur in particular kinds of cases, such as white-collar cases or low-level drug cases; (c) gather reliable data, as opposed to anecdotal information or supposition, on departure rates in the 94 federal judicial districts, or by judicial circuit; (d) compare actual departure rates with those anticipated in the legislative history to the Sentencing Reform Act of 1984; (e) analyze the departure rates of judges according to the Presidents who appointed them, or the judges' prior experience as prosecutors or defense attorneys; (f) in analyzing differences in departure rates among particular judges, districts, or circuits, take into consideration the relative magnitude of downward departures; and (g) consider the actual prison time served by defendants who received downward departures? Please provide a copy of all studies, surveys, or analyses that the Department of Justice relied on in deciding to support the Feeney Amendment.

**Response:** The Department of Justice April 4 letter from Acting Assistant Attorney General Brown, to which your questions refer, sets forth statistics and cites cases, and refers as well to information presented during hearings held before the Senate Judiciary Committee in 2000, and before the House Judiciary Committee during the last year. These materials, which are part of the public record, provide the basis of the recommendation in the letter. I had no part in drafting the letter.

6. At your hearing, you stated in response to a question from Senator Durbin that the Justice Department has made the enforcement of existing gun laws "a very high priority." Many, however, have expressed concern that the Department has ignored the very real possibility that terrorists are exploiting these gun laws to obtain firearms and learn how to use them. For example, a terrorist training manual entitled "How Can I Train Myself for Jihad," found in Afghanistan in November 2001, advised potential terrorists in the United States to "obtain an assault rifle legally . . . learn how to use it properly and go and practice in the areas allowed for such training."

In the aftermath of September 11th, the Justice Department worked aggressively to learn about the activities of the hijackers and other terrorist suspects: what flight schools they attended, where they lived, whom they spent time with, their spending patterns, and other activities. Yet the Department rejected the request of the Federal Bureau of Investigation to investigate the gun

purchases of suspected terrorists – despite the legal opinion of the Office of Legal Counsel, dated October 1, 2001, stating that there is “nothing in the NICS regulations that prohibits the FBI from deriving additional benefits from checking audit log records” – such as assisting in the investigation of the 9/11 attacks.

As a federal prosecutor who has worked on very significant criminal matters in recent years, you are certainly aware of the need for investigators to have all relevant information when conducting an investigation. Did you support the Department’s decision to reject the F.B.I.’s request to investigate gun purchases by suspected terrorists after September 11th? Do you believe we know everything we could know about whether the 9/11 terrorists purchased firearms, received firearms training, or otherwise possessed or used firearms during their time in the United States? Are you concerned that the Department has unreasonably constrained the ability of the F.B.I. to investigate potential terrorists who use legal means, such as purchasing firearms, to obtain the necessary weapons to carry out terrorist attacks?

**Response: I was not involved in the decision concerning what restrictions, if any, would apply to an FBI review of the audit log records. Law enforcement knows a great deal about the background and training of the 9/11 hijackers, although the fund of knowledge increases as additional al-Qaeda members are apprehended. The FBI continues to successfully investigate potential terrorists who purchase or use firearms. For example, indictments currently pending against certain individuals who are charged with material support to terrorist organizations include allegations of use of firearms in the course of the charged criminal conduct.**



WRITTEN QUESTIONS FOR ASSISTANT ATTORNEY GENERAL MICHAEL  
CHERTOFF

Senator Joseph R. Biden, Jr.

May 12, 2003

*Stare Decisis*

Q: What is your approach to *stare decisis* in judicial decision-making – how powerful is an existing court decision in influencing your decision?

**Response:** *Stare decisis* is a critical element of the rule of law, for it is one of the principal means to assure that legal judgments are a product of disciplined, reasoned elaboration as opposed to *ad hoc* preference. Adherence to precedent prevents disruption of settled expectations, and makes the law predictable. For these reasons, I believe that fidelity to prior decisions is a cornerstone of the judicial process.

Q: As a circuit court judge, would you look at the question of whether a Supreme Court decision is flawed in its reasoning in determining what weight to grant it in your consideration? Would it receive less weight than another decision similarly on point that is not so flawed? What other factors would you look to in determining whether to apply an existing decision of the Supreme Court to the case before you?

**Response:** I would regard a Supreme Court decision as binding whether or not I agree with its reasoning or result. If the decision did not directly control the result in the case before me, I would examine the logic and approach of the decision fairly in determining whether it affords guidance on the issue before me. I do not believe that a circuit judge should

**“second guess” a ruling of the Supreme Court, or alter an interpretive approach based on whether one agrees with the decision.**

### **Congressional Findings**

Q: As a general matter, what level of judicial deference should be paid to Congressional findings? Why? What is the role of Congressional findings in your approach to statutory construction and evaluation?

**Response: Congressional findings are entitled to substantial deference. First, Congressional enactments deserve a strong presumption of constitutionality because they express the decision of those elected through the democratic process. Indeed, the constitutional principle of separation of powers underscores the respect due to Congress as the body with the authority to make law. Second, in many instances legislation addresses complex economic and social problems which require extensive study and expertise that are beyond the normal competence of the courts. Accordingly, legislative findings that reflect comprehensive investigation and analysis of a problem are entitled to considerable respect when a court applies a statute or evaluates its conformity with Congressional authority under the Constitution.**

### **Federalism**

I have been increasingly concerned about a series of recent Supreme Court cases which have overturned numerous congressional laws. Following the Lochner era, in which an activist Supreme Court invalidated acts of Congress, the Court only struck down one law as exceeding the Commerce Clause between 1937 and 1995. During that same time period, the Court struck down only one federal law as violating the Tenth Amendment – and that case was overruled within 10 years. In the last eight years, however, the Court has issued several high-profile opinions overturning entire, or gutting provisions of, federal laws. I have titled this new era of activism as “the new judicial imperialism.”

### **Commerce Clause**

Q. In 1995, the Court held the federal gun-free school zone act was unconstitutional in the Lopez case on the grounds that Congress exceeded its authority under the commerce clause.

Do you believe that case was correctly decided? Why?

**Response:** Lopez affirms that the Commerce Clause places some limit on Congressional power to regulate intrastate noncommercial activities under the theory of substantial aggregate interstate effects, at least in the absence of congressional findings. To the extent that the decision reiterates that the Commerce Clause is not boundless, it is unremarkable, but it does break with a fairly long line of decisions rejecting commerce power challenges. I cannot hypothesize how I might have decided the constitutionality of the federal gun-free school zone if it had been presented to me in the first instance, but I observe that Lopez has settled the issue with respect to that statute.

Q: In 2000, the Court applied and extended Lopez in the Morrison case, declaring unconstitutional the civil damages provision of the Violence Against Women Act. The Court held that this statute exceeded congressional authority under the commerce clause.

Do you believe that case was correctly decided? Why?

**Response:** Morrison relies upon the decision in Lopez, but differs in that the statute in Morrison included legislative findings and was based on an extensive record of hearings. I cannot hypothesize how I would have applied Lopez had I been presented with Morrison as a case of first impression. As I indicated in an earlier answer, however, I believe that in dealing with complex economic and social problems legislative enactments and findings are entitled to a great deal of deference. Courts should be very hesitant to substitute their own economic and social assessments in evaluating the constitutionality of such enactments.

Q: In the wake of decisions such as Lopez and Printz, it has been suggested that Congress's commerce clause power is limited to interstate transactions. Do you agree with this view? In other words, do you believe that Congress has the

power under the Commerce Clause to ban sales of, say, drugs, like marijuana, when those drugs were manufactured wholly within one state? Why?

**Response:** I do not believe that the Court has adopted the position that the commerce clause power is limited to interstate transactions. Lopez and its successors have affirmed that a substantial aggregate effect on interstate commerce may still be the basis for commerce power legislation. See, e.g., Wickard v. Filburn, 317 U.S. 111 (1942). Furthermore, the Court has indicated that its commerce clause analysis is affected by whether a particular legislative provision is part of a “larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated.” Lopez, supra, 514 U.S. at 561. Because the Court’s commerce clause jurisprudence following Lopez is still developing, I believe application of these principles should proceed incrementally, with careful attentiveness to the factual distinctions among the decisions, and with due deference to congressional expertise in complex areas.

Section 5, 14<sup>th</sup> Amendment

Q: In 1997, in City of Boerne v. Flores, the Court struck down the Religious Freedom Restoration Act on the grounds that congress exceeded its authority under section 5 of the 14<sup>th</sup> Amendment by creating new substantive rights.

Do you believe that case was correctly decided? Why?

**Response:** Although the Court had previously held that Congress may not expand its Section 5 power under the Fourteenth Amendment by enforcing rights not included within the scope of the Amendment, Boerne struck down an exercise of that power where Congress concluded that an acknowledged right – free exercise of religion - deserved stronger enforcement. Of course, prior decisions established Congress’ power to remedy a violation of constitutional rights under Section 5. Here, however, the Court concluded that there must be reasonable congruence between the right and the means of enforcement being enacted, and judged the necessary congruence lacking.

Whether the Boerne Court gave Congress the deference it had been accorded in past Section 5 cases is debatable. The Court also appears to have given comparatively little consideration to what Congress may have found to be subtle and indirect animus directed at religious practices. A full analysis of the decision would require extensive familiarity with the record presented, which I lack.

Q: Likewise, in 2000, in the Morrison case, the Court invalidated the civil damages remedy of the Violence Against Women Act – not only on commerce clause grounds – but because congress allegedly exceeded its authority under section 5 of the 14<sup>th</sup> Amendment by regulating private, as opposed to state, conduct. In so doing, the Court held that the notorious 1883 decision, The Civil Rights Cases, was still good law and that “state action” must be shown in order to invoke the protections of the 14<sup>th</sup> Amendment. Specifically, the Court in Morrison ignored the fact that in a previous case, United States v. Guest (1966), 5 justices stated that congress could reach purely private conduct pursuant to section 5 of the 14<sup>th</sup> Amendment.

Do you believe that Morrison’s ruling on section 5 of the 14<sup>th</sup> Amendment was correctly decided? Why?

**Response:** An informed opinion about whether The Civil Rights Cases were correctly decided would require a profound familiarity with the history and subsequent interpretation of the Fourteenth Amendment. These are matters which I have not studied in depth, and, therefore, am not in a position to discuss. To the extent that the Court’s opinion rests upon a rejection of the congruence between the VAWA civil damages remedy and Congress’ Section 5 power, I respectfully direct your attention to my preceding answers, in which I have expressed my general views on deference to the legislature.

10<sup>th</sup> Amendment As Limit on Congressional Power

In Printz v. United States, 521 U.S. 898 (1997), albeit by a 5-4 split, the Court struck down the Brady gun law’s provision dealing with interim background check regulations, as violating the 10<sup>th</sup> Amendment. That debate between the majority and minority opinions frames the debate over the appropriate reading of

the 10<sup>th</sup> Amendment. The majority favor an expansive reading of the 10<sup>th</sup> Amendment as a way to limit congressional power. The minority – and many of us in Congress believe that the 10<sup>th</sup> Amendment does not narrowly limit Congress's powers.

Q: Do you believe that the 10<sup>th</sup> Amendment forbids Congress from doing anything that is not specifically permitted by the Constitution?

**Response:** Congress derives authority from constitutional provisions such as the Commerce Clause, the Necessary and Proper Clause and Section 5 of the Fourteenth Amendment. This authority is, of course, limited by other specific cross-cutting provisions of the Constitution, such as the First Amendment, etc. After the decision in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), I do not believe that the Supreme Court views the 10<sup>th</sup> Amendment as an across the board limitation on Congressional power.

*11<sup>th</sup> Amendment As Limit on Congressional Power*

In 1996, the Supreme Court ruled in Seminole Tribe v. Florida that, under the 11<sup>th</sup> Amendment, Congress can only authorize suits against states when acting pursuant to Section 5 of the 14<sup>th</sup> Amendment, not when acting under the Commerce Clause power or other powers. This overruled Pennsylvania v. Union Gas (1989), in which the Court ruled that Congress can override the 11<sup>th</sup> Amendment by using any of its Constitutional powers.

Q: Do you agree with the holding in Seminole Tribe? Why?

**Response:** Seminole Tribe reflects a debate about the meaning and significance of over 200 years of Court jurisprudence, as well as about the historical meaning and significance of sovereign immunity. If I were to approach the question in the first instance, I would expect to become immersed in a very substantial body of text, history and case law. Accordingly, I do not know how I would resolve the issue, but I accept that Seminole Tribe is now controlling law on the power of Congress to abrogate state sovereign immunity under its Article I powers.

Q: In 1999, the Court ruled in Florida Prepaid v. College Savings Bank that Congress cannot authorize suits against states for patent violations, overruling our attempts to apply the Lanham Act to the states. The Court ruled that Congress improperly attempted to create new rights under Section 5 of the 14<sup>th</sup> Amendment, and held that there was no proof before Congress of any widespread theft of patents.

Q: Do you agree with the holding in Florida Prepaid? Why?

**Response:** Florida Prepaid follows upon the Court's ruling in Seminole Tribe which preserved Congressional power to override state sovereign immunity under the Section 5 power. Indeed, Florida Prepaid recognizes that Congress has authority to legislate to protect property against state due process violations because of inadequate remedies against patent infringement. Ultimately, Florida Prepaid appears to be a relatively narrow decision, focusing on whether the record of inadequate remedies for state patent infringements was sufficiently developed to warrant Section 5 remedial legislation.

Written Questions from Senator Patrick Leahy to Michael Chertoff:

1. Over the past few years, the Department of Justice has not only become more secretive, it has also become far less prompt in producing what little information it is willing to produce. I have dozens of outstanding requests to various Department components to which the Department has not yet responded, dating back as far as July 2001. My colleagues on the House Judiciary Committee report similar delays in their communications with the Department. For example, Rep. Henry Waxman, Rep. Nancy Pelosi, Rep. Doug Ose and Rep. Jerry Lewis have written to the Attorney General concerning a criminal investigation into Credit Lyonnais for its acquisition of Executive Life, a failed California insurer, and how the Justice Department was handling this matter. In a letter I received from Rep. Doug Ose and Rep. Jerry Lewis dated May 6, 2003, they stated that they have not received any significant response from the Justice Department to date on how this important case is being handled.
  - a. As Chief of the Criminal Division, have you been aware of the backlog of unanswered questions from members of the Senate and House Judiciary Committees?
  - b. If so, what if anything have you done to expedite or facilitate the flow of information between the Department and Congress?
  - c. Would you agree that congressional oversight of executive branch agencies is an important part of our constitutional system of checks and balances?
  - d. If confirmed to the Third Circuit, what assurances can you provide that you would render decisions in a timely fashion?

**Responses:** a. I do not coordinate or handle responses to Congressional inquiries, and for the most part I am not informed when they arrive and how promptly they are answered, except to the extent that my component participates in supplying or reviewing answers. My experience has been that delays in responding are due to the need to compile information from a wide variety of sources in the Department, and from the lengthy process through which many individuals review and contribute input to proposed answers.



- b. When questions have been directed to my component, I have instructed my colleagues to place a priority on a swift, but accurate, response. I recognize that the need to review and compile answers adds additional time to the process of transmitting a final response.**
  - c. Yes.**
  - d. As a litigator, I recognize the importance of timely decision-making by the courts. If confirmed, I am committed to working with my colleagues to resolve cases and circulate opinions in an expeditious manner.**
2. According to news reports and a House Committee on Government Reform hearing held in October 2002, Credit Lyonnais, once a French government-owned bank, is suspected of having organized the purchase of the bankrupt Executive Life in 1991, at a time when federal law forbade a bank from owning an interest in an insurance company. Credit Lyonnais subsequently earned substantial profits from its acquisition by selling part of the company's assets, while the remaining 300,000 annuity and insurance policyholders across the United States suffered significantly lower payments and many states had to cover the costs of Executive Life's "bail out."

I have heard that, in April 2001, a career federal prosecutor in Los Angeles made a recommendation to bring a criminal indictment against Credit Lyonnais. Yet, the matter has been pending before the Department of Justice for more than two years now.

Over the past year, there have been several reports that the Department of Justice has prevented the prosecutor from seeking indictments. And news reports indicate that Credit Lyonnais and the French Government have recently been in Washington, DC seeking to reach a settlement with the Justice Department. It appears that these negotiations would seek to limit the company's liability for actions it took in acquiring Executive Life.

- a. Would a settlement would preclude a full criminal investigation of the bank and its lead executives?

- b. Do you think that a settlement is fair if the individual and other victims have not been invited to participate in the settlement discussions?
- c. What efforts have been made to consult with victims of economic crimes while you have led the Criminal Division?
- d. As a matter of fairness, do you think that large companies should be able to negotiate their way out of difficult situations even when they leave individuals, in this case policyholders and other investors, with no recourse? What kind of precedent does it set when a large corporation is not held accountable for violations of law?
- e. If confirmed to the Third Circuit, how would you ensure that ordinary working men and women whose rights have been violated would be able to bring litigation to protect their rights and prevent injustice?
- f. What assurances can you give this Committee that injured individuals and employees would receive the full and fair review of their claims, as they are entitled, if they come before you?

**Responses:** a. The Department has previously informed Congress, including Representative Ose on January 8 of this year, that the matter in question is under investigation by the United States Attorney in the Central District of California. Accordingly, I cannot comment on the investigation.

I can observe generally that to the extent prosecutors negotiate a resolution of criminal charges in a case, such a resolution addresses criminal liability; prosecutors neither desire nor have the power to settle private civil claims, which must be handled between the parties. Where a conviction is obtained either after trial or through a plea agreement, however, the Department will in appropriate circumstances seek restitution for victims. Further, a plea agreement or other resolution of a criminal case against a corporation does not normally preclude charges against culpable individuals (or vice versa).

- b. Generally, a civil settlement requires the parties or their representatives to participate in settlement discussions, and requires the parties to agree. Plea agreements or dispositions in criminal cases, of course, involve only private defendants, since

- the government litigates as plaintiff. While prosecutors seek the views of victims in appropriate cases, the prosecutor represents the public as a whole, and it would be inappropriate to invite victims to participate directly in plea discussions, or to give them the power to determine whether prosecution should be initiated.
- c. I have emphasized that victims of all crimes should be informed and consulted, either directly or through representatives. In pursuing our intensive efforts against those responsible for corporate fraud we have been mindful of the need to achieve restitution for injured investors and other victims; so, for example, our plea agreements often provide for restitution.
  - d. As I have demonstrated over the years as Assistant Attorney General and, earlier, as United States Attorney for New Jersey, I am committed to holding corporations and corporate executives fully accountable for violations of law. Repeatedly, we have moved swiftly and forcefully to investigate and prosecute corporate wrongdoers. The Department's recently reformulated guidelines governing corporate fraud prosecutions emphasize that corporations should be held responsible in appropriate cases. Further, I fully agree that large companies should not be able to negotiate themselves out of trouble without adequate compensation to those wrongfully injured.
  - e. Although a judge does not initiate cases, but rules on those presented, if confirmed, I will uphold my profound obligations to afford equal justice, to provide a fair hearing, and to remain mindful of the impact of judicial decisions on the lives and rights of all citizens.
  - f. I have considered fairness and equal treatment of all to be a cornerstone of my public duty since I first took the oath of public service, and I regard providing a full and fair review as part of my solemn obligation, if confirmed as a judge.

**Senator Russell D. Feingold**  
**Written Questions for Michael Chertoff**  
May 13, 2003

1. At your nominations hearing before the Senate Judiciary Committee on May 7, 2003, I asked you about the U.S. Department of Justice threatening to declare a defendant an "enemy combatant" as a bargaining chip in criminal plea negotiations. You testified that "So, I completely agree that it is inappropriate to use it as leverage and it is not the policy of the Department to do that." In your testimony, you suggested that it is the defense attorney and not the federal prosecutor who raises the issue of whether a criminal defendant can ever be charged as an enemy combatant based upon their criminal conduct.

a. Has the Department of Justice ever threatened, suggested or otherwise implied that a defendant may be declared an enemy combatant if they did not plead guilty to criminal charges? If yes, please list the cases in which this occurred.

**Response:** Because I am answering questions in my personal capacity as the nominee for a federal judicial position, and not in my official capacity, I am limited in my ability to answer. To the extent that the question calls for information relating to oversight of the general operations of the Department, I respectfully suggest that it be directed to the Department for an official response.

Speaking personally, I have not threatened that anyone may be declared an enemy combatant if they did not plead guilty to a criminal charge, nor am I aware of anyone who has done so. Of course, so far as I am aware the possibility of enemy combatant status has been addressed with defense counsel in connection with the guilty pleas listed in my response to question e., below. It would be improper for me to discuss the substance of plea discussions with counsel for any defendant who has not pled guilty. See ABA Model Rules of Professional Conduct, Rule 3.6 (Comment 5(2)) (cautioning against discussing "the possibility of a plea of guilty" in a pending proceeding).

b. What role, if any, did you have in the plea negotiations and final plea agreements between the federal government and the defendants in the so-called "Buffalo Six" case? Did you personally approve any of the plea agreements in that case?

**Response:** I had no discussion with counsel for any defendant. I was one of the approving authorities for the plea and I did approve the substance of the plea agreements.

c. As head of the Criminal Division, were you involved in consultation between the Department of Justice and the military with regard to detaining any of the Buffalo Six as enemy combatants? If yes, what was your role?

**Response:** As an attorney at the Department of Justice, I am bound to keep confidential my deliberative discussions with, and legal advice provided to, others in the Executive Branch. Similarly, I am obliged to keep confidential internal discussions relating to charging decisions in particular cases. I can say generally, without reference to a specific case, I consult from time to time with attorneys from the Department of Defense to ensure that information concerning persons who may properly be deemed enemy combatants in the conflict with al-Qaeda is shared in a timely manner so that each department can carry out its distinct functions.

d. As head of the Criminal Division, what guidance have you provided to federal prosecutors in terrorism cases concerning plea negotiations and plea agreements? What guidance, if any, have you provided regarding whether it is appropriate to use enemy combatant status in a plea discussion or plea agreement? Please provide copies of any such guidance responsive to these questions.

**Response:** I have furnished no written guidance specific to terrorism cases or enemy combatant status. Without discussing specific cases, I have directed prosecutors working under my supervision that enemy combatant status may be addressed in plea discussions where applicable, but may not be threatened for leverage to obtain a plea.

e. In how many criminal cases has the Department of Justice and a defendant entered into a plea agreement that contains provisions addressing the government's ability to declare the defendant an enemy combatant? In those cases, please state the initial charges against the defendant, the statement of facts contained in the plea agreement, the final charges, and the sentence imposed against the defendant.

**Response:** Seven to date. The indictments and plea agreements are public record, and are furnished separately. The only defendant to be sentenced to date is John Walker Lindh, who received a prison term of 20 years by judgment of the United States District Court for the Eastern District of Virginia.

f. As head of the Criminal Division, what is your role in plea negotiations and in approving plea agreements in terrorism cases?

**Response:** Generally, I do not participate in negotiations with defense counsel but I am one of the approving authorities for plea agreements, and all such agreements must be approved through my office.

g. What rules, policies or other written materials has the Department of Justice promulgated on plea negotiations and plea agreements for federal prosecutors or investigators? What specific rules has the Department of Justice issued for federal prosecutors concerning the use of enemy combatant status as part of a plea discussion? Please attach copies of all rules, policies or other written materials documents responsive to these questions.

**Response:** As stated in my response to question a., because I am testifying in my personal capacity and not my official capacity, I am limited in my ability to respond. Nevertheless, the general rules governing plea negotiations and agreements are set forth in the United States Attorney's Manual, a publicly available compendium, that is supplemented from time to time. As stated above, I am aware of no written memorandum regarding enemy combatant status in plea negotiations.

h. As the decision to declare a defendant an enemy combatant is not within the scope of authority of the Attorney General, please list the specific agencies and individuals that must be contacted and notified of the possible plea agreement before the Department of Justice can assure a defendant charged with federal crimes that he or she will not be declared an enemy combatant if they plead guilty?

**Response:** As I stated in my response to question a., because I am answering these questions in my personal capacity, and not in my official capacity, I am limited in my ability to respond. To the extent that the questions seeks a comprehensive and authoritative answer about Department procedures, I respectfully suggest that the question be directed to the Department for an official response. So far as I am personally aware, the authority to designate an enemy combatant under the President's power as Commander in Chief rests ultimately with the President, and is generally exercised through his officials at the Department of Defense.

h. Does the Department of Justice routinely consult with the Department of Defense concerning the use of enemy combatant status for U.S. citizens charged with terrorism offenses or financial crimes related to terrorism?

**Response:** I respectfully refer you to my preceding answer and to my answer to question c., above.

i. In what matters has the Department of Justice consulted with the Department of Defense on the military's intention to hold a defendant as an enemy combatant rather than prosecuting the individual through the civilian criminal justice system? Please identify the specific cases and what role you have had in those consultations.

**Response:** As I previously indicated, I am answering in my personal capacity and the question appears largely to be directed at issues more appropriately answered officially by the Department. Additionally, to the extent that the question seeks information about my consultation about specific cases, I am obliged to keep confidential deliberative discussions I have had with other members of the executive branch, as well as any legal advice I have given or received. Further, except to the extent disclosed in previous answers, the question calls for information regarding uncharged, open criminal investigations, about which my obligations of confidentiality also prohibit me to comment. Finally, responding to the question would require me to reveal information about potential enemy combatants – including the mere fact that particular individuals have been or may be apprehended – which constitutes classified, extremely sensitive intelligence that I am legally precluded from disclosing. Otherwise, I refer to my previous answers.

Michael Chertoff  
950 Pennsylvania Avenue  
Room 2107  
Washington, DC 20530

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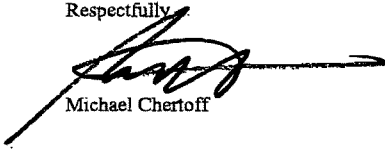
May 19, 2003

The Honorable Edward M. Kennedy  
Member, Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Senator Kennedy:

I am pleased to enclose my answers to your supplemental questions dated May 16, 2003. Of course, if you need any additional information or clarification, I would be happy to meet with you at your convenience. Thank you for your consideration of my nomination.

Respectfully,

  
Michael Chertoff

Enclosures

cc: The Honorable Orrin G. Hatch  
Chairman, Committee on the Judiciary

The Honorable Patrick J. Leahy  
Ranking Member, Committee on the Judiciary

The Honorable Russ Feingold  
Member, Committee on the Judiciary



## SUPPLEMENTAL QUESTIONS FOR MICHAEL CHERTOFF

I. Please review the questions previously submitted by Senator Kennedy on May 12th and Senator Feingold on May 13th and supplement your responses to provide fuller detail in both your official capacity and your personal capacity, separating the two to the extent not apparent from the context.

**Response:** I believe that the responses I provide below will supplement the responses to Senator Kennedy's questions submitted on May 12. Regarding Senator Feingold's questions submitted on May 13, I have one supplemental answer to question e. Since my response to that question was returned on May 14, there has been one additional guilty plea of the remaining member of the so-called "Buffalo Six" on May 19. That plea agreement, in the case of United States v. Al-Bakri, also contains provisions regarding the government's ability to declare the defendant an enemy combatant. The relevant documents are attached.

II. In particular, your supplementary submission should include, but not be limited to, the following matters and should amplify and explain any "yes" or "no" answers:

### A. The Interrogation of John Walker Lindh

1. You state that "those at the Department responsible for the Lindh matter before and during the time of Lindh's interrogation did not to my knowledge seek PRAO's advice." Isn't it true that John DePue, an attorney in the Terrorism and Violent Crime Section of the Criminal Division, which you head now and headed then, called the Professional Responsibility Advisory Office in December 2001 and requested its opinion on the propriety of having the F.B.I. interview Lindh, in light of the fact that Lindh's father had already retained counsel for him? And isn't it true that PRAO attorney Jesselyn Radack answered DePue's phone call in her capacity as the duty attorney that day? When and how did you become aware of this or any similar contacts between anyone in your Division and anyone in PRAO on this matter?

**Response:** The e-mails which are quoted in Newsweek and referred to in Senator Kennedy's questions of May 12 indicate that Mr. DePue initiated contact with PRAO about whether the FBI should question Walker Lindh and that Ms. Radack responded to that inquiry. I do not know how he came to do that and he did so without my knowledge at the time. Before and during the December 9 and 10, 2001 interviews of Walker Lindh I was unaware that anyone had contacted PRAO regarding the FBI's intent to interview. I first became aware of contacts on this issue between anyone in the Criminal Division and PRAO after Lindh had waived his Miranda rights (including his right to counsel) and consented to his December 9 and 10 interviews. I recall that in early 2002 the existence of e-mail traffic between Mr. DePue and Ms. Radack came to my attention as an outgrowth of the prosecutors' review of documents in connection with the Lindh case.

2. You state that “[b]efore and during the time of these interrogations, I was informed of no opinion expressed by any individual at PRAO about the Lindh interrogation.” When and how did you learn about the e-mail message sent by Ms. Radack to Mr. DePue on December 7, 2001, stating: “I consulted with a Senior Legal Advisor here at PRAO and we don’t think you can have the FBI agent question Walker. It would be a pre-indictment, custodial overt interview, which is not authorized by law.”? When and how did you become aware of any similar or related opinion or advice by any attorney in the Department?

**Response:** I learned about the e-mail communication between Ms. Radack and Mr. DePue in early 2002 when it came to my attention as an outgrowth of the prosecutors’ review of documents in connection with the Lindh case. Apart from the foregoing e-mails, I do not recall anyone expressing the opinion that the FBI should be stopped from interviewing John Walker Lindh because of professional ethics rules about contacts with represented persons. Independent of any communication between Mr. DePue and Ms. Radack, other attorneys and I were analyzing and discussing legal issues raised by FBI questioning of overseas combatants during the period before and after the Lindh interviews.

3. You state that the advice provided in Ms. Radack’s e-mail “would not constitute an official opinion” because it “appears to be the impressions of a single PRAO attorney, without factual analysis and case law discussion.”

a. Ms. Radack’s e-mail of December 7, 2001, states that she “consulted with a Senior Legal Advisor here at PRAO.” We understand that Ms. Radack in fact consulted with both Senior Legal Advisor Joan Goldfrank and PRAO Director Claudia J. Flynn. Do you have any reason to believe that Ms. Radack did not consult with these other attorneys at PRAO? When and how did you become aware that such consultations occurred? Isn’t it true that Ms. Radack’s e-mail of December 7th further states: “This opinion is based on the facts as presented and described above and in our telephone conversation. If the facts are different or changed, further analysis may be required.”?

**Response:** Apart from the text quoted in the question, I do not know with whom at PRAO Ms. Radack consulted. Apart from any facts set forth in the quoted e-mails, I do not know what other facts were discussed in any telephone conversation between Ms. Radack and Mr. DePue.

b. Isn’t it customary for PRAO attorneys to provide opinions on professional responsibility matters via e-mail; to base their opinions on the facts presented to them by other Justice Department employees; and not to cite case law unless specifically asked to, particularly when the applicable legal authority is already set forth in existing PRAO memoranda (such as the PRAO memorandum on “Communications Authorized by Law”) and when the inquiry is time-sensitive? Are there any Justice Department policies or regulations that distinguish between “unofficial” and “official” PRAO opinions, or are you applying your own subjective standard on this issue?

**Response:** I appreciate the opportunity to place this in context. PRAO is not part of the Criminal Division and does not report to me. My personal understanding is that PRAO's assignment is to give guidance to prosecuting attorneys regarding issues that may arise under the professional ethics rules in the states in which the prosecuting attorneys are admitted or practice. I also understand that among the rules on which PRAO advises are those canons of professional ethics that specifically address communication between Department attorneys and represented individuals. I do not know PRAO's customary practice in rendering guidance or advice on attorney ethics questions in routine settings or in various contexts.

In stating my personal belief that I would not regard the e-mail traffic as constituting an official opinion of the Professional Responsibility Advisory Office, I am expressing my subjective standard based on what I would expect in the circumstances. Indeed, I still do not know whether PRAO has taken an official position on whether the professional ethics rules governing attorneys should have barred FBI agents from questioning Walker Lindh while he was in military custody in Afghanistan.

In my personal opinion, the legal questions raised by the FBI's desire to interview Walker Lindh were and are far from routine or customary. They involve, among other things, the interplay between the Fifth and Sixth Amendments and intelligence gathering during military operations overseas. Further, the ethics rules by their terms apply only to attorneys. Accordingly, it is unclear how such ethics rules could be applicable to an FBI agent who wishes to question a combatant overseas. See 28 C.F.R. 77.2 (explicitly excluding from the definition of attorney for ethics purposes "investigators or other law enforcement agents"). Yet another consideration is that the Supreme Court has established that a family member's retention of counsel for a suspect does not create a legal bar to questioning where the suspect has waived his Miranda rights. In Moran v. Burbine, 475 U.S. 412 (1986), the Court held that although an adult defendant's sister had retained counsel without defendant's knowledge, it was not a constitutional violation for police to fail to inform the defendant of that fact when they obtained his Miranda waiver and questioned him. The Court also held that prior to the initiation of adversary judicial proceedings, no Sixth Amendment right would attach.

In expressing my personal belief that I would not regard the cited e-mail as PRAO's official position, I have in mind my expectation that an official opinion addressing the novel and complex issues involving questioning of an American captured with the enemy during operations overseas would include explicit analysis of the above factors (and others). Accordingly, in reading the quoted e-mail, I interpret it at most as an initial step toward an official position. In so stating, I do not mean to be critical of the attorneys for exchanging their views (of which I was unaware at the time).

## B. The Feeney Amendment

1. You state that you had “no part in drafting” the Justice Department’s letter of April 4, 2003, which expressed “strong support for Congressman Feeney’s amendment to the House version of S.151.” As Assistant Attorney General in charge of the Criminal Division, however, you surely had some involvement in gathering information, consulting with other practitioners and policymakers, and advising the Attorney General and other top officials on this important legislation. Please describe the full extent of your involvement in the development of the Justice Department’s position on the Feeney Amendment.

**Response:** Generally, the Department has raised its concerns about the issue of downward departures before Congress on previous occasions. On July 10, 2002, for example, United States Attorney William Mercer and I testified before the Senate Subcommittee on Crime and Drugs on the issue of punishment of white collar crime. This testimony was part of the Congressional process leading to enactment of the Sarbanes-Oxley Act of 2002, in the wake of the events at Enron, Worldcom and other corporations. In that testimony both Mr. Mercer and I commented on the fact that some judges were overly willing to depart downward in the case of white collar offenders.

I understand that during the fall of 2002 and early 2003, other officials of the Department testified and wrote to Congress about the subject of downward departures in the context of child victim and sexual crimes. To my knowledge, these communications included a letter from Assistant Attorney General Daniel J. Bryant to the Speaker of the House dated October 4, 2002 and testimony by Associate Deputy Attorney General Daniel Collins before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security on October 2, 2002 and March 11, 2003.

During this time, I did not personally gather information or consult to a significant degree with outside policymakers and practitioners on the issue of downward departures. Shortly before the Feeney Amendment was adopted I became aware that it was pending. Although others within the Department of Justice were primarily engaged in addressing the Amendment, I did have a few discussions about the Amendment generally with others at the Department. I personally had no part in drafting Acting Assistant Attorney General Brown’s April 4 letter, nor did I review it before it was sent.

2. You state that you are unfamiliar with the record of Judge James Rosenbaum, a Reagan-appointed district judge whose sentencing record was subject to extensive investigation and attack in the House Judiciary Committee. You also stated that you took no part in drafting the Justice Department’s letter of April 4, 2003, which described the Feeney Amendment as an appropriate response to the “well known” problem of judges “ignoring the Guidelines in favor of ad hoc leniency.” At your hearing, however, you stated that you were aware of “tremendous regional disparities” in departure rates. You said, “In some districts, they are quite infrequent. In some districts, they are, in fact, much more regular.” What disparities are you referring to?

Where are they documented? And did you mean to suggest that you were not previously aware of the Rosenbaum controversy? If not, based on what you do know from any source, please answer the questions posed in the last paragraph of Senator Kennedy's Question 4 of May 12th.

**Response:** In mentioning disparities at my hearing, I was referring to downward departures other than for "cooperation." These disparities are reflected, for example, in the United States Sentencing Commission's Sourcebooks of Sentencing Statistics. The 2000 and 2001 Sourcebooks note that rates of nonsubstantial assistance downward departures range from a low of approximately 2 to 3 percent in some districts to highs of 25 to 30 percent in others, such as the District of Connecticut, Eastern District of Washington, and Eastern District of Oklahoma (excluding southwest border districts which present separate issues). In referring to disparities in my testimony, of course, I only meant to illustrate that they have presented an issue that needs to be addressed, and I explicitly testified that these are matters about which "reasonable people can disagree."

So far as the matter of Judge Rosenbaum is concerned, my awareness of a controversy involving his testimony comes from a news article, the details of which I do not remember. I have not read Judge Rosenbaum's testimony nor have I read the Committee report. Under these circumstances, I have no basis to evaluate Judge Rosenbaum's record or to believe that he is anything other than a conscientious judge. Equally, I have no basis on which to offer an opinion about the positions taken by the House Judiciary Committee, or about what has transpired between the Committee and the judge.

I reaffirm that I do not endorse the idea that judges should be required to defend their individual decisions outside the framework of their judicial opinions and orders. At the same time, judges must be prepared to accept that they may be criticized for unpopular decisions.

3. You stated that even though you share Chief Justice Rehnquist's concern that judges should not be intimidated or pressured by Congress about sentencing decisions they have made, you cannot express an opinion whether Congress should repeal sections (h) and (l) of the Feeney Amendment, as enacted, because "[a]s a current Department of Justice official my professional obligations make it inappropriate" for you to answer. At the same time, you told Senator Feingold that you cannot say whether the Department has ever threatened or suggested that a defendant may be declared an enemy combatant if they did not plead guilty to criminal charges, because you are "answering questions in my personal capacity as the nominee for a federal judicial position, and not in my official capacity." Please answer the following questions in your personal capacity as the nominee for a federal judicial position, and not in your official capacity as a current Justice Department official:

a. Chief Justice Rehnquist wrote that the Feeney Amendment "would do serious harm to the basic structure of the sentencing guideline system and would seriously impair the ability of courts to impose just and responsible sentences." The Judicial Conference of the United States vigorously opposed the Feeney Amendment. Given your extensive

background as a prosecutor and defense attorney, do you share any of the concerns that these judges have expressed about the Feeney Amendment?

**Response:** I understand that the Chief Justice's letter of April 7 and the Judicial Conference submission of April 3 address the Feeney Amendment as passed by the House. I also understand that the final bill which was enacted modified some elements of the Amendment which the Judicial Conference found objectionable. For example, the final bill eliminated non-enumerated downward departures only in the case of certain child victim and sexual crimes. These changes addressed some of the major concerns raised by the Judicial Conference.

That being said, I take seriously the judges' remaining concerns about the standard of appellate review and record keeping. How these changes will play out in practice will depend, among other things, on application of the new standard of review and upon implementation of the record keeping requirements. Therefore I cannot form a judgment at this point about whether the concerns expressed will be realized.

Finally, I should observe that while I have not seen the operation of departures as a judge, I have addressed the issue as both a prosecutor and as a defense attorney. There is validity to the argument that downward departures are a necessary escape valve for the truly atypical case, recognizing that no guideline structure can foresee all of the many variables arise in a case. There is also weight to the concern that an increase in extraordinary downward departures can generate disparities over time, and thus erode the principle of consistency embodied in the Guidelines.

b. At your hearing, you argued that even though the Justice Department sought the establishment of a *de novo* standard for appellate review of departures from the sentencing guidelines, it does not necessarily follow that the Supreme Court incorrectly interpreted the Sentencing Reform Act when it established a deferential standard of review in its 1996 decision *Koon v. United States*. In reaching its unanimous decision, however, the Court cited not only the text of the Sentencing Reform Act, but also the "traditional sentencing discretion" of trial courts and "institutional advantage" of federal district courts over appellate courts to make fact-based sentencing determinations. Please explain your view of the proper roles of trial judges and appellate judges in criminal sentencing matters. If you are confirmed as a judge on the Third Circuit, do you believe you will be able to show proper respect for the traditional sentencing discretion of district judges while applying the *de novo* standard established by this legislation? In what types of cases would it be appropriate not to respect that tradition sentencing discretion? How will you be able to do this?

**Response:** As a general matter, trial judges who have had the opportunity to become fully acquainted with the facts of the particular case, who have faced the defendant, and who may have sat through a full trial are, as the *Koon* Court said, best situated from an institutional standpoint to make fact specific determinations called for in

sentencing. At the same time, appellate courts are capable of deciding legal issues that affect sentencing. Thus, for example, Koon said that even under the traditional approach to sentencing a court of appeals “need not defer” to a trial court’s resolution of a question of law. 518 U.S. 81, 100 (1996).

The new statute applies the de novo review standard to certain aspects of the district court’s application of the guidelines to the facts, but does not repeal the preexisting standard of review for the trial court’s judgments about credibility and findings of fact. Thus, some of the fundamental elements of traditional deference remain unchanged, but review of the application of the guidelines to the facts is undertaken pursuant to the new standard. If confirmed, I believe that I will be able to respect the traditional sentencing discretion of the trial judges in those areas which the statute permits while applying a de novo review standard where the new law mandates. Of course, the application of standards of review in particular cases is often a problem of exquisite specificity, and it is impossible (and inadvisable) to generalize in advance. If confirmed, I will have the benefit of briefing, oral argument, consultation with judicial colleagues, and developing case law to aid in applying the new rule.

#### C. Firearm Purchases by Suspected Terrorists

1. You state that you were not involved in “the decision concerning what restrictions, if any, would apply to an FBI review of the audit log records.” As Assistant Attorney General in charge of the Criminal Division, however, you were surely aware that the F.B.I. wanted to investigate the recent gun purchases of suspected terrorists after September 11th. Were you or anyone else in your Division involved in any way in the discussions leading to the decision? If so, what was that involvement? If not, explain how and why a matter involving such an important criminal investigation could be decided without the involvement of the Criminal Division, and indicate what other officials and elements of the Department were involved.

**Response:** I was not involved in any discussions leading to the decision about what regulatory restrictions apply to the review of gun purchase records by the FBI. So far as I know, no one else in my Division was involved in this decision to any significant degree. Although I have no personal knowledge about the process, published reports indicate that the resolution of the issue of how to apply regulatory restrictions on gun purchase logs involved communication mainly among representatives of the FBI, Office of Legal Counsel and Office of Legal Policy. Although attorneys with criminal law expertise are often consulted about matters of policy, interpretation of Department regulations addressing investigative agencies does not always include Criminal Division attorneys. Among other repositories of relevant expertise are the United States Attorneys’ Offices and experienced prosecutors in various other components.

SUBMISSIONS FOR THE RECORD

Senator Dianne Feinstein

**Introductory Remarks on the Nomination of  
Consuelo Callahan**

Mr. Chairman, I am pleased to introduce Justice Consuelo Callahan, a nominee for the Ninth Circuit Court of Appeals, to the Judiciary Committee.

Justice Callahan currently serves in the California state court system as an appellate judge on the Third District Court of Appeal, which is located in Sacramento.

In these times of contentious debate on judicial nominations in the Senate, I find it refreshing to introduce a nominee who has **not** provoked controversy. To this date, I have yet to receive a single letter in opposition to Justice Callahan.



Before I delve into Justice Callahan's background, I wanted to briefly acknowledge the presence of her husband, Randy. Randy, could you please stand up so the committee can recognize you?

Justice Callahan has strong roots in California. She was born in Palo Alto and grew up in the Bay Area. For college, she attended Stanford University, where she graduated with Honors. She then attended the University of the Pacific McGeorge School of Law.

After law school, Justice Callahan embarked on a career as a government lawyer. She first worked as a City Attorney for the City of Stockton and then joined the San Joaquin District Attorney's Office as a Deputy District Attorney. In the District Attorney's office, Justice Callahan established the office's first child abuse and sexual assault unit. She also personally handled over 50 jury trials during her tenure as a prosecutor. ✓

In 1986, Justice Callahan became a Commissioner of the Stockton Municipal Court. Six years later, she was appointed to the San Joaquin Superior Court where she became the first Hispanic woman to serve on that bench.

In 1996, Justice Callahan was elevated to the State Court of Appeal. Upon her appointment, she became the first judge from San Joaquin County to serve on the Third District Court of Appeal in 73 years.

Judge Callahan comes to this nomination with the strong support of her colleagues in the Sacramento area legal community.

- Notably, all 10 justices who serve with Justice Callahan on the Third Appellate District have written in support of her nomination. The Justices write that *“during her more than six years on our court, Connie has shown that she has the integrity, capacity, collegiality and diligence to serve with distinction on the Ninth Circuit.”*

- The California La Raza Lawyers Association has endorsed Justice Callahan's nomination and called her an "*exceptional*" candidate for the Ninth Circuit.
- Judge David DeAlba of the Sacramento Superior Court describes Justice Callahan as an "*outstanding jurist who will serve the people of the United States with great distinction and honor.*" He further describes her as having a "*reputation of being a moderate on most issues and for being appropriately conservative in matters of criminal justice,*"
- Noted local defense attorney Al Ellis has described Justice Callahan as tough but fair with a "*reputation of being impeccably honest and ... having common sense.*"

Justice Callahan remains actively involved in professional and civic activities. She is President of the Anthony M. Kennedy Inn of Court, President of the Alumni Board of McGeorge School of law, and a former member of the Executive Board of the California Judges Association.

For her work in the field of child abuse, she has received an award from the San Joaquin County Juvenile Justice Commission. The San Joaquin County Medication Center named her Peacemaker of the Year.

Once again, I am pleased to introduce Justice Callahan to the Committee.



News Release  
**JUDICIARY COMMITTEE**

*United States Senate • Senator Orrin Hatch, Chairman*

May 7, 2003

Contact: Margarita Tapia, 202/224-5225

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

**Consuelo Maria Callahan for the U.S. Court of Appeals for the Ninth Circuit;  
 Michael Chertoff for the U.S. Court of Appeals for the Third Circuit; and  
 L. Scott Coogler for the U.S. District Court, Northern District of Alabama**

I am pleased to welcome to the Committee this morning three impressive nominees for the federal bench. Because I know that their home state senators have much to say about these outstanding nominees, I will keep my remarks brief.

**Consuelo Callahan**, our nominee for the Ninth Circuit, has had an exemplary legal career in California as a successful prosecutor and an esteemed jurist. During her ten-year career as a prosecutor, she handled more than 50 jury trials. She also has first-hand experience with breaking the gender barrier. In 1992, she was appointed to the Superior Court in San Joaquin County, where she was the first female and Hispanic to serve on that court. She was also the first female member of two local social and service organizations. In 1996, Justice Callahan became the first judge from San Joaquin County to be elevated to the California Court of Appeal in more than 73 years. The ten justices that serve with her on the Third Appellate District and work with her every day sent a letter to the Committee praising her skills as a jurist. They write, "Our only reservation in recommending her confirmation is that it will mean a significant loss to our court. We will miss Connie's energy and enthusiasm, her legal skills, and the positive way in which she fulfills her responsibilities as an appellate jurist." I will submit a copy of this letter for the record. Her colleagues' loss will be the federal judiciary's gain, as I have great confidence that the beleaguered Ninth Circuit will greatly benefit from her confirmation.

**Michael Chertoff** is our Third Circuit nominee. A native of Elizabeth, New Jersey, Mr. Chertoff has done it all: A Supreme Court clerkship, private practice, and government service. He won high marks from Democrats and Republicans alike for his pro bono service as counsel to the New Jersey state legislature during its investigation of racial profiling by the state police. He is a familiar face to us here in the U.S. Senate as a result of his service as Assistant Attorney General for the Criminal Division at the U.S. Department of Justice, and I personally know that many of my colleagues admire his intellect, legal skills, and commitment to the rule of law. I think the Bergen County (New Jersey) Record said it best when it endorsed Mr. Chertoff's nomination on March 11 of this year. The paper editorialized, "Mr. Chertoff is exactly the type of nominee the nation needs for federal judgeships," and concluded, "Mr. Chertoff is the type of

smart, non-ideological high achiever whom presidents of both parties should consider for the bench.” That’s high praise and I, too, firmly believe that Mr. Chertoff will be an excellent federal appellate judge.

Our sole district nominee today is **L. Scott Coogler**, who has been nominated for a seat on the Northern District of Alabama bench. Since 1999, Judge Coogler has served on the Alabama Circuit Court, Sixth Judicial Circuit, so he brings depth and experience to this position. Prior to that, he maintained a successful private practice, handling a wide range of civil and criminal litigation cases, so he knows first hand the importance of maintaining a solid judicial temperament. I am particularly impressed that Judge Coogler has shared his expertise by teaching at his alma mater, the University of Alabama Law School, despite the demands of his judicial service.

I welcome each of our nominees to the Committee, and I look forward to hearing from them.

###

**Statement of Senator Edward M. Kennedy  
Senate Confirmation Hearing  
May 6, 2003**

**Today we consider the nominations of Michael Chertoff, nominee to the United States Court of Appeals for the Third Circuit, Consuelo Maria Callahan, nominee to the United States Court of Appeals for the Ninth Circuit, and Justice Scott Coogler, nominee to the United States District Court for the Northern District of Alabama.**

**As with all nominations to the federal courts, it is important that this Committee fulfill its constitutional duty to review the nominees records thoroughly. We must assure ourselves that the nominees have the qualifications, temperament, and commitment to enforcing the constitutional and federal statutory protections that are central to our American democracy.**

**Justice Coogler has served for the past four years as a judge on the State Court in Alabama.**

**Justice Consuelo Callahan is currently an Associate Justice on the Third Appellate District in California. She has a long history of public service in California. She has served as a judge on the**

**California Superior Court, and as Supervisory District Attorney and as Deputy District Attorney in the San Joaquin County District Attorney's Office in California.**

**Mr. Chertoff has a fine reputation as a prosecutor, special counsel, and defense attorney. In his role as Assistant Attorney General in charge of the Criminal Division, certain aspects of his performance have impressed me. For example, in November 2001 Mr. Chertoff testified before our Committee "that the history of this Government in prosecuting terrorists in domestic courts has been one of unmitigated success." His expression of confidence in the ability of our criminal justice system to deal with terrorist suspects has played an important role in the debate over the need for military tribunals.**

**However, other policies and decisions involving criminal justice matters during Mr. Chertoff's tenure as Assistant Attorney General have raised fundamental concerns about the Constitution and due process. In particular, I am concerned about the Justice Department's advocacy on behalf of the Feeney Amendment to S.151, the AMBER Alert child-abduction legislation. The Feeney Amendment has nothing to do with protecting children, and everything to do with handcuffing judges and eliminating fairness in**



**our federal sentencing system. As Chief Justice Rehnquist has said, the Feeney Amendment has the potential to “do serious harm to the basic structure of the sentencing guideline system and . . . seriously impair the ability of courts to impose just and responsible sentences.”**

**I look forward to hearing from the nominees about these and other important issues.**

# U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693

VERMONT

**Statement Of Senator Patrick Leahy  
Judicial Nominations Hearing  
May 7, 2003**

Today, we welcome Consuelo Maria Callahan, nominated to the Ninth Circuit Court of Appeals, Michael Chertoff, nominated to the Third Circuit Court of Appeals, and L. Scott Coogler for the U.S. District Court for the Northern District of Alabama.

This is already the ninth hearing the Republican majority has held for judicial nominees this year. As of today, the Committee will now have held hearings for 37 judicial nominees overall and 10 circuit court nominees. This is in sharp contrast to the way President Clinton's nominees were treated by the Republican majority.

I recall that, during the entire year of 1996, when vacancies were higher and growing, this Committee held only six hearings and those hearings included only five circuit court nominees. Thus, the Republicans have now considered twice as many circuit court nominees in one-third the amount of time they considered President Clinton's nominees. In 1997, the ninth judicial nominations hearing was not held until November of that year. During the entire year of 1999, only seven hearings were held on judicial nominees and, during the entire year of 2000, only eight judicial nominations hearings were held. This year, with a Republican in the White House, the Senate Republican majority has gone from second gear -- the restrained pace it had said was required for Clinton nominees -- to overdrive for the most controversial of President Bush's nominees.

This year, in spite of the lack of cooperation by the Administration and the overbearing exercise of power by the majority, we have cooperated with Committee action and voted on 26 judicial nominees during the first three months of this year. We have proceeded in the Senate to vote on the confirmations of 23 judicial nominees this year, including four controversial nominees to the circuit courts, which makes 123 of this President's judges confirmed overall. That compares most favorably to how Republicans treated President Clinton's nominees. In the 1996 session, for example, the Senate did not confirm a single circuit judge all year and confirmed only 17 judges that entire year. In 1999, the third year of the last presidential term, and in 1997, the Senate did not reach the level we have already attained of 23 confirmations until October.

A good way to see how much faster this Chairman processes nominations for a Republican president is to compare this year's pace to a comparable year in the last Democratic administration. On this day in 1997, when Bill Clinton was President, the Republican-controlled Judiciary Committee was just holding its second judicial nominations hearing of the year -- compared to the ninth hearing that we are in today -- and was considering its first two circuit court nominees of the year. This Chairman has moved **five** times more quickly for President Bush's circuit court nominees than for President Clintons, and vacancies in the courts are nearly

[senator\\_leahy@leahy.senate.gov](mailto:senator_leahy@leahy.senate.gov)

<http://leahy.senate.gov/>

half of what they were in 1997. Even more noteworthy, by this point in 1999, the third year of President Clinton's term, the Committee had not held or scheduled a single judicial nominations hearing. In fact, no hearing for a judicial nominee was held until June of that year.

We often hear from the other side of the aisle that there is a "vacancy crisis," but this is simply not true. The number of vacancies has gone down from the 110 we inherited at the beginning of the Bush Administration to 47 – the lowest level it has been in 13 years. While I was Chairman I was able to cut it from 110 to 60, despite dozens of new vacancies that occurred during that time. I recall that Senator Hatch said in September of 1997 that 103 vacancies (during the Clinton Administration) did not constitute a "vacancy crisis." He also repeatedly stated that 67 vacancies meant "full employment" on the federal courts. Why now do Republican Senators consider 47 vacancies, nearly the rate of attrition, to be a "crisis?"

Considering how low the vacancy rate is, I cannot understand why the Chairman is now forcing us to rush to judgment on these nominees. The rush to consider judicial nominees as if they are on an assembly line thwarts thorough and fair consideration of each nominee. As the Chairman said in 1998, there is a good deal of background research that must be done by the Judiciary Committee before we can send a nominee to the floor. If the Committee fails to do its groundwork, it fails the Senate and prevents this body from fulfilling its constitutional duty. The rapid and rushed speed with which we are now moving undermines the Senate – and, despite Republican claims to the contrary, seems to be solely based on political considerations. The majority is willing – and anxious – to let the Republican in the White House pack the courts with nominees who will reshape the courts along their ideological lines.

Despite my concerns about the lightning pace at which the Chairman is now proceeding, I welcome Judge Callahan and Mr. Chertoff, who come to us with the support of their home-state Senators, for whom I have great respect. Both of these nominees are being given hearings within just a few months of their nominations. Judge Callahan was nominated on February 12, 2003, and hers is a hearing I have requested the Chairman expedite. As I have noted throughout the last two years, the Senate is able to move expeditiously when we have consensus, mainstream nominees to consider. Unfortunately, far too many of this President's nominees have records that raise serious concerns about whether they will be fair judges to all parties on all issues.

Judge Callahan is a well-respected nominee who has years of experience serving on the bench in the state of California. Unlike the divisive nomination of Carolyn Kuhl to the same court, both home-state Senators returned their blue slips and support a hearing for Judge Callahan. Rather than disregarding time-honored rules and Senate practices, I urge my friends on the other side of the aisle to help us fill more judicial vacancies more quickly by bringing those nominations that have bipartisan support to the front of the line for Committee hearings and floor votes. And, I invite the President to nominate more mainstream individuals like Judge Callahan. Her proven record and bipartisan support make it easier for us to uphold our constitutional duty of advise and consent. I look forward to learning more about her record as an appellate judge for the state of California.

Judge Callahan is another Latina nominee that Democrats have supported and worked to consider fairly and promptly. The Democrats have supported, and the Senate has confirmed,

President Bush's nominations of Jose Martinez to a District Court in Florida, Jose Linares to a District Court in New Jersey, Christina Armijo to a District Court in New Mexico, James Otero to a District Court in California, and Alia Ludlum, Philip Martinez, and Randy Crane to District Courts in Texas. In addition, last week the Senate confirmed Judge Prado to the Fifth Circuit Court of Appeals. Another Hispanic judicial nominee, Cecilia Altonaga to a District Court in Florida, was just confirmed yesterday with the support of all Democrats. I urge her consideration without further delay, as well.

Today, we also welcome Michael Chertoff. Mr. Chertoff has served as Assistant Attorney General for the Criminal Division at the Department of Justice since being confirmed by the Senate in May 2001. He previously served as the U. S. Attorney in New Jersey from 1990 to April 1994, and as a partner in the well-known firm of Latham and Watkins. In spite of Mr. Chertoff's role as the lead counsel to the Republicans in the Whitewater investigation, an extremely partisan effort, we confirmed him to head the Criminal Division. I look forward to hearing from him on a number of issues.

Despite the apparent qualifications of these two nominees, I regret that the Chairman has decided to proceed with a hearing with two circuit court nominees. For the second time in just a few months, the Chairman has decided to depart from longstanding Committee precedent and hold a hearing with more than one circuit court nominee. At the end of January, the Chairman held the most unusual hearing with three controversial circuit court nominees – Jeffrey Sutton, Deborah Cook and John Roberts. And it has taken several months of negotiations to ensure that each nominee in that hearing received the undivided attention that a lifetime nomination to the circuit court deserves. In fact, Mr. Roberts appeared before the Committee again just last Wednesday so that his record could be complete.

Now, the Republican majority is proceeding with a second hearing with more than one circuit court nominee – again denying each nominee the undivided attention that a lifetime nomination to the circuit court deserves and undermining the Senate's constitutional duty to advice and consent. Although I had requested that we expedite a hearing for Judge Callahan given her bipartisan support, it was not at the expense of a thorough hearing on either nominee. It is unfortunate that we will not have time to focus on the many important topics raised by each of these nominations.

The Republican majority has shown a corrosive and raw-edged willingness to change, bend and even break the rules that have long governed our proceedings and those that they followed when the judicial nominees involved were a Democratic president's choices, instead of a Republican president's choices.

When there was a Democratic president in the White House, his judicial nominees were delayed and deferred by the Republican majority. Now that there is a Republican President, it seems that there is no past practice that will not be violated, no rule that will not be broken or rewritten or reinterpreted in aid of this Administration's ideological court-packing scheme. The Senate has an important role in the confirmation process, and it is not to rubberstamp unexamined nominees on a high-speed assembly line.

Today, we will also hear from district court nominee L. Scott Coogler to the U.S. District Court for the Northern District of Alabama. He is currently an Alabama state court judge and has the support of both of his home-state Senators. I look forward to hearing his testimony.

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*Supreme Court of the United States*  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

Honorable Patrick Leahy  
United States Senator  
SR-433 Russell Senate Office Building  
Washington, DC 20510-4502

Dear Senator Leahy:

I am responding to your letter of March 31, 2003, that requested the views of the Judicial Conference of the United States on a number of specific provisions of a sentencing-related amendment to H.R. 1104. By now you will have received Ralph Mecharin's letter, dated April 3, which was sent to other Judiciary Committee members as well, expressing the concerns of the judiciary about the amendment. More specifically, the Judicial Conference:

1. Opposes legislation that would eliminate the courts' authority to depart downward in appropriate situations unless the grounds relied upon are specifically identified by the Sentencing Commission as permissible for the departure.
2. Consistent with the prior Judicial Conference position on congressionally mandated guideline amendments, opposes legislation that directly amends the sentencing guidelines, and suggests that, in lieu of mandated amendments, Congress should instruct the Sentencing Commission to study suggested changes to particular guidelines and to report to Congress if it determines not to make the recommended changes.
3. Opposes legislation that would alter the standard of review in 18 U.S.C. § 3742(e) from "due deference" regarding a sentencing judge's application of the guidelines to the facts of a case to a "de novo" standard of review.
4. Opposes any amendment to 28 U.S.C. § 994(w) that would impose specific record keeping and reporting requirements on federal courts in all criminal cases or that would require the Sentencing Commission to disclose confidential court records to the Judiciary Committees upon request.

Honorable Patrick Leahy  
Page 2

5. Urges Congress that, if it determines to pursue legislation in this area notwithstanding the Judicial Conference's opposition, it do so only after the Judicial Conference, the Sentencing Commission, and the Senate have had an opportunity to consider more carefully the facts about downward departures and the implications of making such a significant change to the sentencing guideline system.

I believe these Conference positions respond to most of the questions posed in your letter. Please note, however, that the Conference did not specifically oppose the provisions mentioned in your third and fourth questions. These provisions would amend U.S.S.G. § 3E1.1 and promulgate new policy statement U.S.S.G. § 2K2.23. The Conference considered these provisions in adopting its opposition to direct congressional amendments of the sentencing guidelines. The Conference did not take positions on the provisions noted in your seventh and eighth questions. These would primarily affect the Department of Justice.

As stated in the April 3 letter, the Judicial Conference believes that this legislation, if enacted, would do serious harm to the basic structure of the sentencing guideline system and would seriously impair the ability of courts to impose just and responsible sentences. Before such legislation is enacted there should, at least, be a thorough and dispassionate inquiry into the consequences of such action.

Sincerely,



Testimony for Senator Richard Shelby regarding the nomination of Scott  
Coogler to be United States District Court Judge for the Northern  
District of Alabama  
May 7, 2003

Mr. Chairman, thank you for the opportunity to address the Senate Judiciary Committee. I am glad to be here today as the Committee considers the nomination of Judge Scott Coogler to the United States District Court for the Northern District of Alabama. It is a privilege to have the opportunity to introduce such an outstanding individual. Accompanying Judge Coogler today are his wife, Mitzi, and his three children, Carlson, Hannah, and Allie.

I have had the pleasure of knowing Judge Coogler for a number of years as he is a resident of my hometown of Tuscaloosa, Alabama. Based on my personal experience, I can say that he has a long record of service to the community. Prior to entering the legal profession, Judge Coogler graduated from the University of Alabama's Law Enforcement Academy with honors, after which he served for two years as a police



officer for the City of West Blocton, Alabama. Though no longer a member of the police force, he has served as guest instructor at the University of Alabama's Law Enforcement Academy since 1984. Judge Coogler is also an active volunteer, serving on the Board of Directors for the Tuscaloosa County Boys and Girls Club, the American Christian Academy, FOCUS on Seniors, and "A Woman's Place," a drug treatment center.

Mr. Chairman, Judge Coogler received both his undergraduate and law degrees from my alma mater, the University of Alabama, receiving his Bachelors of Arts with *cum laude* honors and graduating near the top of his law school class. After completing law school, Judge Coogler practiced for over fourteen years in the private sector where he represented clients on both the plaintiff and defense side in civil matters, in addition to representing clients in criminal matters. He also served as a member of the Alabama Army National Guard as part of the Judge Advocate General's Corps, where he attained the rank of Captain before he was honorably discharged in 1997. In 1998, Judge Coogler was elected to be a Circuit Court Judge for Alabama's Sixth Judicial District,

a position he still holds, where he has already handled over 4,000 criminal and civil cases, including a high profile case involving the attempted murder of a police officer by a prison escapee.

Mr. Chairman, Judge Coogler's extensive legal experience makes him an ideal attorney to fill the current judicial vacancy on the United States District Court for the Northern District of Alabama. Throughout his legal career, he has demonstrated unwavering integrity and commitment to upholding the Constitution and the rule of law. I am confident that Judge Coogler will serve on the federal bench with honor and distinction. For these reasons, I unequivocally support his nomination.

Given the large number of vacancies on the federal bench, I urge the Committee to consider his nomination expeditiously so that the full Senate has an opportunity to confirm him in a timely manner. Thank you again Mr. Chairman for allowing me to appear before the Committee today.

**NOMINATIONS OF RICHARD C. WESLEY, OF  
NEW YORK, NOMINEE TO BE CIRCUIT  
JUDGE FOR THE SECOND CIRCUIT; J. RON-  
NIE GREER, OF TENNESSEE, NOMINEE TO  
BE DISTRICT JUDGE FOR THE EASTERN  
DISTRICT OF TENNESSEE; THOMAS M.  
HARDIMAN, OF PENNSYLVANIA, NOMINEE  
TO BE DISTRICT JUDGE FOR THE WESTERN  
DISTRICT OF PENNSYLVANIA; MARK R.  
KRAVITZ, OF CONNECTICUT, NOMINEE TO  
BE DISTRICT JUDGE FOR THE DISTRICT OF  
CONNECTICUT; AND JOHN A. WOODCOCK,  
OF MAINE, NOMINEE TO BE DISTRICT  
JUDGE FOR THE DISTRICT OF MAINE**

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**THURSDAY, MAY 22, 2003**

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

The Committee met, pursuant to notice, at 2:02 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Saxby Chambliss, presiding.

Present: Senators Chambliss, Specter, and Schumer.

**OPENING STATEMENT OF HON. SAXBY CHAMBLISS, A U.S.  
SENATOR FROM THE STATE OF GEORGIA**

Senator CHAMBLISS. [presiding.] The Committee will come to order.

We are pleased to see so many of our colleagues here. It looks like we almost have a quorum. This is great.

We want to issue a special welcome to all of our colleagues from the Senate and to my dear, good friend, Congressman Reynolds from the great State of New York. We are pleased to have you all here to make statements regarding these nominees, and I am going to submit my opening statement for the record, because we do have such a large number of folks to speak, and call first upon my colleague on the Committee, Senator Specter, for any comments he has regarding these nominees.

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

**PRESENTATION OF THOMAS M. HARDIMAN, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF PENNSYLVANIA, BY HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA**

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

I am pleased to introduce a distinguished Pennsylvanian, Thomas M. Hardiman, who is the nominee for the United States District Court for the Western District of Pennsylvania. He has a B.A. from the University of Notre Dame and a law degree from Georgetown. He has had extensive practice in the Federal and State courts. He has experience in securities litigation, white-collar crime, bankruptcy, energy. He is a fellow of the American Academy of Trial Lawyers, Allegheny County, and the American Bar Association's House of Delegates.

He has been very active in community and civic affairs, is a member of the Big Brothers and Sisters of Greater Pittsburgh, the Duquesne Club. He has helped on Ayuda, a legal aid clinic in Washington, where he has represented indigent Spanish-speaking immigrants in political asylum, domestic violence, and employment cases.

Tom Hardiman has achieved this outstanding record at an early age of 37, and he comes to this Committee within a few days of the retirement of Chief Judge Edward Becker, Chief Judge of the Third Circuit, who became a Federal judge at the age of 37 and has had an extraordinarily distinguished career, and I think that Tom Hardiman at this vantage point has the prospect of an equally distinguished career.

Now I yield to my colleague, Senator Santorum, if I may, Mr. Chairman.

Senator CHAMBLISS. Senator Santorum?

**PRESENTATION OF THOMAS M. HARDIMAN, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF PENNSYLVANIA, BY HON. RICK SANTORUM, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA**

Senator SANTORUM. I thank the Chairman, and I thank my colleague.

I would just echo Senator Specter's praises for this incredibly qualified, bright, rising star in the legal field in Pittsburgh. We are just very, very excited out in southwestern Pennsylvania that someone of Mr. Hardiman's legal acumen and tremendous community contributions at the age of 38, 39 is willing to serve in the capacity of a Federal judge. He is really considered one of the truly bright, rising stars in the legal community in Pittsburgh, is someone who has been very active, as Senator Specter said, in serving a lot of underserved communities through his legal work, has been tremendously involved in a lot of community and philanthropic things as well as in political affairs.

He is a very well-rounded and bright person, and I am very excited about his nomination and certainly would ask the Committee to act favorably upon it.

Thank you.

Senator CHAMBLISS. Thank you.

Senator Dodd, we are pleased to have you with us today.

**PRESENTATION OF MARK R. KRAVITZ, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF CONNECTICUT, BY HON. CHRISTOPHER J. DODD, A U.S. SENATOR FROM THE STATE OF CONNECTICUT**

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

I apologize for getting here a couple minutes late, but I thank the Committee—are you all done, Rick?

Senator SANTORUM. Yes. Have a seat.

Senator DODD. I am going to try to pick up that chair—when you serve in the minority, you get the small chairs here.

[Laughter.]

Senator DODD. Times are tough here.

Thank you very much, Mr. Chairman, and members of the Committee, for scheduling this hearing for Mark Kravitz, our candidate for the bench in Connecticut.

I was mentioning to a number of people on my staff that I was introducing someone named “Kravitz” today at this hearing, and all of my younger staff got very, very excited—they were under the impression that maybe a guy named “Lenny” was going to show up here—with all due respect, Mark, I apologize.

Anyway, given that I am a member of the minority in the body, I briefly considered that it might be more helpful for Mr. Kravitz’ prospects if I came out strenuously against his nomination, but I decided against that, because on thoughtful reflection, I have come to the conclusion that I can do nothing but enthusiastically support this nominee, and I believe all of you will as well as you get to know Mark Kravitz.

It is a pleasure to introduce him to the Committee. I would also like to welcome his wife Wendy and their children, Jenny, Lindsey, and Evan from Guilford, Connecticut.

It is always a pleasure, of course, to support the nomination of highly-qualified people, Mr. Chairman, who are professionally accomplished judicial nominees who can demonstrate both the ability and the temperament to serve as fair and objective Federal judges. It is especially gratifying to support such nominees when they come from our home State of Connecticut.

I believe that Mr. Kravitz possesses, as you will find, the intellect, experience, and disposition to be an impartial finder of fact, a faithful legal analyst, and a fair and just jurist. I believe that he will bring a balanced and informed perspective to the bench.

His resume, which I am sure you have had a chance to look at, speaks for itself. Mark graduated magna cum laude and phi beta kappa from Wesleyan University in Middletown, Connecticut. He later graduated from Georgetown Law School, where he was managing editor of the Law Review. He clerked for Judge James Hunter of the Third Circuit Court of Appeals and Supreme Court Justice William Rehnquist.

He is currently a partner and head of the appellate practice of the highly-respected law firm of Wiggin and Dana in New Haven, Connecticut, where he has worked since 1976. He has served as lead counsel on more than 60 appeals to the State and Federal courts and has argued before the United States Supreme Court on numerous occasions.

He has been listed as one of the beset lawyers in America since 1991. He has been elected as a fellow to the American Academy of Appellate Lawyers. He is also endorsed by the Connecticut Bar Association as "exceptionally well-qualified" to be a District Judge, and has been unanimously rated as "well-qualified" by the American Bar Association.

Mark has represented a very diverse array of clients, Mr. Chairman, over the years, including private institutions such as Yale University and organizations representing public interests such as the Stamford Zoning Board. He has extensive experience with land use law, zoning regulations, and has also published considerable material on the issues of privacy and the evolution of internet law.

He is also very well-respected for his efforts to keep government open and acceptable. He was director of the Connecticut Foundation for Open Government and in 1995 received the Deane C. Avery Award for advancing the cause of freedom of information and freedom of speech in Connecticut.

Mr. Chairman, I think this is particularly important given the time in which we live, in an age when many are concerned that the desire for national security may lead to the erosion of core American rights such as freedom of speech and information. I believe it is an integral part of our judicial system that we have judges who are of a deep respect and understanding for these Constitutional principles and who will be charged with upholding and defending our Constitution.

Mark Kravitz possesses a deep commitment to these civil liberties, and I know he will be a fine judge. For those reasons, Mr. Chairman, I would ask that the remainder of my remarks be included in the record and highly comment this nomination to you and to the Committee. My colleague Joe Lieberman would do so as well, and I presume he will be submitting a statement to that effect.

This is a wonderful nomination. We thank Governor Rowland, and I think you will find that the entire delegation is strongly behind this nomination. It is a first-class nomination and will do us all very proud.

Senator CHAMBLISS. Thank you very much for appearing on behalf of Mr. Kravitz, and while you may be in the minority, when it comes to being a great American, you are very much in the majority; you are truly one, and Mr. Kravitz is very fortunate to have you here recommending him today, Chris, so thank you very much.

Senator DODD. Thank you, Saxby, very much.

Chuck, thank you, too.

Senator CHAMBLISS. Senator Snowe?

**PRESENTATION OF JOHN A. WOODCOCK, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF MAINE, BY HON. OLYMPIA J. SNOWE, A U.S. SENATOR FROM THE STATE OF MAINE**

Senator SNOWE. Thank you, Mr. Chairman and members of the Committee. I thank you for the opportunity today to be able to introduce to you John Woodcock, the President's nominee for Federal Judge for the U.S. District Court for the District of Maine in Bangor and to express my strong and unequivocal support for his nomination.

Mr. Chairman, Maine's U.S. District Court has a long and storied history. It is one of the first such courts that was established in 1789, and remarkably, should John Woodcock be confirmed, he will become only the 16th judge appointed by the President of the United States in its 213-year history.

Mr. Chairman, Maine has an established and well-deserved reputation for selecting outstanding trial judges, and I can say without hesitation or reservation that John Woodcock will not only uphold but enhance this reputation, and his tenure will reflect the finest ideals and expectations of our Federal judiciary and the people it exists to serve.

The position for which Mr. Woodcock has been nominated is the lone Federal judge position in northern Maine. So with the vacancy created almost a year ago by Judge Gene Carter's elevation to senior judicial status, it is critical that it be filled as expeditiously as possible, so I appreciate the promptness and the responsiveness of this Committee to this confirmation.

With a nominee of Mr. Woodcock's exceptional caliber, I can think of no one more qualified to make that happen, and I am confident that as you become more familiar with John Woodcock's record and qualifications, you will agree that he has the depth of experience, the temperament, and the integrity demanded by the gravity of the office for which he has been chosen.

With roots deep in the Bangor community—in fact, his family has been there for generations—John grew up in Maine's third-largest city. He attended John Bapst High School in the heart of downtown. He went on to further his education and graduated from Bowdoin College and the University of Maine School of Law before completing his master's degree at the London School of Economics—but we have forgiven him for that mild transgression of leaving the State for a few years—as he returned thereafter to his home and began his law career in Bangor 26 years ago.

Today, he is with the Bangor law firm of Woodcock, Weatherbee, Burlock, and Woodcock, having argued 46 cases before the Maine Supreme Judicial Court. He has also served on the Maine Supreme Judicial Court Advisory Committee on Professional Responsibility.

It is no surprise, Mr. Chairman, that John Woodcock has garnered deep respect and strong support in Maine and nationally. The American Bar Association unanimously named John Woodcock as "well-qualified."

In Maine, the Federal Judicial Nomination Advisory Committee that Senator Collins and I assembled, with over 270 combined years of practicing law, selected John Woodcock as their top recommendation, reflecting the esteem in which he is held by the entire legal community in the State of Maine. And former Senator and Secretary of Defense Bill Cohen has said of John that in his years of practice, John has developed a statewide reputation as a skilled litigator and an effective counselor. He has deep experience in litigation at trial and appellate levels and is well-regarded throughout the Maine Bar.

Mr. Chairman, I would ask that a copy of Secretary Cohen's letter be included in the record of proceedings.

Mr. Chairman, to that, I would only add from my layman's point of view that the best trial judges are distinguished by their ability

to balance several sometimes competitive personal dynamics. They balance broad life exposure with specific courtroom experiences, raw legal aptitude with common sense, patience with firmness, and intellectual curiosity with focused decisionmaking.

Well, John Woodcock has proven his ability to display all these vital traits, plus one more—the ability to balance work with family. I am delighted, Mr. Chairman, to tell you that his family is here today—his sons, Patrick, Chris, and Jack, who works on the Governmental Affairs Committee for Senator Collins, and of course, his great wife, Beverly.

Mr. Chairman, in conclusion, I am most proud to be able to come before this Committee to introduce to you a candidate with the credentials that Mr. Woodcock possesses in abundance. With his substantial and broad legal and courtroom experience as well as his keen intellect and perspective, solid character, and outstanding reputation, he has the ability to manage a challenging docket.

So I am convinced that you will leave this hearing, Mr. Chairman and members of the Committee, as impressed with John Woodcock as we all have been in Maine.

Thank you, Mr. Chairman.

Senator CHAMBLISS. Thank you, Senator Snowe. We look forward to hearing from Mr. Woodcock a little later.

Senator Alexander?

Senator ALEXANDER. Thank you, Mr. Chairman.

I wonder if Senator Collins would like to go ahead, Mr. Chairman, since we were talking about the Maine judge.

Senator CHAMBLISS. That would be very gracious on your part.

Senator Collins, we will be glad to hear from you, and then probably Senator Frist, before we get back to you, Senator Alexander.

Senator SCHUMER. Are there any objections to that, Senator Alexander?

[Laughter.]

**PRESENTATION OF JOHN A. WOODCOCK, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF MAINE, BY HON. SUSAN COLLINS, A U.S. SENATOR FROM THE STATE OF MAINE**

Senator COLLINS. First, let me apologize to my colleague that I was not here for her statement.

Thank you very much, Mr. Chairman, members of the Committee, and members of this distinguished panel. It is my distinct pleasure to speak on behalf of John Woodcock's nomination to be a District Judge for the District of Maine.

I have known John and his wife Beverly for many years. In fact, John recruited me many years ago to serve on the board of Eastern Maine Medical Center which he has chaired for 23 years. This is typical of John's service to his community. He has devoted countless hours volunteering his time and energy to his alma mater, Bowdoin College, Eastern Maine Charities, the Maine State Commission on Arts and Humanities, the Good Samaritan Agency, and the Bangor Children's Home, to name just a few.

The Woodcock family has a proud tradition of public service that spans generations. In fact, two of John's sons, I am pleased to say, have worked as members of my staff. His son Jack currently serves on my Governmental Affairs Committee staff, while his son Patrick



worked for me in my Bangor office and will be returning this summer.

Their hard work and professional demeanor is proof that the apple does not fall far from the tree, and I am pleased that they are all here for this hearing today.

Let me tell you just a little more about John's qualifications to be a Federal judge. He began practicing law nearly 30 years ago and has built a distinguished career as a litigator. He has served as an assistant district attorney for the State of Maine and has worked in private practice as an associate and partner of several law firms in our State.

During his career, John has served as lead counsel in 47 separate appeals to the Maine Supreme Judicial Court on issues ranging from criminal law to trust law. John has also taken an active role in improving the standards of the legal profession, serving on the Maine Supreme Judicial Court's Advisory Committee on Professional Responsibility.

Those of us familiar with John's sterling character and stellar legal career were not surprised when the American Bar Association's Standing Committee on the Federal Judiciary unanimously rated him as "well-qualified." Indeed, it would be difficult for Senator Snowe and I to come up with any other candidate better suited to serve as a Federal judge in the State of Maine.

John has the intelligence, temperament, and integrity to serve on the Federal bench. I have every confidence that he will be a superb Federal judge; he will faithfully follow the laws interpreted by higher courts and bring justice to the parties before him.

I wholeheartedly and enthusiastically support John Woodcock's nomination, and I hope that this distinguished Committee will unanimously approve him.

Thank you very much for the opportunity, and to my colleagues for their courtesy.

Senator CHAMBLISS. Thank you very much, Senator Collins for being here.

Next, the Majority Leader, Senator Frist.

**PRESENTATION OF J. RONNIE GREER, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TENNESSEE, BY HON. BILL FRIST, A U.S. SENATOR FROM THE STATE OF TENNESSEE**

Senator FRIST. Mr. Chairman, thank you. I appreciate the opportunity to be here for a few minutes to introduce and express my strong personal and professional support for J. Ronnie Greer's nomination as a United States District Court Judge for the Eastern District of Tennessee.

I thank the Chairman, the Ranking Member, and members of the Committee, for this opportunity.

Mr. Chairman, people who hail from the mountains of northeast Tennessee are known for their loyalty, for their integrity, for their steadfastness, for their can-do spirit, and indeed, Ronnie Greer personifies that rich tradition.

For the past 19 years, Judge Thomas Hull has served as District Judge in Tennessee's Eastern District, and his distinguished career will long be remembered, and indeed, Judge Hull's shoes are large

and will be big to fill. I am confident, absolutely confident, that Ronnie Greer will do so.

Ronnie has been a personal friend for the past 6 years. He is an accomplished public servant. He has served as an attorney in Tennessee's judicial system with great distinction for the past 20 years. His academic career speaks for itself—he graduated at the top of his class at the University of Tennessee Law School and was invited to be on Law Review.

He has had a distinguished career in politics and public service outside of his law practice. He was a State Senator in Tennessee's General Assembly for 9 years, ably serving the people of his district, District One. There, he served on both the Judiciary Committee and as Chairman of the Environment, Conservation and Tourism Committee.

Ronnie also served, as you will shortly hear, as special assistant in Governor Lamar Alexander's first term, forming a bond and a friendship that continues to this day.

In closing, Mr. Chairman, I tell you that you cannot demand respect from the people of northeast Tennessee—you earn it. And Ronnie has done so without any question. He is known for his sense of fair play and his compassion. With his easy-going, thoughtful manner yet quick mind and keen legal ability, he has the temperament and mature judgment that is necessary and required for the Federal bench.

Mr. Chairman, Ronnie Greer's dedication to the citizens of our State, his true love of the law, and his desire to serve his country make him an ideal choice to serve as a U.S. District Judge. He has my highest recommendation and my unqualified support, and I thank your Committee for scheduling this hearing for his presentation today.

Senator CHAMBLISS. Thank you very much for being with us. Senator Alexander?

**PRESENTATION OF J. RONNIE GREER, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TENNESSEE, BY HON. LAMAR ALEXANDER, A U.S. SENATOR FROM THE STATE OF TENNESSEE**

Senator ALEXANDER. Thank you, Mr. Chairman.

I am glad I got elected to the Senate in time to join Senator Frist in recommending to the President Ronnie Greer to be the judge in the Eastern District of Tennessee at Greeneville. Let me not be redundant about what Bill said, but let me see if I can add to it a little bit.

Arthur T. Vanderbilt, who was the dean of the New York University Law School, used to encourage his students to practice law "in the grand manner," and by that, he meant that they be superb litigators, wise counselors, and that they understand the people whom they served and that they were respectful of those persons. He also meant that they be involved during their time in public service. It has gotten harder to do all those things as a lawyer these days because the practice is so specialized, but Ronnie Greer has been able to do that throughout his career.

He is all of those things that the Majority Leader has said, and the point that I would like to emphasize is the breadth of his

knowledge and the breadth of his skills. He has tried approximately 200 cases in State and Federal courts. He has served as a county attorney. He has been in civil and criminal litigation. He has tried cases in personal injury, in criminal defense, and environmental law. He has represented defendants in criminal cases. He has represented numerous indigent clients in pro bono cases.

And in public service, he has a long and distinguished career and has been named Conservationist of the Year, chaired committees, been elected by the people he served and been Chairman of his political party's activities.

So while Arthur Vanderbilt probably did not have in mind anybody from upper East Tennessee, from the town where former Senator Andrew Johnson, President Andrew Johnson, once lived, he would have been proud of Ronnie Greer just as Senator Frist and I are proud to recommend him. He knows East Tennessee. He knows the law. I have known him since he was a student body president at East Tennessee State University. He is one of the most exceptional citizens we have in our State, and we are fortunate that the President chose to nominate him to be Federal District Judge for the Eastern District of Tennessee.

Thank you.

Senator CHAMBLISS. And he certainly graduated from an outstanding law school.

We have a vote which started about 3 minutes ago, but I would like to see if we can't rush through with our colleagues who are here.

Senator SCHUMER, do you want to go first, or do you want to let them go? Normally, the senior Senator would go first, and I want to let you have as much time as you want.

**PRESENTATION OF RICHARD C. WESLEY, NOMINEE TO BE CIRCUIT JUDGE FOR THE SECOND CIRCUIT, BY HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK**

Senator SCHUMER. I will be brief.

I just want to welcome my colleagues here—Senator Clinton, of course, and we have a special guest. It is rare that somebody from the House comes by, but Congressman Reynolds was really instrumental in bringing Judge Wesley to the Committee's attention. They have known each other for many years. And I see a third member of the triumvirate, former Congressman Paxon, in the back; they are a great group as well. I also want to thank his family for being here as well, including his mother, who is 86, God bless.

Mr. Chairman, I am in full support of Judge Wesley's nomination. Like most nominees we see, he has a top-flight legal mind and experience. He graduated summa cum laude from SUNY Albany and Cornell Law School, worked in private practice for several years, and served in the New York State Assembly a few years after I did, from 1983 to 1987.

Mr. Chairman, this is not a nominee who comes before us where it is well, maybe someone wants him, so we should make him a judge. He is so well-qualified; he has made an excellent judge in New York State, and he will just be a superb judge here.

I have always had three criteria in the judges that I have nominated—excellence, legally excellent; moderation—I do not like judges to be too far right or too far left; and diversity. Judge Wesley is good on two of the three. But our previous two nominees, to the President's credit, the previous two nominees to the Second Circuit are Judge Parker, an African American, and Judge Raggi, a woman, so in a sense you are the diverse candidate today, Judge Wesley, and you meet all three criteria.

I just want to make one point, and I will ask that my whole statement be read in the record, because I know that Senator Clinton and Congressman Reynolds want to say something before we have to break for the vote.

I think that what has happened in New York is a model for how we can all get along. The nominees have been excellent nominees. Most of them probably philosophically do not disagree with Senator Clinton and me on every issue, but they are all in the mainstream.

I thought I would just read you Judge Wesley's own judicial philosophy, which he wrote: "I consider myself a conservative in nature, pragmatic at the same time, with a fair appreciation of judicial restraint. I have always restricted myself to what I understand to be the plain language of the statute and not gone beyond that, because public policy is made by the legislature."

To that, I say amen. We look forward to hearing from you, Judge. We welcome your family here. I believe you will be a great judge on the Second Circuit, the long-distinguished Second Circuit, of the United States

I would just ask unanimous consent that my entire statement be read into the record.

Senator CHAMBLISS. Certainly; without objection.  
Senator Clinton?

**PRESENTATION OF RICHARD C. WESLEY, NOMINEE TO BE CIRCUIT JUDGE FOR THE SECOND CIRCUIT, BY HON. HILLARY RODHAM CLINTON, A U.S. SENATOR FROM THE STATE OF NEW YORK**

Senator CLINTON. Thank you, Mr. Chairman, and I too would like my entire statement in the record.

I want to welcome not only Judge Wesley but also his mother Beatrice and his daughter Sarah and his son Matthew. I had a brief visit with Mrs. Wesley, and it is not any accident that her son is here today, moving toward confirmation for the Second Circuit Court of Appeals.

Mr. Chairman, it is certainly not a requirement that a candidate for the Federal judiciary has significant public service experience, but many of us in New York are extremely proud of the way that Judge Wesley has not only been a superb jurist but has continued to care about the quality of justice and has used his extraordinary experience to try to improve the lives of the people who appear before him and far beyond that.

He has a distinguished academic record, and for the past 16 years, he has served New York State courts with distinction. As a trial court judge, he instituted a Felony Screening Program that reduced the delay in processing felony cases by over 60 percent. That served as a model for other judicial districts across New York.

He also created the JUST Program, which provides services to court and criminal justice agencies in Monroe County, to monitor pre-plea and pre-sentence defendants and to provide program alternatives to incarceration.

He has been a champion for victims of domestic violence. He was at the forefront of working to provide shelters for victims of domestic violence long before it became an issue that captured the attention of most of the rest of us.

After serving for 7 years on the trial court, he was appointed as a justice of the Appellate Division, New York State's intermediate court, and for the past 6 years, he has served as an associate judge of New York State's highest court and one of the most preeminent State court's in our Nation—the New York State Court of Appeals.

All that one has to do is to look at his record, talk to his colleagues, to know that this is a candidate for the Federal judiciary who will serve with the same distinction on the Second Circuit that he has brought to his experience on the New York courts.

Now, as we consider his confirmation, I cannot help but mention as well that this will be the first Western New Yorker to serve as an associate judge of the Second Circuit for 29 years, when we had our last appointment. And it is long overdue, as I am sure Congressman Reynolds would agree, that we have someone from the western part of our State serving on this preeminent and essential Court of Appeals.

So I not only endorse Judge Wesley whole-heartedly, but I endorse the bipartisan process that leads him to be nominated and thank the President for forwarding this nomination and certainly thank his long-time friend and champion, Congressman Reynolds. He will serve with distinction, and we are very proud to offer this nomination to the Committee.

Senator CHAMBLISS. Thank you for your comments and for being here.

Congressman Reynolds?

**PRESENTATION OF RICHARD C. WESLEY, NOMINEE TO BE CIRCUIT JUDGE FOR THE SECOND CIRCUIT, BY HON. THOMAS REYNOLDS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK**

Representative REYNOLDS. Mr. Chairman, it is with high honor and privilege to appear before you as the Chairman of our proceedings today, and Senator Schumer, members of the Judiciary Committee, thank you for the courtesy of allowing me to come here today. It is a great honor for me to be here on behalf of my good friend, Judge Richard Wesley.

Dick Wesley and I have been close friends for more than 20 years, and it is a pleasure to share with this Committee why I believe he is such a tremendous choice for the United States Circuit Judge for the Second Circuit.

Since his election to the New York State Supreme Court in 1986, Judge Wesley has earned the respect and praise of his colleagues and indeed, our entire State, for his temperament, intellect, and commitment to and the love of law.

Judge Wesley was appointed by then Governor Mario Cuomo to the Appellate Division of the Supreme Court in 1994 and to the

Court of Appeals by Governor Pataki in 1996. Despite their divergent political views, both Governors Cuomo and Pataki shared a common thread in their appointments to the New York courts—a desire to select only the best and the brightest that our State has to offer. Both chose Judge Richard Wesley.

Indeed, we are seeing that again today. Nominated to the Federal bench by President Bush, Judge Wesley enjoys the support of both of our Senators, Senator Schumer and Senator Clinton. That is because Judge Wesley's devotion to the law transcends partisanship.

Despite Judge Wesley's rise to the highest levels of the New York judiciary, he remains firmly grounded and deeply rooted in his community. The son of a truck driver and a nurse, Judge Wesley has never forgotten where he came from. And I note to this Committee that joining Judge Wesley today is his mother, Betty, his wife, Kathy, and their children.

Indeed, even though this is probably one of the biggest weeks of his career, Judge Wesley was at the local rotary club just a couple of days ago, speaking to them about what he cares so passionately about—the law. Active in his community, Judge Wesley spends evenings and weekends driving an ambulance in a volunteer ambulance corps. And that is an important part of who Judge Wesley is—a man who always remembers his roots and who has retained throughout his career the small-town values that he grew up with.

Senators I am grateful to you for your consideration of Judge Wesley as circuit court judge. By virtue of his experience and his background, his character, and his integrity, his knowledge of and devotion to the law, our Nation and our judiciary will be well-served by his appointment. I respectfully ask this Committee to support Judge Richard Wesley's nomination as United States Circuit Judge for the Second Circuit.

Thank you.

Senator CHAMBLISS. Thank you very much, Congressman Reynolds, for being here.

Judge Wesley, you not only have strong bipartisan support within the House and the Senate, but also, as my good friend, Senator Schumer mentioned, Bill Paxon, is here with his better half, Susan Molinari, to support you. They are great Americans also. We look forward to hearing from you.

Senator SCHUMER. Let me add my welcome to Susan; she was hiding, I guess. I did not see her. Great.

Senator CHAMBLISS. We are going to adjourn in order for us to vote, and we will come back and hear from our nominees.

[Recess.]

Senator CHAMBLISS. Senator Schumer is on his way back, but I am going to ahead and start for the sake of time.

Judge Wesley, if you will come up and take a seat, please. We are very pleased to have you here after those glowing recommendations; that says an awful lot about what you have accomplished over the last number of years practicing law and sitting on the bench, Judge. So we are certainly pleased to have you here today, and we are happy to hear any opening statement you would like to make.

Would you stand and raise your right hand, please?

Judge WESLEY. No problem, Mr. Chairman; glad to do it.

Senator CHAMBLISS. Do you solemnly swear that the testimony you are about to give before this hearing shall be the truth, the whole truth, and nothing but the truth, so help you, God?

Judge WESLEY. I do.

Senator CHAMBLISS. I should have sworn our friend Tom Reynolds. I have a few questions I would like to ask him.

[Laughter.]

Senator CHAMBLISS. Judge Wesley, we are pleased to have you here, and we welcome any statement that you would like to make.

**STATEMENT OF RICHARD C. WESLEY, NOMINEE TO BE  
CIRCUIT JUDGE FOR THE SECOND CIRCUIT**

Judge WESLEY. I have no opening statement to make, other than perhaps to introduce my family to you, Mr. Chairman.

Seated directly behind me are my wife of soon to be 25 years, Kathy Wesley. Two over from her, the other woman long-term in my life, my 82-year-old mother, Beatrice Wesley, who continues to reside in the house that my father built for my brother, me, and her in 1949. To my wife's left, my daughter, Sarah Elizabeth Wesley, who is a Cornell University graduate and is about to enter the University of Buffalo Law School in the fall—I tried to get her to go 2 years ago, but she has a mind of her own. And at the end, my "baby," my son, Matthew Richard Wesley—I am fond of his middle name—who is currently now to be a senior at Cornell University, studying business.

[The biographical information of Judge Wesley follows:]

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

1. **Name:** Full name (include any former names used).  
**Answer:** Richard Carl Wesley
  
2. **Position:** State the position for which you have been nominated.  
**Answer:** United States Circuit Judge of the U.S. Court of Appeals for the Second Circuit
  
3. **Address:** List current office address and telephone number. If state of residence differs from your place of employment, please list the state where you currently reside.  
**Answer:**  
Home Chambers:  
Livingston County Government Center  
6 Court Street  
Geneseo, New York, 14454  
(585) 243-7910  
  
Courthouse Chambers:  
20 Eagle Street  
Albany, New York 12207-1095  
  
Temporary Courthouse Chambers:  
286 Washington Avenue Extension  
Albany, New York 12203  
(518) 455-7736
  
4. **Birthplace:** State date and place of birth.  
**Answer:**  
August 1, 1949 in Canandaigua, New York
  
5. **Marital Status:** (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Please also indicate the number of dependent children.  
**Answer:**  
Married to Kathryn Rice Wesley (maiden name: Rice)  
Occupation: Kindergarten Teacher  
Livonia Central School  
6 Puppy Lane  
Livonia, New York 14487  
Number of Dependent Children: 1 (one)



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

Answer:

Cornell University - Cornell Law School  
Myron Taylor Hall  
Ithaca, New York 14853

Dates of Attendance: September 1971-May 1974

Degree: Juris Doctor, May 1974

State University of New York at Albany  
1400 Washington Avenue  
Albany, New York 12222

Dates of Attendance: September 1967-May 1971

Degree: Bachelor of Arts, May 1971

State University of New York at Geneseo  
1 College Circle

Geneseo, New York 14454

Date of Attendance: July, 1968

No degree received (three-week summer class)

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

Answer:

1/97 to present

New York State Court of Appeals  
20 Eagle Street  
Albany, New York 12207  
Title: Associate Judge

4/94 to 12/96

Appellate Division of Supreme Court, Fourth Dept.  
50 East Ave., Suite 200  
Rochester, New York 14604  
Title: Additional Justice

1/87 to 4/94	Supreme Court, Seventh Judicial District Hall of Justice Rochester, New York 14614-2186 <u>Title:</u> Justice Supervising Judge, Criminal Courts - 7 <sup>th</sup> Judicial District (1/91-3/94)
1/83 to 1/87	New York State Assembly Capitol Building Room 545, Legislative Office Bldg. Albany, New York 12248 <u>Title:</u> Member of Assembly -136 <sup>th</sup> District
1/83 to 1/87	Streb, Porter, Meyer & Wesley 131 Main Street Geneseo, New York 14454 <u>Title:</u> Partner
1/77 to 1/83	Welch, Streb, Porter, Meyer & Wesley 131 Main Street Geneseo, New York 14454 <u>Title:</u> Partner
1/79 to 6/82	New York State Assembly Capitol Building Albany, NY 12248 <u>Title:</u> Assistant Counsel to Minority Leader
3/76 to 1/77	Welch, Streb & Porter 131 Main Street Geneseo, New York 14454 <u>Title:</u> Associate Attorney
8/74 to 3/76	Harris, Beach & Wilcox 99 Gamsey Road Pittsford, NY 14534 <u>Title:</u> Associate Attorney
9/73 to 6/74	North 40 & Golden Garter Restaurant 1636 East Shore Dr. (Route 34N) Ithaca, NY 14850 <u>Title:</u> Bartender

6/73 to 9/73 Welch, Streb & Porter  
131 Main Street  
Genesco, New York 14454  
Title: Summer Clerk

6/72 to 8/72 NYS Thruway Authority  
200 Southern Blvd.  
Albany, NY 12209  
Title: Summer Toll Collector

1/72 to 6/72 NYS Bar Assoc. Committee on Professional Responsibility  
Cornell Law School  
Myron Taylor Hall  
Ithaca, New York 14853  
Title: Research Assistant

OTHER ACTIVITIES:

1/00 to present Cornell University Council  
Cornell University  
Ithaca, New York 14853  
Title: Board Member

1/99 to present Cornell Law School Advisory Council  
Cornell Law School  
Myron Taylor Hall  
Ithaca, New York 14853  
Title: Board Member

1/89 to present Myers Foundation  
c/o Michael Haugh  
21 Lynnewood Drive  
Livonia, New York 14482  
(585) 346-2470  
Title: Board Member

1981-82, 1996 Monroe County Legal Assistance Corp.  
80 St. Paul Street, Suite 700  
Rochester, New York 14604  
(585) 325-2520  
Title: Board Member

1/91-3/94                      Pre-Trial Services Corp.  
 80 W. Main Street, Suite 200  
 Rochester, New York 14614  
 (585) 454-7350  
Title: Board Member

8. **Military Service:** Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number and type of discharge received.  
Answer: None
9. **Honors and Awards:** List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.  
Answer:  
 Madison Award 2001 - Sullivan Policy Group  
 Distinguished Alumni Award 1999 - Alumni Assoc. University of Albany  
 Distinguished Service Alumnus Award 1997 - State University of New York  
 New York State Bar Association Fellow, 1997 - present  
 Award of Gratitude 1986 - PEF-CSEA Council 82  
 Legislator of the Year 1985, Livingston - Wyoming Assoc. of Retarded Citizens  
 Distinguished Service Award 1985, United University Professions  
 Cornell Law Review, Cornell Law School 1973-1974  
 Summa Cum Laude, State University of New York at Albany, May 1971  
 Myskania, 1971 (peer-selected honor society for SUNY at Albany Seniors)  
 Regents Scholarship, 1967-1971
10. **Bar Associations:** List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.  
Answer:  
 New York State Bar Association  
  
 New York State Bar Foundation  
  
 Livingston County Bar Association  
Office: Past Secretary, 1978  
  
 Chief Judge's Committee on Alternative Criminal Sanctions (Report Issued in 1993)  
  
 Seventh Judicial District Grievance Committee  
  
 Monroe County Legal Assistance Corp.  
Office: Board of Directors, 1981-82, 1996

Seventh Judicial District Supreme Court Justices' Association

Offices: President, 1992

Vice-President, 1991

Treasurer, 1990

Secretary, 1989

Pre-Trial Services Corp.

Office: Board of Directors, 1991-1994

Monroe County Bar Association

Offices: Bench/Bar Committee, 1994

Ethics Committee, 1994

State Association of Supreme Court Justices

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

Answer: New York, March 1975-present

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

Answer:

Livingston-Wyoming Assoc. of Retarded Citizens 1982-1986

Livingston Drug and Alcohol Abuse Prevention Council, Past Chairman 1978

Chances and Changes, Board of Directors 1994-1996

(provides safe housing for battered women)

Livonia Ambulance Corp., Driver 1993-present

United Church of Livonia, Board of Trustees 1986-1990

Charles Settlement House, Board of Directors 1990-1993

Myers Foundation, Founder and Director 1989-present

Locust Hill Country Club, 1991-1994

Livonia Basketball Club, Board of Directors 1992-1995

Livonia Little League/Babe Ruth Baseball, Coach 1988-1994

Livonia Youth Soccer, Coach 1985-1989

Geneseo Kiwanis Club, Member 1983-1986\*

Livonia Rotary Club, Member 1987-1994\*\*

\* The Geneseo Kiwanis Club formerly was a male-only club but now admits women.

\*\* I resigned from the Livonia Rotary Club when it refused to admit a woman (see Board of Directors of Rotary Int'l v Rotary Club of Duarte, 481 US 537 [1987]). Once a woman was admitted to the Club, I rejoined for a brief period of time.

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

Answer:

Published Works\*

*When Law and Medicine Collide*, \_\_ CORNELL JOURNAL OF LAW & PUBLIC POLICY \_\_ (to be published Spring 2003) [Steinberg Lecture at University of Rochester Medical School]

*Hugh Jones and Modern Courts: The Pursuit of Justice Then and Now*, 65 ALBANY LAW REVIEW 1123 (2002) [Jones Memorial Lecture at Albany Law School]

*New York's Court of Appeals: A Personal Perspective*, 48 SYRACUSE LAW REVIEW 1461 (1998)

*Developments in Welfare Law -- 1973*, 59 CORNELL LAW REVIEW 859 (June 1974)  
co-authored with Carol B. Clemons, David Rothenberg and Richard C. White

\*see Schedule A for copies of published works.

Speeches\*\*

<u>Title (format)</u>	<u>Location</u>	<u>Date</u>
Eulogy for Tom Downey (Typed speech)	Livonia, NY	2/17/03
NYS Bar Assoc. Family Law Section (Extemporaneous)	Amherst, NY	12/6/02
Alumni speech Cornell/Penn Club (Extemporaneous)	Rochester, NY	11/25/02
Legal Affairs Club SUNY Geneseo (Extemporaneous)	Geneseo, NY	10/28/02

NYS Bar Assoc. Family Law Section (Extemporaneous)	Syracuse, NY	10/25/02
"When Law and Medicine Collide" Steinberg Lecture Series (Typed speech; published work)	Rochester, NY	9/25/02
NYS Bar Assoc. Family Law Section (Handwritten outline)	Manchester, VT	7/11/02
Middle-school students (Extemporaneous)	Livonia Central School	6/17/02
Memorial service - Judge John Callahan (Extemporaneous)	Appellate Division Rochester, NY	4/8/02
"Hugh Jones & Modern Courts: The Pursuit of Justice Then and Now" (Typed speech; published work)	Albany Law School	3/11/02
Speech to pre-law class (Extemporaneous)	Univ. of Albany	3/20/02
Swearing-in ceremony (Extemporaneous)	Rochester, NY	2/28/02
Trial Advocates luncheon (Extemporaneous)	Rochester, NY	12/18/01
Retirement dinner for Judge Fred Henry (Extemporaneous)	Canandaigua, NY	11/30/01
NYS Bar Assoc. Commercial Litigation CLE (Extemporaneous)	Binghamton, NY	11/1/01
Onondaga Co. Bar Assoc. Dinner honoring Judge John Lawton (Extemporaneous)	Syracuse, NY	10/25/01

NYS Bar Assoc. Appellate Advocacy CLE (Extemporaneous)	Batavia, NY	9/15/01
Assoc. of Higher Education Faculty Officers (Extemporaneous)	Montreal, Quebec	7/22/01
Rochester Rotary Club "A Free and Independent Judiciary" (Typed speech)	Rochester, NY	7/10/01
NYS Co. Judges' Assoc. Annual meeting (Extemporaneous)	Cooperstown, NY	6/12/01
Onondaga Co. Bar Assoc. Commercial Litigation CLE (Extemporaneous)	Syracuse, NY	5/16/01
Touro Law School Law Review Banquet (Extemporaneous)	Huntington, NY	5/14/01
Albany Co. Bar Assoc. "Chambers Chat" CLE (Extemporaneous)	Albany, NY	4/24/01
American Bd. Of Trial Advocates Judiciary/General Counsel Roundtable (Extemporaneous)	Rochester, NY	11/6/00
NYS Bar Assoc. Commercial Litigation CLE (Extemporaneous)	Rochester, NY	10/25/00
Sullivan Policy Institute Constitution Day Ceremony (Typed speech)	Rochester, NY	9/17/00
Livonia Central School commencement (My son's graduation)	Livonia, NY	6/00



Mt. Morris Central School Business Law class (Extemporaneous)	Mt. Morris, NY	4/11/00
NY Assoc. of Counties' Annual Meeting (Extemporaneous)	Albany, NY	4/4/00
Eulogy for Justice M. Dolores Denman (Typed speech)	Buffalo, NY	1/22/00
Eulogy for Justice John Doerr (Typed speech)	Buffalo, NY	12/4/99
Nathaniel Hawthorne Awards (Typed speech)	Rochester, NY	10/28/99
Jurist in Residence Syracuse Law School "Judges as Problem Solvers" (Typed speech)	Syracuse, NY	10/27/99
SUNY Albany Government & Politics class (Extemporaneous)	Albany, NY	10/20/99
Canisius College Education Law Class (Handwritten outline)	Buffalo, NY	10/6/99
Council of State Governments (Extemporaneous)	New Paltz, NY	9/23/99
"Chambers Chat" Albany Co. Bar Assoc. (Extemporaneous)	Albany, NY	9/7/99
Cornell Law School Alumni (Handwritten outline)	New York, NY	1/29/99
Eulogy - Dr. David Huntington (Typed speech)	Alfred, NY	12/22/98

Monroe Co. Bar Assoc. Criminal Justice Section (Extemporaneous)	Rochester, NY	12/8/98
Orchard Park High School (Extemporaneous)	Orchard Park, NY	11/21/98
Justice David Boehm's retirement dinner (Extemporaneous)	Rochester, NY	10/28/98
NYS Bar Assoc. Seminar (Extemporaneous)	Rochester, NY	9/18/98
Albany Co. Bar Assoc. "Ineffective Appellate Advocacy" (Handwritten outline)	Albany, NY	9/8/98
Monroe Co. Bar Assoc. Trust & Estates Section "A View From Eagle Street" (Handwritten outline)	Rochester, NY	6/12/98
Commencement Address (Typed speech)	University of Buffalo School of Law	5/16/98
Genesee Valley Chapter Civil Liberties Union "What's Not In The Bill of Rights" (Typed speech)	Rochester, NY	12/11/97
Monroe Co. Bar Assoc. Appellate Advocacy CLE (Extemporaneous)	Rochester, NY	11/13/97
Assoc. of Law Libraries of Upstate New York (Extemporaneous)	Albany, NY	10/17/97
NYS Magistrates' Assoc. (Handwritten outline)	Buffalo, NY	9/30/97

American Corporate Counsel Assoc. "Life On The Court of Appeals" (Handwritten outline)	Rochester, NY	9/24/97
Allegany County Bar Assoc. (Extemporaneous)	Belmont, NY	8/8/97
Livonia Central School Commencement (my daughter's graduation) (Handwritten outline)	Livonia, NY	6/97
Eulogy for Judge J. Robert Houston (Typed speech)	Geneseo, NY	6/5/97
Brighton Chamber of Commerce (Handwritten outline)	Rochester, NY	5/22/97
Assoc. of the Bar of the City of NY (Handwritten outline)	New York, NY	5/20/97
Albany Co. Lawyers' Assoc. (Typed speech)	SUNY Albany Albany, NY	5/8/97
Syracuse Law School students (Extemporaneous)	Albany, NY	4/30/97
Albany County Bar Association Court of Appeals Dinner (Extemporaneous)	Albany, NY	2/13/97
Swearing-in ceremony at Court of Appeals (Handwritten outline)	Albany, NY	2/3/97
NYS Bar Foundation "Why Did You Become a Lawyer" (Handwritten notes)	New York, NY	1/97
Genesee Co. Bar Assoc. (Extemporaneous)	Batavia, NY	12/9/96
Livonia Central School Business Law Class (Extemporaneous)	Livonia, NY	11/26/96

F.B.I. Agents Luncheon (Extemporaneous)	Rochester, NY	11/20/96
NYS Bar Assoc. Seminar (Extemporaneous)	Rochester, NY	10/18/96
Dansville Rotary Club (Extemporaneous)	Dansville, NY	9/23/96
Judicial Skills Committee Seminar (Extemporaneous)	Westchester, NY	7/10/96
Law Guardian Seminar 4 <sup>th</sup> Dept., Appellate Division (Extemporaneous)	Rochester, NY	6/22/96
Rochester Gas & Electric Co. (Extemporaneous)	Portageville, NY	5/1/96
NYS Assoc. of Alternative Sentencing Programs (Extemporaneous)	Albany, NY	4/2/96
Young Lawyers' Orientation 4 <sup>th</sup> Dept., Appellate Division (Extemporaneous)	Rochester, NY	3/6/96
Finger Lakes Forum Television coverage of criminal trials (Extemporaneous)	Geneva, NY	1995
NYS Bar Assoc. "Appellate Practice in New York" (Extemporaneous)	Rochester, NY	11/95
Judicial Seminar for Newly Elected Judges (Extemporaneous)	New York, NY	12/92
NYS Bar Assoc. "Basic Criminal Practice" (Extemporaneous)	Rochester, NY	9/92

NYS Bar Assoc.  
 "How to Settle a Commercial Case"  
 (Extemporaneous)

Rochester, NY

5/92

**\*\* see Schedule B for notes and outlines for speeches where noted.**

14. **Congressional Testimony:** List any occasion when you have testified before a committee or subcommittee of the Congress, including the name of the committee or subcommittee, the date of the testimony and a brief description of the substance of the testimony. In addition, please supply four (4) copies of any written statement submitted as testimony and the transcript of the testimony, if in your possession.  
Answer: None.
15. **Health:** Describe the present state of your health and provide the date of your last physical examination.  
Answer: Excellent. I am a marathon runner and have a physical every year. My last physical was in November, 2002.
16. **Citations:** If you are or have been a judge, provide:
- (a) a short summary and citations for the ten (10) most significant opinions you have written;

Answer:

Ten Most Significant Opinions

Case Name/Citation:

1. Hamilton v Beretta U.S.A. Corp.  
 (96 NY2d 222 [2001])

Summary:

Plaintiffs sought to hold several handgun manufacturers liable for death or injury caused to persons by illegally obtained handguns. The Court held that the manufacturers did not owe plaintiffs a general duty to exercise reasonable care in the marketing and distribution of their handguns. The Court reasoned that imposition of such a duty would expose defendants to potentially limitless liability, which should not be imposed without a more tangible showing that the manufacturers were a direct link in the causal chain that resulted in plaintiff's injuries and that the manufacturers were realistically in a position to prevent the wrongs.

2. People v Johnson  
(95 NY2d 368 [2000])

In this case, the Court was asked to determine whether acts of violence committed against a mother in the presence of her children, notwithstanding that none of the harmful conduct was specifically directed at the children, supported a defendant's convictions for endangering the welfare of a child under Penal Law § 260.10(1). Recognizing the well-documented adverse effects when children are exposed to domestic violence, the Court concluded that the statute was written broadly enough to encompass such indirect conduct because it imposes criminal liability for awareness of the mere "likelihood" of harm to a child.

3. People v Hues  
(92 NY2d 413 [1998])

This case called into question the propriety of juror note-taking during trial. The Court held that, based upon the need to respond to contemporary challenges facing our jury system, the overwhelming authority of Federal and other State courts, and "a healthy dose of common sense," it is within the sound discretion of trial courts to allow note-taking by jurors during a trial. If a trial court determines that a particular case warrants note-taking, the court can *sua sponte* instruct jurors that they are permitted to take notes during the trial. This discretion, however, must be tempered, in light of the potential perils that note-taking can present during trial, by cautionary instructions at the commencement and conclusion of the trial as part of the court's charge prior to jury deliberations.

4. Blanco v AT & T Co.  
(90 NY2d 757 [1997])

Various products liability lawsuits claiming damages for keyboard related repetitive stress injuries ("RSIs") were consolidated for the purpose of deciding the applicable statute of limitations. The trial court held that the limitations period commenced upon the onset of RSI symptoms, or the plaintiff's last use of a keyboard, whichever was earlier. The Appellate Division modified, holding that actions accrued upon a plaintiff's first use of a keyboard. The Court modified the Appellate Division order, and adopted the onset of symptoms or last use

rule. Noting that past precedents did not adequately deal with this information age injury, the Court held that the onset of symptoms or last use rule was dictated by a fair balancing of the competing interests at stake.

5. In re New York Agency of Bank of  
Commerce & Credit Int'l S.A.  
(90 NY2d 410 [1997])

As part of his seizure of a local bank, the superintendent seized an account of a foreign bank's funds that were in the local bank. That account had received an electronic transfer at the direction of the foreign bank on that day. The foreign bank had ordered the transfer prior to any seizure of assets pursuant to an agreement reached the previous day. The foreign bank challenged the superintendent's authority to seize the funds. The Court concluded that New York Banking Law §606(4) gave the superintendent sufficiently broad powers to validate the seizure. Years before the seizure, financial officials worldwide were on notice that the local bank was a rogue bank, and that there were substantial risks involved in doing business with it. Thus, the assets were seized because the local bank was in an unsound and unsafe condition and could not safely and expediently continue business. The Court noted that there was no mutual mistake when the contract was signed, and no inequity in treating the foreign bank in the same manner as any other depositor/creditor who was unfortunate enough to have placed its money with the local bank prior to the time it was seized.

6. People v Harris  
(98 NY2d 452 [2002])

Defendant was convicted on six first-degree murder counts, attempted first-degree murder and second-degree criminal possession of a weapon. The jury sentenced defendant to death. The Court found that defendant failed to overcome the presumption of constitutionality with respect to New York Criminal Procedure law § 270.20(1)(f), which uses "death qualification" to ensure that prospective jurors are able to consider the death penalty. Further, to the extent the trial court may have forecast the type of individual who could avoid jury service when it described the life/death qualification process, there was no prejudice to

defendant. Finally, defendant failed to make a claim that his for-cause challenge against a juror pursuant to Criminal Procedure Law §270.20(1)(f) should have been granted because he did not correlate the juror's expressed skepticism regarding the mitigating factor of child abuse and the juror's views on the death penalty or her ability to exercise sentencing discretion conferred by statute. Defendant's death sentence was vacated because of controlling precedent under Matter of Hynes v Tomei (92 NY2d 613), which, consistent with Jackson v United States (390 US 570 [1968]), struck the post-death notice plea bargaining provisions of the death penalty statute as unconstitutional.

7. Luna v Dobson  
(97 NY2d 178 [2001])

On two occasions, a New York woman went to the courts of Connecticut requesting a declaration of paternity, but both claims were dismissed as a result of a series of missteps by a representative of the Connecticut Attorney General. The woman then brought a paternity action in New York and the child's putative father sought to invoke one of the Connecticut proceedings as a total bar. Applying the Full Faith and Credit Clause, the Court looked to Connecticut law to determine whether the earlier dismissal had preclusive effect. Given Connecticut's strong interest in the identification of parent-child relationships and the unique nature of proof in that regard, the Court held that in this case – where no adjudication of paternity occurred because of governmental missteps – Connecticut law would have deemed the paternity determination more important than the convenience afforded by finality and would not have given the disciplinary dismissal preclusive effect.

8. People v Foley  
(94 NY2d 668 [2000])

Posing as a fifteen-year-old girl named "Aimee", a State Trooper logged onto a sex chat room on the Internet. Defendant began corresponding with "Aimee" and sent pictures of what appeared to be children engaging in sexual acts with adults along with his transmissions. Defendant was in the process of arranging a meeting with "Aimee" when he was



arrested. The Court was called upon to determine the constitutionality of New York Penal Law § 235.22, which criminalizes the computerized dissemination of indecent material to minors. The Court rejected defendant's contention that the statute was unconstitutionally overbroad because it exposed individuals to criminal liability who unintentionally address a minor through sexually oriented communication. Recognizing that Penal Law § 235.22 is not directed only at the transmission of certain types of communication over the Internet, the Court noted that the second prong of the statute prohibited conduct – the importuning, invitation, inducement of a minor to engage in sexual acts – as opposed to mere speech. The Court further held that Penal Law § 235.22 is not unconstitutionally vague because a person of ordinary intelligence would reasonably know that the statute is meant to prevent the intentional luring of minors to engage in sexual conduct through the dissemination of harmful sexual images. The Court also determined that the speech-conduct sought to be prohibited by Penal Law § 235.22 did not merit First Amendment protection. Nor did the statute violate the Commerce Clause, distinguishing this provision from § 235.21(3), which banned the sending of a sexually explicit depiction to a minor over the Internet (see American Libraries Assn. v Pataki, 969 F.Supp 160 [SDNY 1997]). In American Libraries, the district court held that this provision unduly burdened interstate commerce. Finally, the Court of Appeals upheld the constitutionality of Penal Law § 263.15, which prohibits promoting a sexual performance by a child.

9. In re Benjamin L.  
(92 NY2d 660 [1999])

The Court held that a juvenile has a right to speedy adjudication under the Due Process Clause of New York's Constitution. Noting that the same policies that precipitated the articulation and enforcement of a criminal defendant's right to a speedy trial are applicable to juveniles in delinquency proceedings, the Court concluded that the speedy trial protections afforded under the Due Process Clause are not for criminal proceedings alone and are not at

odds with the goals of juvenile proceedings. The Court adopted, extended and modified the five factors for determining whether a defendant's speedy trial rights have been violated that were articulated in People v Taranovich (37 NY2d 442) to the juvenile delinquency context, and directed courts to weigh these factors on a case-by-case basis. However, it cautioned courts to be acutely cognizant of the goals, character and unique value of juvenile proceedings when assessing a speedy trial claim.

10. Tamagni v Tax Appeals Tribunal  
(91 NY2d 530 [1998])

The Tamagni's, who lived in New Jersey but were also statutory residents of New York, having spent more than 183 days here, claimed that New York's income tax violated the dormant Commerce Clause of the Federal Constitution insofar as it allowed their income from intangible assets to be subject to full taxation in both New York and New Jersey. The Court held the New York tax did not trigger Commerce Clause scrutiny because it was based solely on the taxpayer's status as a New York State resident without regard to any economic activities conducted here. In the alternative, the Court held that even if Commerce Clause analysis was applicable, the tax was constitutional because it did not discriminate against interstate commerce, and states have traditionally retained broad powers to tax their own residents.

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

Answer:

Rulings Reversed or Significantly Criticized on Appeal  
(see Schedule C for copies of unreported decisions)

Case Name/Citation:

1. Hickson v. Gardner  
(134 AD2d 930 [4<sup>th</sup> Dept 1987])

Summary:

Reversed order of Supreme Court (Wesley J.) that denied defendant's motion to dismiss plaintiff's action as abandoned after plaintiff failed to enter and serve trial court's judgment.

Supreme Court decision/order unreported.

2. Clintwood Assoc. v. County of Ontario  
(144 AD2d 928 [4<sup>th</sup> Dept. 1988])

Supreme Court decision/order unreported.

3. Samper v University of Rochester  
(144 AD2d 940 [4<sup>th</sup> Dept. 1988])

Samper v Univ. of Rochester  
(139 Misc2d 580 [1987])

The Appellate Division held that plaintiff had burden to explain failure to comply with 22 NYCRR 202.48 and failed to show good cause in this case. Note: The Appellate Division decision was later criticized by the Court of Appeals in Funk v Barry (89 NY2d 364 [1996]).

Reversed decision of Supreme Court (Wesley J.) holding that a county resolution violated the gift provision of the New York Constitution. Although no consideration was provided in the resolution, the action relieved the county of administrative problems and responsibilities, which served as consideration.

Modified order of Supreme Court (Wesley J.) that dismissed plaintiffs' cause of action against several of the defendants alleging discrimination under Civil Rights Law §§ 40-c and 40-d. Since plaintiffs alleged sufficient facts to sustain a cause of action under the Human Rights Law against those defendants, the cause of action under the Civil Rights Law was reinstated.

Dr. Samper sued the University of Rochester and several doctors alleging the defendants discriminated against her based on gender during her residency in anesthesiology. Supreme Court (Wesley J.) denied in part defendants' motion for summary judgment. The court held plaintiffs alleged sufficient facts to create a question of fact as to whether the defendants discriminated against Dr. Samper on the basis of gender and therefore violated the Human Rights Law. The court rejected defendants' claims that the conduct was protected under the Education Law (§ 6527), which immunizes conduct done in evaluating a physician's work. While evaluations are immune, discrimination based on sex is not. The court also rejected defendants' claims that their conduct occurred in an educational context as opposed to an employment relationship. The court noted that Dr. Samper's residency had both

- an educational and employment component. Since it was difficult to separate the two, the court reasoned that the protection of the anti-discrimination statute could apply and summary judgment was inappropriate. On appeal, the Appellate Division agreed with that determination.
4. Kost v. Schiefen Construction, Inc.  
(155 AD2d 909 [4<sup>th</sup> Dept. 1989])
- Supreme Court decision/order unreported.
- Modified ruling of Supreme Court (Wesley J.) that dismissed breach of contract cause of action against some defendants and limited recovery on counterclaims to the amount shown on the invoices.
5. Paros, Inc. v. Vogt  
(156 AD2d 928 [4<sup>th</sup> Dept. 1989])
- Supreme Court decision/order unreported.
- Reversed order of Supreme Court (Wesley J.) that granted defendant's summary judgment motion in a legal malpractice action. The Appellate Division held that the lower court's conclusion that the plaintiffs caused their own damages was based on a determination of credibility and plaintiffs' testimony raised a question of fact. Thus, summary judgment was inappropriate.
6. Tymkin v. Edwards  
(158 AD2d 973 [4<sup>th</sup> Dept. 1990])
- Supreme Court decision/order unreported.
- Reversed order of the Supreme Court (Wesley, J.) that denied defendant's motion to dismiss. The Appellate Division held plaintiff failed to properly serve defendant because summons was served at place where defendant no longer resided.
7. Rohr v. Hoyt  
(159 AD2d 980 [4<sup>th</sup> Dept. 1990])
- Supreme Court decision/order unreported.
- Reversed order of Supreme Court (Wesley, J.) that denied defendants' motion for summary judgment. Defendants met their burden of showing as a matter of law that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102. Plaintiff failed to meet her burden of submitting evidence sufficient to raise a question of fact.

8. Backus v. Planned Parenthood of Finger Lakes, Inc.  
(161 AD2d 1116 [4<sup>th</sup> Dept. 1990])
- Reversed order of Supreme Court (Wesley, J.) that denied defendants' motion to dismiss plaintiff's complaint that alleged a claim of breach of an employment contract and related matters. In the Appellate Division's view, the facts alleged by the plaintiff-employee fell short of establishing the tort of intentional infliction of emotional distress because the conduct did not meet the strict standard of extreme and outrageous conduct. Facts also fell short of establishing breach of an employment contract. Furthermore, one defendant's motion to dismiss should have been granted because there was no evidence of interference with a contractual relationship.
- Supreme Court decision/order unreported.
9. Green v. Green  
(170 AD2d 1026 [4<sup>th</sup> Dept. 1991])
- Reversed order of Supreme Court (Wesley, J.) that concluded the motion to fix attorney's fees was for enforcement of an attorney's charging lien under section 475 of the Judiciary Law.
- Supreme Court decision/order unreported.
10. Eisenhart v. Marketplace  
(176 AD2d 1220 [4<sup>th</sup> Dept. 1991])
- Reversed order of Supreme Court (Wesley, J.) that granted defendants' motion for summary judgment. The Appellate Division ruled that defendants failed to show as a matter of law that the common area was not inherently dangerous. The Appellate Division concluded that even though defendants complied with building construction code, a jury could find the area inherently dangerous.
- Supreme Court decision/order unreported.
11. Dignan v. Dignan  
(156 AD2d 995 [4<sup>th</sup> Dept. 1989])
- Modified order of Supreme Court (Wesley, J.) that directed husband's law firm to disclose to defendant its federal and state partnership tax returns. Because the husband's interest in his law firm was limited to his capital account, the partnership agreement provided defendant with the necessary information (see Burns, 193 AD2d 1104, below at #12).
- Supreme Court decision/order unreported.

12. Burns v. Burns  
(193 AD2d 1104 [4<sup>th</sup> Dept. 1993])

Modified judgment of Supreme Court (Wesley, J.). The Appellate Division reduced the maintenance award to wife and gave husband a credit for the payments made by him from his separate property on several loans. This decision was later modified in part, affirmed in part and remanded by the Court of Appeals (Burns v Burns (84 NY2d 369 [1994])). In that decision the Court specifically rejected an earlier line of cases in which the Fourth Department, Appellate Division, held that a partner's interest in his or her law firm is limited to the partner's capital account (see Dignan, 156 AD2d 995, above at #11). The Court of Appeals noted "[a]lthough Supreme Court [Wesley, J.] limited plaintiff's proof of defendant's interest in the firm to the value of his capital account, it did so on constraint of Appellate Division decisions which construed the same partnership agreement in the context of other cases" (Burns, 84 NY2d at 373). The Court of Appeals specifically rejected this view.

Supreme Court decision containing findings of fact and conclusions of law is sealed pursuant to New York Domestic Relations Law § 235(1).

13. O'Brien v. O'Brien  
(195 AD2d 993 [4<sup>th</sup> Dept. 1993])

Modified judgment of Supreme Court (Wesley, J.) that awarded child support retroactive only to July 1, 1990 rather than to May 15, 1989, the date of commencement of the action.

Supreme Court decision containing findings of fact and conclusions of law is sealed pursuant to New York Domestic Relations Law § 235(1).

14. People v Brown  
(195 AD2d 1055 [4<sup>th</sup> Dept. 1993])

Reversed judgment of Supreme Court (Wesley, J.) that convicted defendant of murder in the second degree. Defendant's absence from an in-camera hearing deprived him of his statutory right to be present during all material stages of the trial. The Appellate Division suppressed defendant's statements.

Supreme Court decision/order unreported.

15. People v. Young  
(195 AD2d 1041 [4<sup>th</sup> Dept. 1993])

Supreme Court decision/order unreported.

Reversed judgment of Supreme Court (Wesley, J.) because defendant's absence from the in-camera hearing violated his statutory right to be present at all material stages of his trial.

16. Clarke v De John  
(198 AD2d 818 [4<sup>th</sup> Dept. 1993])

Supreme Court decision/order unreported.

Reversed order of Supreme Court (Wesley, J.) denying defendant's summary judgment motion. In New York, police officers and firefighters cannot sue third parties when the third party's negligence causes the police officer or firefighter injury if the injury occurs in the line of duty. The lower court, relying on several appellate court cases, held that the rule was not applicable in this case because the negligent conduct that caused plaintiff's injury was "separate and distinct" from the circumstances that brought him to the scene. The Appellate Division ruled that a Court of Appeals decision (see Cooper v City of New York, 81 NY2d 584 [1993]), decided after the motion at Supreme Court, but before the appeal, rejected this exception.

17. People v Tindale  
(198 AD2d 889 [4<sup>th</sup> Dept. 1993])

Reversal premised on plea allocation, thus there was no ruling or decision from Supreme Court [Wesley, J.].

Reversed judgment of Supreme Court (Wesley, J.) that accepted defendant's guilty plea to escape in the second degree. The lower court erred in accepting the plea because defendant's factual allocation negated an essential element of escape in the second degree.

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

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

Answer:

## Significant Opinions on Federal and State Constitutional Issues

Case Name/Citation:Summary:1. People v Hansen

(2003 N.Y. LEXIS 122 [2003])

Defendant was convicted of murder in the first degree and robbery in the first degree, both non-capital offenses. Defendant contended that CPL § 400.27(1), as it applied to sentencing in a non-capital case, deprived him of his constitutional rights of due process under both the State and Federal constitutions as it did not provide for a separate sentencing hearing at which he could submit evidence of mitigating factors. Although defendant argued for procedural standards in non-capital cases similar to those in capital cases, the Court rejected his effort. The Court found New York's sentencing scheme clearly met due process requirements. Specifically, a sentencing hearing was held and defendant's concerns were put forward in a pre-sentencing memorandum. At no time did defendant claim his sentence was based on materially untrue assumptions or misinformation, or that he lacked the notice or opportunity to contest the facts upon which the sentencing court relied. Consequently, § 400.27(1) afforded defendant all the process he was due.

2. People v Berroa

(2002 N.Y. LEXIS 3581 [2002])

Defendant was indicted for murder in the second degree and related offenses stemming from a killing. At trial, defense counsel pursued a misidentification defense. Two defense witnesses testified not only that defendant did not match the description given by the eye-witnesses, but also suggested an unnoticed alibi. Contrary to defense counsel's earlier statements to the court, the witnesses testified to informing counsel of the alibi information before trial. In an attempt to remedy this situation, defense counsel offered a stipulation that was read to the jury indicating the witnesses had not previously informed her of the alibi information. Defendant was found guilty of murder in the second degree. Because defense counsel's stipulation did not support defendant's best



defense or soften damaging evidence, the Court found that the stipulation put defense counsel's credibility in direct conflict with her client's interests and rendered her representation ineffective.

3. People v Harris  
(98 NY2d 452 [2002])

Defendant was convicted on six first-degree murder counts, attempted first-degree murder and second-degree criminal possession of a weapon. The jury sentenced defendant to death. The Court found that defendant failed to overcome the presumption of constitutionality with respect to New York Criminal Procedure Law § 270.20(1)(f), which uses "death qualification" to ensure that prospective jurors are able to consider the death penalty. Further, to the extent the trial court may have forecast the type of individual who could avoid jury service when it described the life/death qualification process, there was no prejudice to defendant. Finally, defendant failed to make a claim that his for-cause challenge against a juror pursuant to Criminal Procedure Law §270.20(1)(f) should have been granted because he did not correlate the juror's expressed skepticism regarding the mitigating factor of child abuse to the juror's views on the death penalty or her ability to exercise the sentencing discretion conferred by statute. Defendant's death sentence was vacated because of controlling precedent under Matter of Hynes v Tomei (92 NY2d 613), which, consistent with Jackson v United States (390 US 570 [1968]), struck the post-death notice plea bargaining provisions of the death penalty statute as unconstitutional.

4. Luna v Dobson  
(97 NY2d 178 [2001])

On two occasions a New York woman went to the courts of Connecticut requesting a declaration of paternity, but both claims were dismissed as a result of a series of missteps by a representative of the Connecticut Attorney General. The woman then brought a paternity action in New York and the child's putative father sought to invoke one of the Connecticut proceedings as a total bar. Applying the Full Faith and Credit Clause, the Court looked to Connecticut law to determine whether the

earlier dismissal had preclusive effect. Given Connecticut's strong interest in the identification of parent-child relationships and the unique nature of proof in that regard, the Court held that in this case – where no adjudication of paternity occurred because of governmental missteps – Connecticut law would have deemed the paternity determination more important than the convenience afforded by finality and would not have given the disciplinary dismissal preclusive effect.

5. People v DePallo  
(96 NY2d 437 [2001])

Defense counsel, who was unable to dissuade his client from testifying falsely, disclosed the client's perjury in an ex parte appearance before the trial court. The Court rejected defendant's claim that he was denied the effective assistance of counsel because a defendant has no right to commit perjury and no right to the assistance of counsel in the presentation of perjured testimony. The Court held that when an attorney is confronted with this problem at trial, revelation to the court is a professionally responsible and appropriate response, particularly because the intent to commit a crime is not a protected confidence or secret. The lawyer's actions properly balanced the duties he owed to the client and to the courts.

6. People v Jones  
(96 NY2d 213 [2001])

Based on the allegations of an undercover officer, defendant and codefendant were arrested and charged with sale and possession of crack-cocaine in Brooklyn. At trial, the People moved to close the courtroom during the undercover officer's testimony. The court conducted a hearing where the officer stated there were 10 "lost subjects" still on the street and she had received threats in the past. In addition, defendant was still at large. A guard was posted at the door to question potential observers. Everyone who sought entrance into the courtroom was allowed in. Applying the standard enunciated in Waller v Georgia (467 US 39 [1984]), the Court determined that the trial court had taken the factors set forth in that case into consideration and had narrowly tailored a solution. The restriction of the public's access to the courtroom did not violate

defendant's right to a public trial.

7. Tenn. Gas Pipeline Co. v Urbach  
(96 NY2d 124 [2001])

Tennessee Gas challenged the constitutionality of New York Tax Law §189, which recaptures taxes on natural gas from end users in the State who buy gas directly from out-of-state producers and thereby avoid the taxes passed through by in-state utilities in the rates charged to customers under New York Tax Law §§ 186 and 186-a. The Court held that the import tax was a valid compensatory tax under the Commerce Clause, comparing the statutory scheme to permissible sales and use taxes. However, the Court concluded that the import tax was nevertheless facially unconstitutional because it ran afoul of the internal consistency test for determining "fair apportionment" (see Oklahoma Tax Comm'n v Jefferson Lines, 514 US 175 [1995]). In this case a double tax burden would be imposed on interstate commerce because the import tax contains no credit for taxes assessed on the purchase of gas out-of-state. The Court also held invalid the Legislature's attempt to include a savings clause in the enactment language providing a credit for any double taxation because that clause improperly required the Court to define the parameters of the credit and the manner in which it would be implemented in violation of fundamental separation of powers principles.

8. City of New York v State of New York, et al.  
(94 NY2d 577 [2000])

The City of New York has, for over three decades, imposed a tax on nonresident commuters who work in the City. In 1999, the Legislature attempted to rescind the tax for State resident commuters while retaining the tax for out-of-State commuters. Anticipating challenges to the statute, the Legislature added a provision that if a court declared the new law void, the entire tax authorization was repealed. The City of New York, the State of Connecticut and other taxpayers brought separate suits challenging the validity of the 1999 enactment. The City's challenge sought to undo the entire 1999 enactment and preserve the tax in its pre-1999 form on the ground that the statute was enacted in violation of the home rule provisions of the State Constitution. The other suit,

brought by residents of New Jersey and Connecticut and by the State of Connecticut, sought termination of the commuter tax on the ground that the taxing scheme as amended in 1999 violated the Federal Constitution. The Court rejected the City's argument that the 1999 amendment violated the Home Rule provision of the New York Constitution. As for the challenge brought by non-State entities, the Court determined that the remaining tax scheme denied nonresidents one of the privileges and immunities of New York residents and accordingly violated article IV, § 2 of the United States Constitution. The Court also held that the tax imposed an undue burden on interstate commerce thereby violating the Commerce Clause of the Federal Constitution. Thus, the commuter tax was repealed in its entirety.

9. People v Wood  
(95 NY2d 509 [2000])

Defendant's ex-wife obtained two separate orders of protection directing defendant to have "no contact whatsoever" with her. One order was issued by City Court and the other by Family Court. At issue was whether defendant's prosecution for criminal contempt in the first degree under New York Penal Law § 215.51(c) was barred by the Double Jeopardy Clause because he was previously prosecuted for contempt under Family Court Act article 8 for the same acts of harassment. Noting this unique double jeopardy situation had its genesis in the parallel family offense jurisdiction of Family Court and the criminal courts, the Court applied the traditional test under Blockburger v United States (284 US 299, 304 [1932]) for determining whether the prosecutions were for the same offense. The Court concluded that the contempt provision of Family Court Act article 8 was a lesser included offense of first degree criminal contempt and, thus, defendant's second prosecution was barred.

10. People v Foley  
(94 NY2d 668 [2000])

Posing as a fifteen-year-old girl named "Aimee", a State Trooper logged onto a sex chat room on the Internet. Defendant began corresponding with "Aimee" and sent pictures of what appeared to be children engaging in sexual acts with adults along with his

transmissions. Defendant was in the process of arranging a meeting with "Aimee" when he was arrested. The Court was called upon to determine the constitutionality of New York Penal Law § 235.22, which criminalizes the computerized dissemination of indecent material to minors. The Court rejected defendant's contention that the statute was unconstitutionally overbroad because it exposed individuals to criminal liability who unintentionally address a minor through sexually oriented communication. Recognizing that Penal Law § 235.22 is not directed only at the transmission of certain types of communication over the Internet, the Court noted that the second prong of the statute prohibited conduct – the importuning, invitation, inducement of a minor to engage in sexual acts – as opposed to mere speech. The Court further held that Penal Law § 235.22 is not unconstitutionally vague because a person of ordinary intelligence would reasonably know that the statute is meant to prevent the intentional luring of minors to engage in sexual conduct through the dissemination of harmful sexual images. The Court also determined that the speech-conduct sought to be prohibited by Penal Law § 235.22 did not merit First Amendment protection. Nor did the statute violate the Commerce Clause, distinguishing this provision from § 235.21(3), which banned the sending of a sexually explicit depiction to a minor over the Internet (see American Libraries Assn. v Pataki, 969 FSupp 160 [SDNY 1997]). In American Libraries, the district court held that this provision unduly burdened interstate commerce. Finally, the Court of Appeals upheld the constitutionality of Penal Law § 263.15, which prohibits promoting a sexual performance by a child.

11. Merlino v Schneider  
(93 NY2d 477 [1999])

Petitioner took an examination to apply for the position of a Spanish-speaking probation officer, but failed the oral portion of the exam. Petitioner's administrative appeals were denied, as was her initial judicial appeal. The Court held that under article V, section 6 of the New York State Constitution oral examinations had to employ objective standards as far as

practicable. Though a completely objective exam was not possible to measure petitioner's language proficiency, the oral exam petitioner took used clearly delineated standards that were capable of being challenged and reviewed by other examiners. Though certain subjective elements entered into petitioner's evaluation, they were insufficient to render the entire examination improper. Because the examination met constitutional standards of competitiveness and was reasonable in testing for the skills required for the position, it was valid.

12. In re Benjamin L.  
(92 NY2d 660 [1999])

The Court held that a juvenile has a right to speedy adjudication under the Due Process Clause of New York's Constitution. Noting that the same policies that precipitated the articulation and enforcement of a criminal defendant's right to a speedy trial are applicable to juveniles in delinquency proceedings, the Court concluded that the speedy trial protections afforded under the Due Process Clause are not for criminal proceedings alone and are not at odds with the goals of juvenile proceedings. The Court adopted, extended and modified the five factors for determining whether a defendant's speedy trial rights have been violated that were articulated in People v Taranovich (37 NY2d 442) to the juvenile delinquency context, and directed courts to weigh these factors on a case-by-case basis. However, it cautioned courts to be acutely cognizant of the goals, character and unique value of juvenile proceedings when assessing a speedy trial claim.

13. Tamagni v Tax Appeals Tribunal  
(91 NY2d 530 [1998])

The Tamagni's, who lived in New Jersey but were also statutory residents of New York, having spent more than 183 days here, claimed that New York's income tax violated the dormant Commerce Clause of the Federal Constitution insofar as it allowed their income from intangible assets to be subject to full taxation in both New York and New Jersey. The Court held the New York tax did not trigger Commerce Clause scrutiny, because it was based solely on the taxpayer's status as a New York State resident, without regard to any

economic activities conducted here. In the alternative, the Court held that even if Commerce Clause analysis was applicable, the tax was constitutional, because it did not discriminate against interstate commerce, and states have traditionally retained broad powers to tax their own residents.

14. People v Burdo

(91 NY2d 146 [1997] [Wesley, J., dissenting])

Defendant was in custody at a county jail pursuant to a pending charge of rape and assault and had been assigned legal representation following his arraignment. The officers who questioned defendant about an unrelated matter were fully aware of these facts and proceeded to interrogate the defendant. The Court held that under the circumstances, the custodial interrogation was improper and defendant's statements made during questioning must be suppressed because defendant was represented by counsel on the charge on which he was held in custody and could not be interrogated in the absence of counsel on any matter. The Court relied on prior precedent, People v Rogers (48 NY2d 167) for its ruling. In dissent, Judge Wesley argued that before the protections of Rogers become available, a defendant must establish an actual attorney-client relationship or an invocation of his right to counsel under the Fifth Amendment of the United States Constitution and article I, section 6 of the New York State Constitution. The dissent reviewed New York's extensive case law in this area and noted that a number of previous decisions of the Court of Appeals had confused the difference between one's right to counsel associated with the Fifth Amendment and the right to counsel under the Sixth Amendment and the State constitutional corollaries. (see N.Y. Const., art. I, § 6).

15. Park Slope Jewish Ctr. v Congregation B'Nai Jacob

(90 NY2d 517 [1997])

One religious congregation sued another seeking payment for use and occupancy of a portion of the synagogue they shared under the terms of an in-court stipulation. Although the lower courts had concluded the case presented a nonjusticiable religious dispute, the Court of Appeals reversed and held the dispute could be resolved by the application of "neutral

principles of law" under the secular terms of the stipulation that had resolved the parties' prior religious disagreement.

16. People v Vasquez and Matter of Cordero v Lalor  
(89 NY2d 521 [1997])

Appellants in both cases argued that the Double Jeopardy Clause barred criminal prosecution of inmates who had previously been the subject of internal prison disciplinary sanctions. The Court affirmed the judgments and concluded that the disciplinary sanctions imposed did not constitute criminal punishment that triggered double jeopardy protections. The Court explicitly held that the Double Jeopardy Clause did not bar criminal prosecution of a prison inmate simply because the inmate was previously subjected to internal prison disciplinary action for the same conduct. The test was whether disciplinary sanctions were intended to constitute criminal punishment, and, assuming they were not, whether they were so grossly unrelated to the noncriminal governmental objectives at stake in a prison environment that they could only be viewed as criminal punishment. The Court was satisfied that prison disciplinary rules were intended to serve legitimate noncriminal objectives. The sanctions were aimed at the terms and conditions of the sentences being served and were not harsh or extreme.

17. Anello v Zoning Bd. of Appeals  
(89 NY2d 535 [1997] [Wesley, J., dissenting])

Appellant contended that the denial of a variance, which prevented her from building a one-family dwelling on her parcel, constituted a taking of property for which she was entitled to just compensation. On appeal, the Court held that appellant's takings claim failed because she never acquired an unfettered right to build on the property free from the steep-slope ordinance. Appellant purchased the property in 1991, two years after the steep-slope ordinance was enacted. This statutory restriction thus encumbered appellant's title from the outset of her ownership and its enforcement did not constitute a governmental taking of any property interest owned by her. In a dissenting opinion, Judge Wesley wrote that the transfer should not make a once-compensable taking noncompensable. In a later case, the U.S.



Supreme Court took a similar position (see Palazzolo v Rhode Island, 533 US 606, 628 [2001]).

18. People v Bedell  
(210 AD2d 922 [4<sup>th</sup> Dept 1994])

Defendant argued that her sentence was invalid as a matter of law because her continued incarceration through the minimum term of 25 years violated the constitutional proscription against cruel and unusual punishment. The defendant did not seek the reduction premised upon a constitutional attack on the sentence as originally imposed. Agreeing with the majority that the sentence should not be reduced, Judge Wesley reasoned that the court's authority to examine the constitutional dimensions of a State-imposed sentencing scheme is limited to weighing the gravity of the offense against the danger the offender poses to society at the time the sentence is imposed. There is no authority that permits a mid-sentence constitutional assessment because of the defendant's good behavior in jail. That power is reserved to the Governor through clemency proceedings.

- 
17. Public Office, Political Activities and Affiliations:

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

Answer:

Member, New York State Assembly – 136<sup>th</sup> District  
Elected November, 1982; re-elected November, 1984

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

Answer:

I have never played a role in a political campaign other than my own candidacy for New York State Assembly and New York State Supreme Court.

18. Legal Career: Please answer each part separately.

- (c) Describe chronologically your law practice and legal experience after graduation from law school including:
- (1) whether you served as clerk to a judge, and if so, the name for the judge, the court and dates of the period you were a clerk;
  - (2) whether you practiced alone, and if so, the addresses and dates;
  - (3) the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

Answer:

Law Practice and Legal Experience:

8/74 to 3/76	Harris, Beach & Wilcox 99 Garnsey Road Pittsford, NY 14534 <u>Title:</u> Associate Attorney
3/76 to 1/77	Welch, Streb & Porter 131 Main Street Geneseo, New York 14454 <u>Title:</u> Associate Attorney
1/77 to 1/83	Welch, Streb, Porter, Meyer & Wesley 131 Main Street Geneseo, New York 14454 <u>Title:</u> Partner
1/79 to 6/82	New York State Assembly Capitol Building Albany, New York 12248 <u>Title:</u> Assistant to Minority Leader
1/83 to 1/87	Streb, Porter, Meyer & Wesley 131 Main Street Geneseo, New York 14454 <u>Title:</u> Partner

1/87 to 4/94	Supreme Court, Seventh Judicial District Hall of Justice Rochester, New York 14614-2186 <u>Title:</u> Justice Supervising Judge, Criminal Courts - 7 <sup>th</sup> Judicial District (1/91-3/94)
4/94 to 12/96	Appellate Division of Supreme Court, Fourth Dept. 50 East Ave., Suite 200 Rochester, New York 14604 <u>Title:</u> Additional Justice
1/97 to present	New York State Court of Appeals 20 Eagle Street Albany, New York 12207 <u>Title:</u> Associate Judge

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

Answer: I worked primarily in civil and criminal litigation with a focus on tort litigation as a plaintiffs' lawyer. I also handled a number of products liability and contract defense cases. My work in the Assembly focused on drafting legislation for the Minority Leader and reviewing bills before the Assembly.

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

Answer: Private individuals who were injured in accidents. I also did a good deal of matrimonial law. I did represent the Butler Mfg. Co. (a manufacturer of agricultural buildings) in a number of cases involving barn failures or contract disputes.

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

Answer: Frequently – on a weekly basis.

- (2) Indicate the percentage of these appearances in  
(A) federal courts;  
(B) state courts of record;  
(C) other courts.

Answer: 99% State courts; 1% Federal courts (bankruptcy only)

- (3) Indicate the percentage of these appearances in:  
(A) civil proceedings;  
(B) criminal proceedings.

Answer: 80% Civil; 20% Criminal

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

Answer: I do not have the records to establish this since it was over 16 years ago. However, I had many divorce and other non-injury trials. I did try two jury trials to verdict; one as lead counsel and one as associate counsel.

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

Answer: see (4) above.

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

Answer: None.

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

Answer: I took *pro bono* referrals from a local referral agency, although I do not have any records to provide specific information as to examples and amount of time devoted. While I was a second-year law student I assisted the Monroe County Legal Assistance Corporation in the preparation of a brief for an appeal to the 2<sup>nd</sup> Circuit (see Warth v Seldin, 495 F2d 1187 [2d Cir. 1974]). I also did *pro bono* work for Chances & Changes, a shelter for battered women.

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

- (a) the citations, if the cases were reported, and the docket number and date if unreported;
- (b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;
- (c) the party or parties whom you represented; and
- (d) describe in detail the nature of your participation in the litigation and the final disposition of the case.

Answer:

Most of my general civil and criminal litigation practice was focused on addressing legal issues facing citizens of a small community. My practice was also reduced during my years serving as a Member of the New York State Assembly. The records of my former firm have been destroyed. I am able, however, to provide a limited list of cases drawn

from a similar list I prepared in 1986 at the request of the Governor's Judicial Screening Committee.

(1) In re Ralph L. Button, Jr. v Sheridan Oil Co. Inc.

**Date of Representation:** June 15, 1979 - March 2, 1982

**Court:** United States Bankruptcy Court for the Western District of New York

**Judge:** Hon. Edward D. Hayes

**Counsel:**

John A. Ward, counsel for plaintiff  
170 Main Street  
Groton, New York 13073  
(607) 893-3190

(a) This case is reported at 18 B.R. 171 (WDNY 1982).

(b) Button stole money from Sheridan Oil Company and was sentenced to probation with restitution. He then filed a bankruptcy petition and obtained a discharge of the underlying debt. When he stopped paying restitution, a violation of probation proceeding ensued. In lieu of going to jail, he reaffirmed the debt thus satisfying the terms of his probationary sentence. He defaulted on the new note. The Bankruptcy Court ruled that the note was not the same debt as that discharged in the bankruptcy proceeding, as it was supported by new consideration, Sheridan's willingness to accept the new note as satisfaction of the restitution requirement of the criminal sentence.

(c) I represented the defendant, Sheridan Oil Company Inc.

(d) I was Sheridan Oil Company's counsel throughout this proceeding.

(2) Gerald Hilliman and Fay Hilliman v Agtron Steel Builders, Inc., et.al.

**Date of Representation:** September 30, 1982 - January 1, 1987

**Court:** State of New York, County of Cattaraugus, Supreme Court

**Judge:** None Assigned

**Counsel:**

John J. Cotter, Jr., counsel for defendant Agtron  
298 Main Street  
Buffalo, New York 14202  
(716) 854-4062

Pusatier, Sherman, White & London  
Kenneth S. Sherman, counsel for plaintiff (deceased)  
2464 Elmwood Avenue  
Kenmore, New York 14217  
(716) 873-6765

- (a) This case was not reported.
- (b) This case involved a claim arising out of the failure of a barn roof that destroyed a number of dairy cows.
- (c) I represented defendant Butler Manufacturing Company.
- (d) I drafted all responsive pleadings and participated in discovery. The case was not completed prior to my taking the bench.

(3) People v Edward Harvey,

**Date of Representation:** September 26, 1984 - January 1985

**Court:** State of New York, County of Livingston, County Court

**Judge:** Hon. James Orman, Avon Town Justice  
Hon. Ronald A. Cicoria

**Counsel:**

Livingston County District Attorney  
Theodore E. Wiggins (deceased)  
Livingston County Courthouse  
Geneseo, New York 14454  
(585) 243-0110

- (a) The case was not reported.
- (b) Harvey was charged with disorderly conduct. He was convicted following a non-jury trial in justice court. On appeal, his conviction was affirmed.
- (c) I represented defendant Edward Harvey.
- (d) My participation in this matter included defense of the charges at trial and on appeal.

(4) M/O Paternity Proceeding, Gordon D. Shepard, Jr. v Diane M. Parsons,

**Date of Representation:** November 21, 1985 - January 1987

**Court:** State of New York, County of Livingston, Family Court

**Judge:** Hon. J. Robert Houston (deceased)

**Counsel:**

James McCann attorney for Respondent, Diane M. Parsons  
9 Genesee Street  
Avon, New York 14414  
(585) 226-2040

(a) The case was not reported.

(b) Mr. Shepard was attempting to establish his paternity with regard to Ms. Parson's child.

(c) I represented the petitioner, Gordon D. Shepard, Jr.

(d) I drafted all pleadings and conducted the discovery.

(5) Michael L. Visale and Rosalie J. Vasile v Suburban Propane Gas Corp., et. al.

**Date of Representation:** December 12, 1995 - January 1987

**Court:** State of New York, County of Livingston, Supreme Court

**Judge:** None assigned

**Counsel:**

Reed, Smith, Shaw & McClay  
Richard C. Wesley -- local counsel  
Counsel for defendant Suburban Propane  
1150 Connecticut Avenue, N.W.  
Suite 900  
Washington, D.C. 20036  
(202) 457-6100

Osborne, Reed, VanDeVate & Burke  
Jeffrey M. Wilkens, counsel for defendant Fisher Controls  
1 Exchange Street -- 4<sup>th</sup> Floor  
Rochester, New York 14614  
(585) 454-6480

George G. Mackey, counsel for defendant Perfection Manufacturing  
28 East Main Street, Suite 800  
Rochester, New York 14614  
(585) 325-7570

Harter, Secrest & Emery, counsel for defendant Honeywell, Inc.  
700 Midtown Tower  
Rochester, New York 14604  
(585) 232-6500

Faraci & Lange  
John A. Bryant, counsel for plaintiff (deceased)  
309 Times Square Building  
Rochester, New York 14614  
(585) 325-5150

(a) This case was not reported.

(b) This case involved the explosion of a liquid propane gas space heater.

(c) I represented defendant Suburban Propane Gas Corporation.

(d) I prepared all pleadings and conducted discovery on behalf of my client in consultation with Washington counsel.

(6) Donna C. Felstead v The County of Ontario, et. al.  
**Date of Representation:** July 8, 1985 - March 20, 1986

**Court:** State of New York, County of Ontario, Supreme Court

**Judge:** Hon. Frederic T. Henry (retired)

**Counsel:**

Gary H. Abelson, counsel for defendant Town of East Bloomfield  
28 East Main Street, Suite 800  
Rochester, New York 14614  
(585) 325-7570

Osborn, Considine, Reed, VanDeVate and Burke  
Jeffrey M. Wilkens, counsel for defendant County of Ontario  
1 Exchange Street – 4<sup>th</sup> Floor  
Rochester, New York 14614  
(585) 454-6480

Rollins and Mulroy  
J. Kevin Mulroy, counsel for defendant Rayburns  
216-220 South Warren Street  
Syracuse, New York 13202  
(315) 472-2688

(a) This case was not reported.



(b) Ms. Felstead's son was killed in an auto accident involving a jeep.

(c) I represented plaintiff Donna C. Felstead, as Administratrix of the Estate of Paul J. Smith.

(d) My participation included preparation of all pleadings and supervising discovery. When the case settled, I drafted the relevant papers and sought court approval of the settlement.

(7) Daniel Bowen v Hansen and Bone, M.D., P.C. et al.

**Dates of Representation:** April 21, 1982 - October 4, 1984

**Court:** State of New York, County of Livingston, Supreme Court

**Judge:** Hon. Richard D. Rosenbloom

**Counsel:**

Dennis R. McCoy, counsel for the defendants  
3 Fountain Plaza  
Buffalo, New York 14203  
(716) 856-5400

(a) This case was unreported.

(b) This case involved a medical malpractice action.

(c) I represented the plaintiff, Daniel Bowen.

(d) My participation in this case involved preparing all pleadings and conducting discovery.

(8) Mary E. Fox v Donald A. Fox.

**Dates of Representation:** August 30, 1985 - October 24, 1985

**Court:** State of New York, County of Monroe, Supreme Court

**Judge:** Hon. Ronald A. Cicoria

**Counsel:**

Louis J. Colella, P.C.  
Counsel for plaintiff  
88 Ossian Street  
Dansville, New York 14437  
(716) 335-3168

- (a) This case was not reported.
- (b) This case was a matrimonial action.
- (c) I represented the defendant, Donald A. Fox.
- (d) I prepared all pleadings and relevant documents and conducted discovery. I also prepared the stipulation and judgment roll when the matter was settled.

(9) Howard Communications, Inc. v Genesee Valley Broadcasting, Inc. et. al.  
**Date of Representation:** September 9, 1983 - May 21, 1984

**Court:** State of New York, County of Erie, Supreme Court

**Judge:** Hon. Frederick M. Marshall

**Counsel:**  
Summner, Kolken & Collesano  
Counsel for plaintiff  
Suite 1300  
Statler Building  
107 Delaware Avenue  
Buffalo, New York 14202  
(716) 854-1541

- (a) This case was not reported.
- (b) As best I can recall, this case involved a contract claim. The matter was dismissed.
- (c) I represented the defendants, Genesee Valley Broadcasting and Dansville Broadcasting.
- (d) I handled all aspects of the litigation.

(10) Carol L. Buell v Thomas R. Buell.  
**Dates of Representation:** November 17, 1981 - January 1, 1987

**Court:** State of New York, County of Livingston, Supreme Court

**Judge:** Hon. Robert J. Houston (deceased)

**Counsel:**

Theodore S. Kantor counsel for defendant  
 16 East Main Street Suite 950  
 Rochester, New York 14614  
 (585) 262-4700

(a) This case was not reported.

(b) This was an ancillary proceeding involving maintenance and other payments pursuant to a divorce decree.

(c) I represented the plaintiff, Carol L. Buell.

(d) I handled all aspects of the case.

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

Answer: No

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

Answer: Yes.

Actions Against Court of Appeals

1. Matter of N.Y. State Assn. of Criminal Defense Lawyers v Kaye et al. (96 NY2d 512 [2001]) Article 78 proceeding in which the petitioners challenged the Court's authority to alter reimbursement rates for assigned counsel in capital appeals. The Court determined that the Court had the administrative authority to establish those rates and dismissed the petition.

2. Hudson v State of New York (No. 02-CIV-6600[RCC])

This action was commenced in the U.S. District Court for the Southern District of New York. Mr. Hudson was a party to a State court action to quiet title to property in Dutchess County. Among other things, he made a motion for leave to appeal to the Court of Appeals (Hudson v Edgett, No. 97/782). That motion was denied. Mr. Hudson then asked the Court to certify a document he had submitted to the Court of Appeals, but court personnel were unable to locate it in the file. Although Mr. Hudson's action is directed against the Court of Appeals, I was not personally served in the matter. The Attorney General's Office is handling the matter and I would be more than happy to supply any additional information concerning that matter or refer any inquiries in that regard to the appropriate Assistant Attorney General.

3. Liang-Houh Shieh v Pataki, et al. (OAG No. 98-000881-0)\*

Dr. Shieh, apparently disgruntled over a bar admission matter, obtained criminal judgments against members of the Court of Appeals and others in Taiwan without ever serving any member of the Court. Again, the New York State Attorney General's Office is working on the matter with outside counsel to have these "criminal" judgments vacated in Taipei. However, that process is not as of yet entirely successful. Any documents that we have received are in Chinese. Again, I would be more than happy to provide further materials, if necessary, along with the name and address of the Assistant Attorney General handling the matter.

\* There is also a related matter involving the Taipei Economic and Cultural Office in New York.

4. Multani v U.S. DOJ, et al (97 - CV - 628)

Bruce Feldman, head of the Attorney General's Litigation Bureau, reports that this case was dismissed, and the Attorney-General's file closed, in January 1999. This Federal court action followed proceedings in State courts bearing the same title. On June 5, 1996, the State action was dismissed by Supreme Court, Erie County (Whelan, J., Index No. I-1996-1923). Multani appealed to the Appellate Division, Fourth Department, which affirmed in an order entered November 8, 1996 (Denman, P.J., Green, Wesley, Doerr and Boehm, JJ., No. 1723). Multani appealed to the Court of Appeals, which dismissed the appeal *sua sponte* upon the ground that no substantial constitutional question is directly involved on January 9, 1997 (Titone and Wesley, JJ. taking no part, Mo. No. 1716, SSD 117). Apparently Multani then unsuccessfully sought review in the Supreme Court of the United States. The complaint in the Federal action attempts to allege a violation of Multani's right to due process as a result of "judicial malpractice." Multani's motion for default judgment in the Federal action was denied, and the action later was dismissed.

5. Sinacore v NY Ct. of Appeals (8:02-CV-0761-T-27MSS)

The Assistant Attorney General handling this case (Steve Schwartz, tel. 518-473-8047) reports that plaintiff's claims were dismissed with prejudice in late November, 2002. Mr. Sinacore sued the Court of Claims and other State courts, including the Court of Appeals for dismissing his lawsuit challenging certain disciplinary matters involving his employment as a corrections officer. Specifically, he sued the Court of Appeals for not granting leave to hear his appeal of the dismissal below. In an order dated November 19, 2002, the District Court dismissed with prejudice the claims against, *inter alia*, the Court of Appeals, upon the ground that "Judicial Defendants enjoy absolute immunity from Plaintiff's purported Claims."

Additional information concerning any actions brought against the Court of Appeals of the State of New York can be obtained from the Clerk of the Court, the Honorable Stuart M. Cohen, 20 Eagle Street, Albany, NY 12207 (518-455-7810).

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

Answer: My general procedure to resolve a potential conflict of interest has been, and remains, to examine carefully every case before me to determine if I have any familiarity

with the parties outside the confines of that case. If I would not feel comfortable ruling against a party because of that relationship, I will not sit on the case. To ensure no conflicts arise, I have compiled a list of all my investments, boards on which I sit, organizations of which I am a member and people with whom I have worked closely. I routinely cross-reference the parties in a case before me against this list to guarantee that neither a potential conflict of interest exists nor the appearance of such. I have always adhered to the New York Code of Judicial Conduct in that regard (see, Canon 3[C]) and will adhere to the requirements of the Code of Judicial Conduct (28 USC § 455).

23. Outside Commitments During Court Service: Do you have any plans, commitments, or arrangements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.  
Answer: No
24. Sources of Income: List sources and amounts of all income received during the calendar year preceding the nomination, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500. If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.  
Answer: See Financial Disclosure Report, attached as **schedule 2**.
25. Statement of Net Worth: Complete and attach the financial net worth statement in detail. Add schedules as called for. See attached Net Worth Statement.
26. Selection Process: Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts?  
Answer: Yes.
- (a) If so, did it recommend your nomination?  
Answer: No. The Governor's Screening Committee reviews candidates for the District Court.
- (b) Describe your experience in the judicial selection process, including the circumstances leading to your nomination and the interviews in which you participated.  
Answer: I was called to the White House on September 18, 2002 with regard to a vacancy at the Second Circuit. I was interviewed by White House Counsel Alberto Gonzales and staff, along with someone from the Department of Justice. During the interview, I discussed my work at the Court of Appeals and my personal and professional background.

In late December, I was contacted by the White House and told they would like me to complete some paperwork for a background check. I completed several forms, including an SF-86, a White House Questionnaire, the Senate Committee on the Judiciary Questionnaire and a financial disclosure form. I forwarded those forms to the Office of Legal Policy at the Department of Justice.

Thereafter, I was interviewed over the phone by a representative of the Office of Legal Policy -- the interview lasted several hours and covered most of my professional and personal life. I was also interviewed in person by an F.B.I. agent in my Albany chambers. That interview also covered my professional and personal life experiences. I also spoke with the Agent over the phone on two or three occasions to answer questions he had.

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

Answer: No.

Senator CHAMBLISS. Very good. As with all of us, they are the ones who make life worth living every day, and you certainly have a very beautiful family there.

We are pleased to have all of you with us today.

Judge Wesley, you have had significant experience in private practice, as a legislator and as a judge at both the trial and the appellate levels. How do you think that experience has prepared you to serve on the Second Circuit?

Judge WESLEY. Mr. Chairman, I have been very, very fortunate, and it is a good question, because I think to some degree, it reflects upon my life, and I appreciate your asking me.

I have been very blessed in my life. I have had the opportunity to serve in the State legislature; I have served as a trial judge in the State courts and then worked my way up through the intermediate courts. And I think it is important for a judge to always keep their feet firmly grounded in the practical realities of life.

The Second Circuit presents a new challenge for me, and I am excited about it, Mr. Chair, if I am so fortunate to be confirmed. It presents me with the opportunity to continue to deal with State law with regard to diversity cases, but opens up to me a whole new area of law with the Federal jurisdiction and the Federal issues that are presented to the Second Circuit.

Senator CHAMBLISS. Frankly, Judge, one problem that I always have as we engage in these hearings is making sure that we have people serving on the bench who are judges, judges who are there to interpret the Constitution and not make law, because there is a tendency to sometimes move over into that area.

You have been a legislator, you have been a judge, and I would like you to comment on your philosophy on interpreting rather than legislating from the bench, as well as your ability to look at the Constitution, follow precedents, and interpret the law.

Judge WESLEY. Mr. Chair, I appreciate the question, and it is a question I think that presents itself regularly to the American people.

I live in the town where I was born, the Town of Livonia, and occasionally I am called to go to the Livonia Post Office, and every once in a while, someone at the post office will say, "What was that court thinking about when they did that most recent decision?" I call it "the Livonia Post Office test," and I regularly apply it to some of the writings my colleagues present.

Senator Schumer mentioned a statement that I had made at the time of my nomination by Governor Pataki; I reaffirm it. I view myself as having a great deal of healthy respect for the wide diversity of opinions and the forum of public opinion, the legislature, my most recent experience being the State legislature, and certainly the national legislature, the Congress. When one comes from a State like New York, as wide and diverse as New York, and one has the opportunity to serve in the State Assembly, one begins to appreciate how many different points of view there are in my great State, and certainly that is multiplied 10-fold—or 50-fold, quite frankly—with regard to the issues that present themselves in the national Congress.

My view is to continue to respect the separation of powers and the responsibilities of the Congress and to do my job to examine

the statutes enacted by the Congress and the plain intent and meaning of those statutes as expressed in the language therein.

Senator CHAMBLISS. Judge, you have been active in efforts to improve the judicial process, to improve the fairness and efficiency of criminal courts, and to reach out to youth groups to help them understand the law. Could you please explain to the Committee what you have done in these areas and the results that you have achieved?

Judge WESLEY. I will deal with the second part of the question first, Mr. Chair. I have had the opportunity on many occasions to go into classrooms. There was a time in my life when I had anticipated being a teacher, and I think all good lawyers and all good judges are to some degree teachers in the sense that they need to explain their positions and/or to educate others with regard to the opinion that they are writing or the position that they are taking as an advocate. So I enjoy immensely the opportunity to go into the classroom and talk to people, to young people in particular.

When I was a young boy, as was indicated earlier, my dad was a truck driver. I am very proud of that. It was a wonderful experience; I got to ride all over Western New York with him. And my mom was a nurse. Prior to that, she worked in a butcher shop. I always thought that was an interesting switch from butcher shop to being a nurse.

But we come from humble sorts, and I never had any idea what it meant to be a lawyer. There were not many shows about law on TV. But I was very fortunate to have met a lawyer, a practicing lawyer in my home town, who talked with me about it and got me interested in it.

So I try to repay that. I think we have an obligation as professionals—we are blessed with the license to practice law—to go back and to spread the good news about practicing law among young people.

With regard to the second aspect of your question, in 1991, I was the supervising judge of the criminal courts in the Seventh Judicial District in Western New York. It is a seven-county area that goes from Rochester to the Pennsylvania border, about 1.5 million people. The primary court, though, is located in Monroe County. Monroe County is a county of about 750,000 people.

At that time, there was a backlog of criminal indictments of around 220 indictments or more, most of which were over 6 months in length. And it struck me that there were several people who were incarcerated, indigents who could not make bail, who had at in the county jail for upwards of 18 months to 2 years before their trial.

It further occurred to me that the victims of the crimes for which those defendants were charged had waited over a year and a half to 2 years for the court to render justice.

And finally, it occurred to me that from a prosecutor's standpoint, the memories of the witnesses that would be called to testify in those trials might grow dim.

I brought the district attorney together—Howard Rellan happens to be a good friend of Senator Schumer—the public defender of Monroe County, a fellow by the name of Edward Nowak, and representatives of the private criminal defense bar, along with court



staff, right from court clerks to court stenographers to probation officers, and we tried to look at the system as a whole to see why the system was not producing opportunities to fairly and quickly adjudicate matters.

Through a collaborative effort of all those people—attorneys, clerks, civil servants—we rolled up our sleeves, and we got the job done in a thing called the Felony Screening Program. Quite simply, Mr. Chair, it was an opportunity to look at a case very early on, to assess it, to assess its provability—in the vast majority of cases in which the defendant who is arrested ultimately pleads to some crime arising from his or her activity—and to sweep away those cases which could be resolved in a fast fashion and to identify the difficult cases that would need to go to trial.

As mentioned earlier by Senator Clinton, the results were startling. I must tell you I was totally shocked at how quickly we worked away at the backlog—and there was not magic to it, Senator. It was just people of good will, of many different perspectives, working on a problem together.

It became a model that others have adopted around the State. I am quite proud of it and thankful that I had the opportunity to work on it.

Senator CHAMBLISS. Well, you are to be commended for making that effort, Judge. As somebody who practiced law for 26 years, I know that we all do not do enough work of that nature to make sure that justice does prevail in every instance and in every corner of our great country, so I commend you for that.

And having come from a similar background as you did, I know the hard work and dedication that you have endured to get to where we are, so we look forward to moving forward with your nomination.

Judge WESLEY. Thank you.

Senator CHAMBLISS. I understand that Senator Schumer is stuck in a Committee meeting. I regret that you will not have to endure the stern cross-examination that Senator Schumer always brings—and since he is my good friend, I can say that about him.

But we are pleased to have you here and thank you very much for your testimony today.

Judge WESLEY. Thank you very much, Mr. Chair.

Senator CHAMBLISS. I will ask the third panel—Mr. Greer, Mr. Hardiman, Mr. Kravitz, and Mr. Woodcock if they would now come forward.

If each of you would raise your right hand—do you solemnly swear that the testimony you are about to give in the matter now pending before this Committee shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. GREER. I do.

Mr. HARDIMAN. I do.

Mr. KRAVITZ. I do.

Mr. WOODCOCK. I do.

Senator CHAMBLISS. Thank you.

Mr. Greer, we will start with you and move to your left and welcome any opening statement. And I will say initially, Mr. Greer, having grown up in the early years of my life in East Tennessee, up on the Cumberland Plateau, in Monteagle and Sewanee, and

having gone to the University of Tennessee, I am pleased to see you here. It is always nice to see somebody else come out of East Tennessee and do particularly well, as you have done, so we are pleased to have you here.

**STATEMENT OF J. RONNIE GREER, NOMINEE TO BE DISTRICT  
JUDGE FOR THE EASTERN DISTRICT OF TENNESSEE**

Mr. GREER. Thank you very much, Mr. Chairman. I certainly appreciate those comments.

It is a great honor to be here today and at the same time, a very humbling experience.

I do not have an opening statement. I would simply like to express my appreciation to both Senator Frist and Senator Alexander for their comments earlier and, if I may, would like to introduce my family and friends who are here today.

Senator CHAMBLISS. Please do.

Mr. GREER. I would like to first of all introduce my wife, Bunny, who is in the second row here.

Senator CHAMBLISS. Let them stand up if you will, so we can see you back there.

Mr. GREER. And my friends, Billy McCamey and Peggy Freshour, who came here from Greeneville to lend support today, and I appreciate them being here very much.

Bunny and I have a 6-year-old daughter. We did not bring her today—we thought that might be a little much—and she has been very busy this week with kindergarten graduation and dance recitals, so we decided to leave her at home. But I am very proud of my family and very proud to have my family and friends here today.

Senator CHAMBLISS. Great. Well, we can sure understand why. Thank you.

Mr. Hardiman?

[The biographical information of Mr. Greer follows.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full name (include any former names used.)**  
James Ronnie Greer, J. Ronnie Greer, James R. Greer
2. **Address: List current place of residence and office address(es).**  
**Residence:** Greeneville, Tennessee  
**Office:** 206 South Irish Street  
P.O. Box 454  
Greeneville, TN 37744-0454
3. **Date and place of birth.**  
July 26, 1952  
Mountain City, Tennessee
4. **Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**  
Bunny Gale Johnson Greer  
Homemaker
5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**  
University of Tennessee  
College of Law  
1975-80; Doctor of Jurisprudence, 1980  
East Tennessee State University  
1970-1974; Bachelor of Science, 1974
6. **Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.**  
January 1983-present                      Law Firm of J. Ronnie Greer  
(private law practice)                      206 South Irish Street

	Greeneville, TN 37743 (1987 – present)
	200 W. Church Street Greeneville, TN 37743 (1983-1987)
February 1986- November, 1994 (Elected Position)	Member, Senate, Tennessee General Assembly Nashville, TN 37243
October, 1985 – April, 1986 (County Attorney- Appointed)	Greene County, Tennessee 204 North Cutler Street Greeneville, TN 37743
July 1981- November, 1982 (Campaign Manager)	Robin Beard 1982 Committee, U.S. Senate Campaign Nashville, TN
June, 1981 – December, 1981 (Partner)	Law Firm of Hull, Weems, Greer and Charles R. Terry and Associates 109 S. Main Street Greeneville, TN 37743
August, 1980 – May, 1981 (Special Assistant to the Governor – Coordinator of Governor's Policy Group)	Office of Governor Lamar Alexander State Capitol Nashville, Tennessee
January, 1979 – August, 1980 (Special Assistant to the Governor – Appointments to Boards and Commissions)	Office of Governor Lamar Alexander State Capitol Nashville, TN.
December, 1978 – January, 1979 (Executive Director)	Alexander Inaugural Committee Nashville, TN.
September, 1977 – November, 1978 (Political Director)	Alexander For Governor Committee Nashville, TN.
May, 1977 – August, 1977 (Organizational Director)	Tennessee Republican Party Nashville, TN.

June, 1976 – November, 1976  
(Campaign Manager)

Robin Beard For Congress Committee  
Franklin, TN.

January, 1976 – June, 1976  
(Law Clerk)

Hodges, Doughty & Carson  
617 Main Street  
Knoxville, TN. 37901-0869

May, 1974 – November, 1974  
(1<sup>st</sup> Congressional District  
Coordinator)

Alexander For Governor Committee  
Nashville, TN.

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

None

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

Toll Fellow, Council of State Governments, 1991

American Council of Young Political Leaders, 1987  
Study Tour of Argentina and Uruguay

Tennessee Conservation League  
Legislator of the Year, 1989

Environmental Action Fund  
Legislator of the Year, 1993

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

Tennessee Bar Association  
Chairman, Public Relations Committee, Early 1980's

Greene County Bar Association

Association of Trial Lawyers of America

Tennessee Trial Lawyers Association

American Bar Association

Member, Judiciary Committee  
Tennessee State Senate  
1986-1992

Admissions Committee, U.S. District Court  
Eastern District of Tennessee

Local Rules Advisory Committee, U.S. District Court  
Eastern District of Tennessee

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

I do not belong to any organization that is active in lobbying before public bodies.

Member, Greeneville/Greene County Chamber of Commerce

Member, Towering Oaks Baptist Church

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

Tennessee Supreme Court  
October 22, 1980  
(Includes Tennessee Court of Appeals, Court of Criminal Appeals, and all Trial Courts)

United States District Court  
Eastern District of Tennessee  
1981

United States Court of Appeals for the Sixth Circuit  
September 5, 1985

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

I have not written or edited any books, articles, reports or other published material. During my campaigns for the Tennessee State Senate I made numerous campaign "stump" speeches, almost always extemporaneously. While serving in the Tennessee Senate from 1986 to 1994, there were numerous floor or committee speeches or remarks to various groups. These were almost always done extemporaneously or from a handwritten outline. I do not have copies of any speeches or outlines that I might have used. I do have a transcript of a floor speech I made on the floor of the Senate during debate on a proposal to place on the statewide ballot a referendum on removing Tennessee's constitutional prohibition on lotteries and that transcript is attached. Also attached is a letter to the editor of the Greeneville Sun written by me in October, 2002, expressing my opinion on the lottery referendum. I have also been able to locate a few newspaper articles concerning speeches or remarks made by me at various events or community gatherings. Copies of these are attached.

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

I am in excellent physical and mental health. My last physical examinations were in October and December, 2002.

14. **Judicial Office:** State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

None

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

Not Applicable

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for which were not confirmed by a state or federal legislative body.

Tennessee State Senate, 1986 – 1994  
Elected 1986 and 1990

County Attorney, Greene County, Tennessee  
October, 1985 – April, 1986  
Appointed by Greene County Commission

17. Legal Career:

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

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

No

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

I have had a solo practice from 1983 to present

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

January, 1976 – June, 1977, Hodges Doughty and Carson,  
Knoxville, Tennessee, Law Clerk

June, 1981 – December, 1981, Hull, Weems, Greer and Charles  
R. Terry and Associates, 109 S. Main Street, Greeneville, TN.  
37743, Partner

January, 1983 – Present, Law Firm of J. Ronnie Greer, 200 W.  
Church Street, Greeneville, TN 37743, Solo Practice

1987- Present, Law Firm of J. Ronnie Greer



206 S. Irish Street, Greeneville, TN 37743, Solo Practice

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

I have had a typical, general small town law practice since 1983. My practice has consisted of considerable litigation involving both jury and bench trials in the practice areas of state and federal criminal defense, personal injury and workers compensation. I have also practiced in the areas of domestic relations and have represented a number of clients on environmental issues and before state and federal agencies. The only real change in my practice since 1983 has been that I no longer practice in the bankruptcy court and have reduced the number of domestic relations clients represented.

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

My typical former clients have been individuals, although I have represented a few corporate clients. I have not had an area of specialization.

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

I have appeared in court, both state and federal, frequently; court appearances were somewhat less frequent from 1986-1994 because of my service in the Tennessee General Assembly

2. What percentage of these appearances was in:

- (a) federal courts;
- (b) state courts of record;
- (c) other courts.

Federal – 25% (est);  
State Courts of Record – 60% (est);  
Other – 15% (est).

3. What percentage of your litigation was:

- (a) civil;
- (b) criminal.

Civil Proceedings – 60% (est);  
Criminal Proceedings – 40% (est).

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

Approximately 200 as sole counsel or chief counsel

5. What percentage of these trials was:

- (a) jury;
- (b) non-jury.

Jury – Approximately 25%  
Non-Jury – Approximately 75%

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

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

I. United States of America vs. Alpine Industries, Inc., and William J. Converse, No. 2: 97-CV-509, U.S. District Court, Eastern District of Tennessee, Northeastern Division. 1998 – 2001; Currently on appeal in the Sixth Circuit Court of Appeals.

Trial Judge: United States Magistrate Judge Dennis H. Inman

Summary of the Case:

Civil Action brought by the United States (on behalf of the Federal Trade Commission) against Alpine Industries, Inc., a Tennessee corporation, and William J. Converse, its president, seeking civil penalties and injunctive relief for alleged violations by the defendants of a consent decree prohibiting certain product claims by the defendants without scientific substantiation for the claims. Preparation for the trial included review and organization of thousands of pages of documents and depositions of approximately two dozen fact and expert witnesses. The liability phase of the trial was tried before a jury, and after a fourteen-day trial, resulted in a verdict partially favorable to the government and partially favorable to the defendants. I represented the defendant William J. Converse. The government sought civil penalties of \$150 million dollars. The penalty phase of the case was tried before the court over a one-week period. Civil penalties were awarded in the amount of \$1.49 million dollars.

Other counsel: For Alpine Industries, Inc.:  
William A. Erhart, Esquire  
315 E. Main Street, Ste. 110  
Anoka, MN. 55303  
(763) 427-7800

For The United States of America:  
Elizabeth Stein, Esquire  
United States Department of Justice  
Division of Consumer Litigation  
1331 Pennsylvania Avenue, NW, Ste. 950N  
Washington, D.C. 20044  
(202) 307-0486

Helen Smith, Esquire  
Assistant United States Attorney  
220 West Depot Street, Ste. 423  
Greeneville, TN. 37743  
(423) 639-6759

Elena Paoli, Esquire  
Federal Trade Commission  
601 Pennsylvania Avenue, NW  
Washington, D.C. 20850  
(202) 326-2974

II. United States of America vs. Robert Logan, et. al., No. CR2-96-17, U.S.

District Court, Eastern District of Tennessee, Northeastern Division, 1996 - 1998

Trial Judge: The Honorable James H. Jarvis, United States District Court Judge

**Summary of the Case:**

This criminal case was filed in the United States District Court for the Eastern District of Tennessee, Northeastern Division, in August, 1996 naming numerous co-defendants and charging various violations of mail fraud, wire fraud, bank fraud statutes, and conspiracy to defraud the government. All of the defendants had been officers and/or employees of Logan Laws Financial Corporation, a Johnson City, Tennessee company involved in the financing of mobile homes for low income home buyers through various Department of Housing and Urban Development programs. I was appointed pursuant to the Criminal Justice Act to represent Robert Logan, who was a vice president of the corporation. The discovery in the case involved the production by the government of over one million documents which had to be reviewed and organized for trial. The case proceeded to trial against four of the co-defendants and spanned a period of approximately five weeks. The jury returned a verdict of not guilty as to Robert Logan on all counts charged in the indictment.

Other counsel: For the United States of America:  
M. Neil Smith, Esquire  
Assistant United States Attorney  
220 West Depot Street, Ste. 423  
Greeneville, TN. 37743  
(423) 639-6759

Guy W. Blackwell, Jr., Esquire  
Assistant United States Attorney  
220 West Depot Street. Ste. 423  
Greeneville, TN. 37743  
(423) 639-6759

For John M. Logan:  
John T. Milburn Rogers, Esquire  
Jerry Laughlin, Esquire  
100 South Main Street  
Greeneville, TN. 37743  
(423) 639-5183

For Alan Michael Laws:  
Robert W. Ritchie, Esquire  
606 West Main Avenue, Ste. 300  
Knoxville, TN 37901  
(865) 637-0661

For Ramon Sanchez-Vinas:  
James T. Bowman, Esquire  
128 East Market Street, Ste. 1  
Johnson City, TN. 37604  
(423) 926-2022

- III. State of Tennessee vs. Randolph Wayne Brobeck, 751 S.W. 2d 828, 76 A.L.R. 4<sup>th</sup> 1137 (Tenn. 1988).

Trial Judge: The Honorable James E. Beckner, Judge of the Criminal Court of the Third Judicial District, State of Tennessee, Sitting at Greeneville

Summary of the case:

This was a capital murder case in which the defendant, Randolph Wayne Brobeck, was charged with felony murder and aggravated rape. The defendant was convicted in the Criminal Court of Greene County on both counts of the indictment after a week long trial. The State then withdrew its death penalty request. The Court of Criminal Appeals in Tennessee affirmed the felony murder conviction and reversed and dismissed the aggravated rape conviction. The issue in the Court of Criminal Appeals was one of first impression, whether or not Tennessee's aggravated rape statute requires a finding that the victim be alive at the moment of sexual penetration in order for the offense of aggravated rape to be committed. The Tennessee Supreme Court reviewed the case and, in a fairly lengthy opinion, held that the statute does not require a finding that the victim be alive at the moment of penetration and the fact that death may have preceded penetration by an instant does not negate the commission of the crime of aggravated rape and reduce it to a relatively minor offense associated with erotic attraction to dead bodies. I represented the defendant, Randolph Wayne Brobeck, both at the trial and on appeal.

Other counsel: Co-Counsel for defendant, Randolph Wayne Brobeck:  
Melody Kranifeld Starr, Esquire  
1104 Tusculum Boulevard, Ste. 128  
Greeneville, TN. 37745

(423) 787-2203

**Trial Counsel for State of Tennessee:**  
C. Berkeley Bell, Jr., Esquire  
District Attorney General  
109 South Main Street, Ste. 501  
Greeneville, TN. 37743  
(423) 787-1450

**Appellate Counsel for State of Tennessee:**  
W.J. Michael Cody, Attorney General and Reporter  
425 Fifth Avenue N  
Nashville, TN. 37202  
(615) 741-6474

**Kathy N. Principe, Assistant Attorney General**  
425 Fifth Avenue N  
Nashville, TN. 37202  
(615) 741-6474

**Amicus Curiae,**  
Tennessee Association of Criminal Defense Lawyers

**Kenneth J. Ries, Esquire**  
Neal and Harwell, PLC  
2000 First Union Tower  
150 Fourth Avenue North  
Nashville, TN. 37219  
(615) 244-1713

**Paul J. Morrow, Jr., Esquire**  
530 Church Street, Ste. 600  
Nashville, TN. 37243  
(615) 741-9339

- IV. Anthony Sutton vs. Tennessee Civil Service Commission, 779 S.W. 2d 788 (Tenn. 1989).

**Trial Judge:** The Honorable Irvin H. Kilcrease, Jr., Chancellor, Davidson County Chancery Court, Nashville, TN.

**Summary of the Case:**

This case involved the appeal of a decision of an administrative state agency, the Tennessee Civil Service Commission, which had held that the plaintiff could be terminated from his state employment for excessive absenteeism in spite of the fact that he was using annual and sick leave granted him by act of the Tennessee General Assembly. The Davidson County, Tennessee Chancery Court upheld the Civil Service Commission decision and the case was appealed to the Tennessee Court of Appeals, Middle Section, at Nashville, where the Court, in a 2 - 1 decision, ruled that a state employee could not be terminated from his or her employment for using annual or sick leave granted by act of a legislature. The Tennessee Supreme Court granted review of the case and, in resolving this question of first impression, held, in a 3 - 2 decision, that a civil service employee could not in fact be terminated from his or her employment on the basis of absenteeism where the employee was using annual or sick leave granted to the employee by Act of a legislature. I represented the plaintiff, Anthony Sutton, before the Civil Service Commission, at trial and on appeal.

Other counsel: For Tennessee Civil Service Commission:  
 Michael Catalano  
 Office of the Attorney General and Reporter  
 425 Fifth Ave. N.  
 Nashville, TN. 37202  
 (615) 741-6474

V. State of Tennessee vs. Bill C. Whitehead, 43 S.W. 3d 921 (Tenn. Crim. App., 2000).

Trial Judge: The Honorable James E. Beckner, Criminal Court Judge, Third Judicial District, State of Tennessee, Sitting at Greenville

Summary of the Case:

This state criminal case involved the prosecution of a former Greene County Commissioner for a felony charge of having a financial conflict of interest under a Tennessee statute involving county purchasing procedures. The felony provision in the statute was a "local option" provision which had been adopted in fourteen counties in the State of Tennessee. The defendant challenged the constitutionality of the statute on numerous grounds, including the equal protection provisions of both the state and federal constitutions. The trial judge denied the defendant's motion to dismiss but granted an interlocutory appeal to the Tennessee Court of Criminal Appeals. The Tennessee Court of Criminal Appeals agreed to review the trial court's judgment which presented a case of first impression in the State of Tennessee. The Court of Criminal Appeals held that a felony statute which is "local option" in nature and applicable in only fourteen counties of the state does in fact

violate the equal protection provisions of both the Tennessee and federal constitutions and dismissed the indictment. No application for review by the Tennessee Supreme Court was filed by the State of Tennessee in this case. I represented the defendant, Bill C. Whitehead.

Other counsel: Trial Counsel for State of Tennessee:  
C. Berkeley Bell, Jr., Esquire  
District Attorney General  
109 South Main Street, Ste. 501  
Greenville, TN. 37743  
(423) 787-1450

Appellate Counsel for State of Tennessee:  
Elizabeth B. Marney, Esquire  
Assistant Attorney General  
Criminal Justice Division  
425 Fifth Avenue North  
Nashville, TN. 37243  
(615) 741-2850

VI. Hadiopoulos vs. Hadjopoulos, 1998 WL 668804 (Tenn. Ct. App. 1998).

Trial Judge: The Honorable Ben K. Wexler, Circuit Court Judge, Third Judicial District, State of Tennessee, Sitting at Greenville

Summary of the Case:

This domestic relations case involved the question of whether or not the non-custodial father of a minor child of "tender years" would be denied the ordinary visitation generally reserved for a non-custodial parent after a divorce simply because of the child's age. The trial court restricted the non-custodial father's visitation and denied him overnight visitation with the minor child until the child reached the age of three years. On appeal, the Tennessee Court of Appeals, in a case of first impression, held that non-custodial parents could not be denied overnight visitation with a minor child simply because of the child's age unless it was proven that the non-custodial father presented a risk of harm to the minor child. This case is an important case dealing with the rights of non-custodial parents and is a frequently cited case in Tennessee domestic relations law. I represented the father, Mr. Hadjopoulos.

Other counsel: For the Defendant/Appellee:  
Leroy Tipton, Jr., Esquire  
115 East Depot Street



Greeneville, TN. 37743  
(423) 638-1211

VII. State, ex. rel. Lockert vs. Crowell, 1986 WL 1649 (Tenn. 1986).

Trial Judge: The Honorable Robert Brandt, Chancellor, Davidson County  
Chancery Court, Nashville, Tennessee

Summary of the Case:

This case arose while I was serving as County Attorney for Greene County, Tennessee. Greene County's State Senator Tom Garland, who was elected to a four year term representing Senate District 3 in November, 1982, resigned prior to the end of his elected term. At the time the Senator was elected, Senate District 3 consisted of all of Hancock, Hawkins, Greene and Unicoi counties and a portion of Washington County. The division of Washington County had been held unconstitutional by the Tennessee Supreme Court in 1983 and the General Assembly had responded to that decision by reapportioning Senate Districts 1 and 3 such that Senate District 1 was composed of Johnson, Carter, Unicoi and Greene Counties with Washington and Hawkins counties comprising Senate District 3. The Tennessee Constitution provides that, upon the resignation of a member of the General Assembly, a successor shall be elected by the legislative body of the replaced legislator's county of residence at the time of his or her election. Senator Garland's place of residence was Greene County, Tennessee. The State of Tennessee, acting through the Secretary of State, filed this action in the Davidson County Chancery Court seeking declaratory and injunctive relief and the Chancery Court issued an injunction in which it held that it could not enjoin the Greene County Commission from electing a successor Senator but that it could mandate that the successor be chosen from only residents or qualified voters of Hawkins or Washington Counties. The injunction had the effect of requiring the Greene County Commission to elect a successor to the District 3 Senate position from residents or voters of two other counties. A petition was filed on behalf of Greene County, Tennessee for a direct appeal to the Tennessee Supreme Court and for an expedited hearing. Within approximately thirty days of the Chancery Court decision, the Tennessee Supreme Court reversed the Chancery Court's ruling and permitted Greene County to proceed with its efforts to elect a successor Senator for Senate District 3.

Other counsel: Trial and Appellate Counsel for State of Tennessee:  
Michael W. Catalano, Deputy Attorney General  
425 Fifth Avenue N.  
Nashville, TN. 37202  
(615) 741-6474

VIII. Fourakre vs. Perry, 667 S.W. 2d 483 (Tenn. App. 1983)

Trial Judge: The Honorable Joe M. Ingram, Giles County, Tennessee Circuit Court

## Summary of the Case:

This was a wrongful death action brought for the death of plaintiff's wife which occurred in a collision at an intersection when the plaintiff attempted to turn his vehicle left across the path of the defendant's vehicle, a Tennessee State Trooper, who was on an emergency call with emergency warning devices operating. The plaintiff had previously filed an action against the State of Tennessee, the defendant's employer, which had held in favor of the State finding there was not sufficient evidence that the Trooper was negligent in the operation of his emergency vehicle under the circumstances surrounding this claim. Thereafter, the plaintiff filed this action against the defendant Trooper in the Giles County Circuit Court. On behalf of the defendant, motion was made to dismiss on the basis that the plaintiff was collaterally estopped and barred by the doctrine of res judicata from pursuing his claim in the trial court after an adverse decision of the Tennessee Claims Commission an administrative agency. The trial court overruled the motion but granted an interlocutory appeal to the Tennessee Court of Appeals. The Court of Appeals accepted the case for review and reversed the trial court, holding and that the doctrines of res judicata and collateral estoppel are equally applicable to the judicial determinations of an administrative agency, thus barring plaintiff's action in this case. This was a case of apparent first impression in the State of Tennessee and is a frequently cited case in the Tennessee reported decisions. I represented the defendant in this case.

Other counsel:       Co-Counsel for Defendant/Appellant:  
Charles R. Terry, Esquire  
918 West First North Street  
Morristown, TN. 37815  
(423) 586-5800

For Plaintiff/Appellee:  
Jack B. Henry, Esquire  
(Deceased)

IX. C & C Millwright Maintenance Company, Inc. vs. Town of Greeneville, No. CIV-2-92-487, United States District Court, Eastern District of Tennessee, Northeastern Division, 1992 – 1995.

Trial Judge: The Honorable Leon Jordan, United States District Court Judge

**Summary of the Case:**

This action involved a claim for rescission of a deed and monetary damages filed by C & C Millwright Maintenance Company, Inc. against the Town of Greeneville, Tennessee, on the basis of environmental contamination discovered on property purchased by the plaintiff from the defendant. I represented C & C Millwright Maintenance Company, Inc. and this case involved complicated questions of interpretation of federal and state environmental statutes and rules and regulations. The case involved extensive discovery and negotiations over a period of about three years before it was ultimately resolved and dismissed.

**Other counsel:** For the Town of Greeneville:  
Ronald W. Woods, Esquire  
109 South Main Street, Ste. 301  
Greeneville, TN. 37743  
(423) 639-6811

William L. Penny, Esquire  
2525 West End Avenue, Ste. 1500  
Nashville, TN. 37203  
(615) 244-0020

For Third Party Defendant Weavexx:  
James C. Wright, Esquire  
AmSouth Bank Building, Ste. 810  
P.O. Box 2649  
Knoxville, TN. 37901-2649  
(865) 637-3531

X. **Crum vs. Crum**, 1988 WL 5683 (Tenn. Ct. App. January, 1988).

Trial Judge: The Honorable Dennis H. Inman, Chancellor (Now United States Magistrate Judge), 220 West Depot Street, Greeneville, TN. 37743)

**Summary of the Case:**

This was a divorce action filed by the plaintiff/appellant against his wife, defendant/appellee, whom I represented. The trial court denied a divorce and found that certain acts committed by the wife which would otherwise constitute

cruel and inhuman treatment and, hence, grounds for divorce, could not be considered such because of the fact that wife was mentally incompetent at the time the acts were committed. The husband appealed to the Tennessee Court of Appeals which reaffirmed a recent Tennessee Supreme Court decision which held that acts committed by a spouse suffering from mental incapacity such that the spouse could not appreciate the wrongfulness of his or her conduct or did not have the volition to control his or her actions because of mental illness could not form the basis for grounds for divorce in Tennessee and the divorce was, therefore, denied.

Other counsel:       For Plaintiff/Husband:  
                               Samuel B. Miller, II, Esquire  
                               1315 South Roan Street  
                               Johnson City, TN. 37601  
                               (423) 282-1821

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

I have advised several corporate clients on a wide variety of matters, including compliance with state and federal environmental regulations and statutes, business and real estate acquisitions, state sales tax matters and other similar matters. Since I do have a typical small town practice, I have advised individual clients on a whole host of matters as well.

From 1986 to 1994, I was a member of the Tennessee Senate and served on the Senate Judiciary Committee from 1987 to 1992. The committee considered all legislation introduced dealing with the judiciary, state criminal code and sentencing of criminal defendants. The committee approved bills during my service on the committee which completely rewrote the Tennessee Criminal Code, instituted the Missouri Plan for state appellate court judges and revisions to the Rules of Evidence and Civil and Criminal Procedure. I also served as Chairman of the Senate Environment, Conservation and Tourism Committee from 1987 to 1994. The committee considered bills related to environmental issues, wildlife, state parks and tourism. I was author and chief sponsor of the Tennessee Solid Waste Management Act and either sponsored or co-sponsored numerous other significant environmental legislation.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

I own a small number of shares of Greene County Bancshares which generally pays dividends on a quarterly basis. The amount of dividends paid varies from quarter to quarter depending on the bank's earnings.

There may also be some legal fees earned, but not yet paid, at the time of my initial service as a United States District Court Judge.

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

I maintain a computer record of all prior clients which can be searched for possible conflicts of interest. I have no outside business interests which would pose a possible conflict of interest except for stock ownership in Greene County Bancshares, Inc.

I will strictly follow guidelines in the Code of Judicial Conduct and recuse myself as necessary.

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

No

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

See attached Financial Disclosure Report.

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

See attached Net Worth Statement.

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

1. 1974 – Alexander For Governor  
Candidate: Lamar Alexander  
Volunteer (Primary Campaign); Paid Staff (General Election Campaign) – 1<sup>st</sup> Congressional District Coordinator
2. 1976 – Robin Beard For Congress Committee  
Candidate: Congressman Robin L. Beard (TN.-6)  
Campaign Manager, (responsibility for oversight of all major Aspects of campaign)
3. 1978 – Alexander For Governor Committee  
Candidate: Lamar Alexander  
Political Director, (responsible for oversight and direction of county political organization in Tennessee's 95 counties)
4. 1982 – Robin Beard 1982 Committee  
U.S. Senate Campaign  
Candidate: Congressman Robin L. Beard  
Campaign Manager, (responsibility for oversight and direction Of all major aspects of campaign)
5. 2002 – Alexander U.S. Senate Committee  
Candidate: Lamar Alexander  
Volunteer, East Tennessee Region

## III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I have handled numerous cases for indigent clients on a pro bono basis over the last twenty years. I have routinely prepared wills or other documents for clients who could not afford to pay for these services. I have not kept a listing of these cases nor have I kept records of the amount of time devoted to each case. I have also routinely accepted 2 or 3 cases, on the average, per year by appointment of the U. S. District Court pursuant to The Criminal Justice Act, and have accepted appointments by the United States Court of Appeals for the Sixth Circuit to handle criminal appeals under the CJA.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

No.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

There is no selection commission in this jurisdiction to recommend candidates to the federal courts. I discussed my potential nomination with Senator Bill Frist and his staff, with then Senator-Elect Lamar Alexander and with Senator Fred Thompson's staff. I was interviewed by the White House counsel and other members of his staff in December, 2002. I was informed by White House staff in mid-December of the President's intention to submit my nomination to the Senate, subject to the necessary background checks. I was interviewed by agents of the FBI during that process.

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

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

I believe that judges should defer policy making to the legislative and executive branches of government. Judges should be constrained in their decision making by legal precedent and by the plain and literal meaning of constitutional provisions and statutes. Judges should not become problem solvers who use cases pending before them to resolve broad political questions of public policy or to promote social ends, nor should judges decide cases by applying their own policy preferences in making



decisions. I do not subscribe to the view that the constitution means whatever judges say it means. I also believe courts should decline to hear cases when there is not an actual, justiciable controversy where it is alleged that private, legally protected interests of the parties are at issue.

**STATEMENT OF THOMAS M. HARDIMAN, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

Mr. HARDIMAN. Thank you, Mr. Chairman.

Like my colleague and fellow nominee, Mr. Greer, I am humbled and privileged to be here. I thank President Bush for the nomination. I thank Senators Specter and Santorum for those kind words.

I do not have an opening statement, but if the chair would permit, I would like to introduce my family and friends who are with us.

Senator CHAMBLISS. Certainly.

Mr. HARDIMAN. First, my wife Lori is here; my daughter Kate and my son Matthew are both here. Unfortunately, our daughter Marissa did not make the trip, was not able to be here.

I am privileged to have my parents, Bob and Judy Hardiman, and also especially privileged to have my secretary of many years, Kay Wilkinson, here, and her husband Jerry is with us and also the Wilkinson family—Roy, Sheila, and Cassandra. I am very happy that they made the trip down from Pittsburgh as well.

Senator CHAMBLISS. Great.

Thank you all for being here.

Mr. Kravitz, we are glad to have you here.

[The biographical information of Mr. Hardiman follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Thomas Michael Hardiman

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

Office:

Reed Smith LLP  
435 Sixth Avenue  
Pittsburgh, PA 15219

Residence:

105 Hawthorne Road  
Pittsburgh, PA 15238

3. Date and place of birth.

July 8, 1965. Winchester, Massachusetts.

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

Married to Lori (Zappala) Hardiman. Lori is a lawyer who works as General Counsel to The First City Company, Suite 212, Four Gateway Center, Pittsburgh, PA 15222.

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

Georgetown University Law Center, 1987-1990, J.D. received on May 28, 1990.  
University of Notre Dame, 1983-1987, B.A. received on May 17, 1987, including exchange program from January - May of 1986 at Universidad Iberoamericano in Mexico City, Mexico.

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

I have held the following paid positions:

Reed Smith LLP 435 Sixth Avenue Pittsburgh, PA 15219	Partner	1999-Present
Titus & McConomy LLP (f/k/a Cindrich & Titus) Four Gateway Center 20 <sup>th</sup> Floor Pittsburgh, PA 15222	Partner	1996-1999
	Associate	1992-1996
Skadden, Arps, Slate, Meagher & Flom LLP 1440 New York Avenue, N.W. Washington, D.C. 20005	Associate Law Clerk	1989-1992
Pettit & Martin 1800 Massachusetts Avenue, N.W. Washington, D.C. 20006	Law Clerk Summer Associate	1988-1989
Waltham Central Square Taxi 43 Rear Sun Street Waltham, MA 02154	Taxi Driver/ Dispatcher	1987

I have held the following unpaid volunteer positions:

Hearing Officer, Disciplinary Board of the Pennsylvania Supreme Court		1995-1999
Alternate Hearing Officer, Disciplinary Board of the Pennsylvania Supreme Court		1999-Present
Co-Chairman, Transition Team of Allegheny County Executive James C. Roddey		1999-2000
President, Big Brothers Big Sisters of Greater Pittsburgh, Inc.		1999-2000

Co-Chair, Roddey 2003	2000-April 10, 2003
Director, Big Brothers Big Sisters of Greater Pittsburgh, Inc.	1995-Present
Treasurer, Republican Committee of Allegheny County	2000-April 10, 2003
Trustee, Richard A. Zappala Family Foundation	2000-Present

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

None.

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

Fellow, Academy of Trial Lawyers of Allegheny County	
"AV" Rating from Martindale-Hubbell	
Delegate, American Bar Association	1996-1998
House of Delegates	
<u>Georgetown Law Journal</u> , Notes & Comments Editor	1989-1990
<u>Georgetown Law Journal</u> , Associate Editor	1988-1989
Notre Dame Scholar	1983-1987

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

Governor's Judicial Advisory Commission, 5 <sup>th</sup> Judicial District	Member	2000-Present
American Bar Association	Delegate	1996-1998
Pennsylvania Bar Association, Professionalism Committee	Member	1999-Present

Allegheny County Bar Association                      Member                      1992-Present

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

I do not belong to any organizations that lobby before public bodies.

I am a member of:

Big Brothers Big Sisters of Greater Pittsburgh, Inc.  
 Duquesne Club  
 Longue Vue Club  
 Federalist Society

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

Supreme Court of the United States	August 4, 2000
U.S. Court of Appeals for the Third Circuit	December 9, 1996
U.S. Tax Court	November 18, 1994
U. S. District Court for the Western District Of Pennsylvania	September 15, 1992
Pennsylvania Supreme Court	November 19, 1992
District of Columbia Court of Appeals	May 29, 1991
Massachusetts Supreme Judicial Court	December 20, 1990

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

Copies of each of the following were provided in my initial submission.

1. Jeffrey A. Jacobs, Reform of the National Guard: A Proposal to Strengthen the National Defense, 78 Geo. L. J. 625 (1990) (I edited this law review Note).
2. Competency to Stand Trial, The Eighteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1987-1988, 77 Geo. L. J. 489 (1989) (I authored portions and edited this section of this annual survey of criminal procedure).
3. Remarks For The Installation Of The Honorable Mary Jane Bowes, January 2, 2002 (I wrote and delivered this speech).

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

Excellent. Last physical examination - December 18, 2002.

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

None.

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

N/A

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

Hearing Officer, Disciplinary Board of the Pennsylvania Supreme Court (appointed by the Disciplinary Board)	1995-1999
Alternate Hearing Officer, Disciplinary Board of the Pennsylvania Supreme Court (appointed by the Disciplinary Board)	1999-Present
Co-Chairman, Transition Team of Allegheny County Executive James C. Roddey (appointed by County Executive Roddey)	1999-2000
Member, Governor's Judicial Advisory Commission, 5 <sup>th</sup> Judicial District (appointed by Governors Tom Ridge and Mark Schweiker)	2000-Present
Committeeman, Republican Committee of Allegheny County, 14 <sup>th</sup> Ward, 5 <sup>th</sup> District, City of Pittsburgh (elected)	2000-2001
Treasurer, Republican Committee of Allegheny County (elected)	2000-2004

17. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:
- whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;  
  
N/A.
  - whether you practiced alone, and if so, the addresses and dates;  
  
N/A.



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

Reed Smith LLP 435 Sixth Avenue Pittsburgh, PA 15219	Partner	1999-Present
Titus & McConomy LLP (f/k/a Cindrich & Titus) Four Gateway Center 20 <sup>th</sup> Floor Pittsburgh, PA 15222	Partner Associate	1996-1999 1992-1996
Skadden, Arps, Slate, Meagher & Flom LLP 1440 New York Avenue, N.W. Washington, D.C. 20005	Associate	1990-1992

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

My entire legal career has been devoted to litigation work, both civil and criminal. The character of my practice can fairly be divided into three periods, which are discussed below.

I. The Washington Years 1989-1992

I spent the summer of 1989 working in the D.C. office of Skadden, Arps, Slate, Meagher, & Flom. During that summer I was exposed to a variety of practice areas and decided to concentrate on litigation, which was the area that interested me most. I remained employed at Skadden during my third year of law school, working approximately 10-20 hours per week while maintaining a full course load at Georgetown and working as Notes & Comments Editor for the *Georgetown Law Journal*.

After graduation I joined Skadden's Washington, D.C. office as an Associate in the Litigation Group. For two years I worked on a variety of litigation matters related to contracts, securities, white-collar crime, bankruptcy, and energy. Like most young associates at large law firms, I spent most of my time researching and writing, preparing discovery requests, working on

document productions and generally "carrying the bags" of more senior lawyers. In the white-collar area, I was privileged to work with Bob Bennett, former counsel to President Clinton, on two large fraud matters. During my tenure at Skadden, I was given substantial responsibility in a few instances, including:

- serving as second-chair in a successful litigation for Ames Department Stores in the U.S. Bankruptcy Court for the Southern District of New York;
- drafting a summary judgment brief and motion for Sallie Mae that was granted by the U.S. District Court for the Northern District of West Virginia;
- drafting a motion to dismiss, with supporting brief, on behalf of Hyundai Motor Company that was granted by the U.S. Bankruptcy Court for the Eastern District of Michigan.

In addition to my billable hours, Skadden encouraged pro bono work and was supportive of my desire to deploy my legal training and my fluency in Spanish on behalf of immigrants from Latin America. I spent a substantial amount of time volunteering at Ayuda, a legal aid clinic for Spanish-speaking persons. In the two years I was at Skadden, I represented several immigrants, including a judge from Columbia, an accountant from Peru, and Salvadorans who were poor and uneducated. I tried two cases in immigration court by myself and was sole counsel for a woman on whose behalf I obtained a civil protection order as a result of spousal abuse.

While practicing at Skadden I met my wife, Lori, who was then an Associate in Skadden's Corporate and Banking Group. We were married in Lori's hometown of Pittsburgh and chose to live and raise a family there.

## II. The Pittsburgh Associate Years 1992-1996

When considering where to seek employment in Pittsburgh, I resolved to work at a small firm in the hope that I could obtain more in-court litigation experience than a large firm could provide. Accordingly, I accepted an offer from Cindrich & Titus in 1992 and joined its Litigation Group. My first two years at the firm were spent working primarily for Bob Cindrich, who was appointed a District Court Judge by President Clinton in 1994. Judge Cindrich's practice was an interesting mix of high-profile white-collar criminal and civil matters, so I was exposed to a wide diversity of cases. I continued researching and writing quite a bit, but I also took numerous depositions and acted as second chair for Judge Cindrich. Whenever appropriate Judge Cindrich allowed me to handle the matter myself, while he remained available to answer questions and supervise my work.

About the time Judge Cindrich left the firm in 1994, I inherited some of his clients and I began to find and cultivate new clients. In one case, I assumed principal responsibility for a

criminal and civil fraud investigation in federal court that involved in excess of \$20 million in disputed claims. In addition, I obtained substantial experience as lead counsel on numerous cases involving real estate, injunctions, civil rights, securities, constitutional law, taxation and non-competition agreements. During 1995-96, about 75% of my work was for clients I had generated while the remaining 25% was for clients of the firm's two senior partners, Paul Titus and Bert McConomy. As with Judge Cindrich, both Paul and Bert were extremely generous with their time and guidance. To the extent I have become a capable litigator, it is largely due to the time that those three gentlemen spent teaching and advising me based on their more than 100 years of experience in the law.

III. The Partnership Years 1996-2003

Since I was elected Partner at Titus & McConomy in 1996, I have been engaged in an active civil and criminal litigation practice in federal and state courts. The subject matter of the cases I handle has not changed much since I first began practicing law. The principal change during the past seven years is that I have been lead or sole counsel on all matters instead of serving as "second" or "third" chair. Thus, I have spent substantial time managing my caseload and the work of several talented associates who have worked with me at Titus & McConomy and Reed Smith. Rather than list here some of the most significant matters I have handled in the past five years, I refer to the cases listed below in response to question 18.

Serving as lead counsel is challenging and rewarding. I have represented individuals and organizations at every level of the federal and state courts and argued cases in all of these courts, except for the United States Supreme Court. There is no greater satisfaction than winning a case for a client whose life will be changed for the better. Unfortunately, the converse is true as well. Having been involved in over 50 cases in which a judgment was entered, I have celebrated victory with my clients and held their hands in defeat. In all cases, I have worked to ensure that my clients were zealously represented within the bounds of the law and the Rules of Professional Conduct. Win, lose, or draw, I have made a conscious effort to maintain a high degree of professionalism and collegiality with the bench and bar.

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

I have represented individuals, corporations, partnerships, and unincorporated associations. My practice has encompassed a broad range of both civil and criminal matters, although I could fairly be described as having specialized knowledge in real estate litigation.

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

I have appeared in court frequently. I estimate that I have averaged between one and two court appearances per week during my legal career.

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

- (a) federal courts - 25%  
(b) state courts of record - 70%  
(c) other courts - 5%

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

- (a) civil proceedings - 95%  
(b) criminal proceedings - 5%

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

I have not kept a record of all of the cases I have handled in my career. For marketing purposes, a few years ago I began compiling a list of matters I have handled. That list, which is an incomplete record of my cases, indicates 54 cases that have gone to verdict or judgment, broken down as follows:

Sole Counsel:	28
Chief Counsel:	14
Associate Counsel:	12

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

Jury: 10%  
 Non-jury: 90%

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

- (a) the date of representation;  
 (b) the name of the court and the name of the judge or judges before whom the case was litigated; and  
 (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. *William L. Dailey, et al. v. John DeFazio, et al.*,  
 Civil Action No. 01-1911 (W.D. Pa. 2001)

a. Summary and Significance of the Case:

In this matter I have served as lead counsel to several individuals and the Republican Committee of Allegheny County in their challenge to the legality of redistricting plans adopted by Allegheny County Council after the 2000 Census. We alleged that the redistricting plan adopted by County Council violated both the United States Constitution and the Allegheny County Administrative Code. The District Court agreed that the redistricting plan violated the Administrative Code and held the plan invalid. After County Council passed a second plan, we filed another case in federal court, which was rendered moot because County Council passed a third redistricting plan shortly before trial was scheduled on the second plan. A trial on the legality of this third plan was held on December 16, 2002. The district court ruled against my clients, finding that the third redistricting plan adopted by County Council did not violate federal or state law. The case involves a matter of public interest because the voting rights of over 118,000 persons were at stake and the redistricting was adopted pursuant to a new "home rule" government.

b. Judge:  
Trial Court: Hon. Robert J. Cindrich  
U.S. District Court for the Western  
District of Pennsylvania

c. Co-Counsel:  
Robert M. Owsiany, Esquire  
Plummer, Harty & Owsiany, LLP  
2800 Gulf Tower  
707 Grant Street  
Pittsburgh, PA 15219  
(412) 566-1625

Associate Counsel:  
Brian T. Himmel, Esquire  
Reed Smith LLP  
435 Sixth Avenue  
Pittsburgh, PA 15219  
(412) 288-4058

d. Opposing Counsel:  
John F. Cambest, Esquire  
Dodaro, Kennedy & Cambest  
1001 Ardmore Boulevard  
Pittsburgh, PA 15221  
(412) 243-1600

The Honorable Terrence McVerry  
U. S. Post Office and Courthouse  
Room 1008  
Pittsburgh, PA 15219  
(412) 208-7495

Edward Still, Esquire  
Edward Still Law Firm  
Title Building, Suite 710  
300 Richard Arrington Blvd., North  
Birmingham, AL 35203-3352  
(205) 322-1100

David Armstrong, Esquire  
Dickie McCamey & Chilcote P.C.  
Suite 400  
Two PPG Place  
Pittsburgh, PA 15222  
(412) 392-5227

2. *Andy Modrovich, et al. v. Allegheny County Pennsylvania*  
Civil Action No. 01-0531 (W. D. Pa. 2001) (pending)

a. Summary and Significance of the Case:

I am working pro bono, with a team of Reed Smith lawyers who are defending Allegheny County in an equity action brought by two atheists who seek to force the removal of The Commandments plaque from the side of the Allegheny County Courthouse. The Commandments Plaque, erected in 1917, has substantial historical value as it was intended to honor those who perished in World War I and to endorse the rule of law over the whims of the powerful. This case is of great interest to numerous residents of Allegheny County, as indicated by the hundreds of letters and telephone calls that the County Executive has received relative to the matter. The case has been stayed by the District Court pending a ruling by the U. S. Court of Appeals for the Third Circuit in a case involving The Ten Commandments plaque located in Chester County, Pennsylvania.

b. Judge:

Trial Court: Hon. Donetta W. Ambrose  
U.S. District Court for the  
Western District of Pennsylvania

c. Co-Counsel:

Ralph A. Finizio, Esquire  
Houston Harbaugh, P.C.  
Two Chatham Center  
12<sup>th</sup> Floor  
Pittsburgh, PA 15219  
(412) 288-2223

Lead Counsel:

Perry A. Napolitano, Esquire  
Reed Smith LLP  
435 Sixth Avenue  
Pittsburgh, PA 15219

(412) 288-7230

- d. **Opposing Counsel:**  
Alex J. Luchenitser, Esquire  
Americans United For Separation of Church & State  
518 C Street, NE  
Washington, DC 20002  
(202) 466-3234

3. *Beverly Powell v. Housing Authority of the City of Pittsburgh*,  
812 A.2d 1201 (Pa. 2002)

a. **Summary and Significance of the Case:**

In this case I was lead counsel to the Housing Authority of the City of Pittsburgh both at trial and on appeal to the Supreme Court of Pennsylvania. The case involved the constitutionality of regulations promulgated by the U. S. Department of Housing and Urban Development that permit housing authorities to terminate Section 8 benefits to those whose family members engage in violent criminal activity. The trial court held the regulations unconstitutional, ruling against my client.

We appealed to Commonwealth Court, which ruled against us by a panel vote of 2-1. The Supreme Court of Pennsylvania granted our Petition for Allowance of Appeal and I argued the case on March 2, 2002. On December 20, 2002, the Supreme Court unanimously reversed Commonwealth Court and upheld the validity of HUD's regulations. This precedent permits all public housing authorities the discretion to evict recipients who commit violent crimes.

- b. **Judge:**  
Trial Court: Hon. R. Stanton Wettick  
Court of Common Pleas of Allegheny County  
Intermediate Appellate Court: Pennsylvania Commonwealth Court  
Final Appellate Court: Pennsylvania Supreme Court

- c. **Co-Counsel:**  
Associate Counsel:  
Dianna Calaboyias Wyrick, Esquire  
Reed Smith LLP  
435 Sixth Avenue  
Pittsburgh, PA 15219



(412) 288-4058

d.       Opposing Counsel:  
Richard S. Matesic, Esquire  
Neighborhood Legal Services Association  
928 Penn Avenue  
Pittsburgh, PA 15222-3799  
(412) 255-6700

Martha S. Helmreich, Esquire  
Witold Walczak, Esquire  
American Civil Liberties Union  
313 Atwood Street  
Pittsburgh, PA 15213  
(412) 456-2000

Evalynn Welling, Esquire  
Community Justice Project  
1705 Allegheny Building  
Pittsburgh, PA 15219  
(412) 391-5225

4.   *Robert Smith, et al. v. Michael F. Coyne, et al.*,  
555 Pa. 21, 722 A.2d 1022 (Pa. 1999)

a.       Summary and Significance of the Case:

This case began as a simple residential landlord-tenant case and expanded into a vigorous dispute among several parties, including individuals, corporations, public agencies, and non-profit organizations. At issue was the constitutionality of Rule 1008(B) of the Rules of District Justice Procedure. Rule 1008(B) is significant because it governs the ability of a tenant to remain in possession of a leasehold while an appeal to Common Pleas Court is pending.

I represented Landlord Service Bureau, Inc., a consortium of "mom and pop" landlords interested in upholding the constitutionality of Rule 1008(B) because it required an appealing tenant to pay rent due into court in order to remain in possession during the appeal. The Housing Authority of the City of Pittsburgh, a real estate company called Pittsburgh Factors, and the American Congress of Real Estate had the same interest as my client and I cooperated with counsel for those entities in preparation of the case. Neighborhood Legal Services and the Community Justice Project represented several tenants who sought to invalidate Rule 1008(B).

In a scholarly opinion exceeding 40 pages, Judge Wettick ruled against my client and the other groups representing the landlord position. Judge Wettick held that Rule 1008(B) violated Article I, Section 6 of the Pennsylvania Constitution which guarantees the right to trial by jury. Judge Wettick rejected all of the other claims made by the tenants, including alleged violations of due process and equal protection of the law under the federal and state constitutions.

We appealed the case directly to the Pennsylvania Supreme Court and I was chosen to argue the landlords' position. The Supreme Court of Pennsylvania reversed Judge Wettick's decision unanimously. The decision has improved the administration of justice in Allegheny County because tenants who previously filed frivolous appeals now have no incentive to do so.

b. Judge:  
Trial Court: Hon. R. Stanton Wettick, Jr.  
Court of Common Pleas of  
Allegheny County  
Appellate Court: Pennsylvania Supreme Court

c. Co-Counsel:  
Bradley S. Dornish, Esquire  
Dornish & Scolieri, P.C.  
Allegheny Building, Suite 1100  
429 Forbes Avenue  
Pittsburgh, PA 15219  
(412) 765-2726

Vincent Scaglione, Jr., Esquire  
Dickie, McCamey & Chilcote, P.C.  
Two PPG Place, Suite 400  
Pittsburgh, PA 15222  
(412) 392-5339

Associate Counsel:  
Dianna Calaboyias Wyrick, Esquire  
Reed Smith LLP  
435 Sixth Avenue  
Pittsburgh, PA 15219  
(412) 288-7238

- d. Opposing Counsel:  
 Paul W. O'Hanlon, Esquire  
 Richard Matesic, Esquire  
 Neighborhood Legal Services Association  
 928 Penn Avenue  
 Pittsburgh, PA 15222  
 (412) 255-6700
5. *Borough of Edgewood, et al., v. Henry Cisneros, et al.*,  
 129 F.3d 1254 (3d Cir. 1997)
- a. Summary and Significance of the Case:  
 This high-profile case involved the purchase of single family homes -- at prices above the median home price in Allegheny County -- for use as public housing. I was retained by two African-American residents of Edgewood and its Borough Council to challenge the legality of the purchases, which were made pursuant to a federal court order known as the Sanders Consent Decree. Soon after the Allegheny County Housing Authority announced that it was going to purchase eight homes in Edgewood, we filed a Motion for a Preliminary Injunction and a Complaint In Equity. The U. S. District Court for the Western District of Pennsylvania denied the Motion and dismissed the Complaint. We filed an appeal with the U. S. Court of Appeals for the Third Circuit, which eventually upheld the District Court. During the pendency of the appeal, I worked to broker a settlement and we were advised that the County Housing Authority received permission from the Department of Housing and Urban Development to find homes in municipalities in other areas of Allegheny County besides Edgewood and other Eastern suburbs. As a result, Edgewood received three units instead of the originally scheduled eight.
- The *Edgewood* case was my first experience dealing extensively with the media. I appeared on television, radio, and was quoted in print media. The case required poise and tact when dealing with an emotionally-charged public issue.
- Soon after the case was concluded, the Allegheny County Housing Authority retained me as special litigation counsel. This was the first time that I was hired by a party that I had sued.
- b. Judge:  
 Trial Court: Hon. Gustave Diamond  
 U.S. District Court for the Western  
 District of Pennsylvania

Appellate Court: U.S. Court of Appeals for Third Circuit

c. Associate Counsel:  
Joseph P. McHugh, Esquire  
Reed Smith LLP  
435 Sixth Avenue  
Pittsburgh, PA 15219  
(412) 288-7236

d. Opposing Counsel:  
Henry Azar, Esquire  
901 E Street, NW  
Washington, DC 20004  
(202) 616-8475

John W. Joyce, Esquire  
Allegheny County Housing Authority  
341 Fourth Avenue  
Fidelity Building  
Pittsburgh, PA 15222  
(412) 355-2157

Donald Driscoll, Esquire  
Community Justice Project  
1705 Allegheny Building  
429 Forbes Avenue  
Pittsburgh, PA 15219  
(412) 434-6012

6. *Ronald Alexander, et al. v. Joseph Riga, et al.*,  
208 F.3d 419 (3d Cir. 2000), *cert. denied*, 531 U.S. 1069 (2001)

a. Summary and Significance of the Case:  
In this case I was retained to defend a husband and wife, both first-generation Italian immigrants, who were accused of violating the Fair Housing Act of 1968 and the Civil Rights Act of 1866. After a hard-fought two week trial, the jury returned a verdict in favor of my clients. The U. S. Court of Appeals for the Third Circuit reversed and remanded the case for a trial on the issues of punitive damages and attorneys' fees, despite the fact that the plaintiffs were awarded no compensatory damages. We filed a Petition for Writ of Certiorari with the U. S. Supreme Court, which was denied. This case involves several cutting-edge legal issues, including standing to sue, liability without damages, and causation.

- b. Judge  
Trial Court: Hon. William L. Standish  
U.S. District Court for the  
Western District of Pennsylvania  
  
Appellate Court: U.S. Court of Appeals for the Third Circuit
- c. Associate Counsel:  
Joseph P. McHugh, Esquire  
Reed Smith LLP  
435 Sixth Avenue  
Pittsburgh, PA 15219  
(412) 288-7236
- d. Opposing Counsel:  
Caroline Mitchell, Esquire  
1705 Allegheny Building  
429 Forbes Avenue  
Pittsburgh, PA 15219  
(412) 232-3131  
  
Timothy P. O'Brien, Esquire  
1705 Allegheny Building  
429 Forbes Avenue  
Pittsburgh, PA 15219  
(412) 232-4400

7. *Ravin, Inc. v. First City Company*,  
692 A.2d 577 (Pa. Super. 1997)

- a. Summary and Significance of the Case:  
This case was a construction contract dispute in which I defended a real estate management company and a related real estate partnership that developed and owned an upscale mall in Mt. Lebanon, Pennsylvania. The plaintiff construction company filed a ten count complaint against my clients, including claims for breach of oral and written contract and quasi-contract claims. Prior to trial the plaintiff withdrew four of its causes of action. After the plaintiff put its case on, the Court dismissed five of the six remaining claims by granting my Motion for Compulsory Nonsuit. We received a Directed Verdict on the tenth and final count before the case was submitted to the jury.

The plaintiff appealed the case to Superior Court, which affirmed the verdict in favor of my client. Superior Court set a noteworthy precedent regarding the exclusion of expert testimony when an expert attempts to opine regarding the value of leasehold improvements without ever having inspected the property at issue.

- b. Judge:  
Trial Court: Hon. James H. McLean  
Court of Common Pleas  
of Allegheny County  
  
Appellate Court: Pennsylvania Superior Court
- c. Co-Counsel:  
None
- d. Opposing Counsel:  
Anthony W. Hinkle, Esquire  
Cipriani & Werner, P.C.  
Two Chatham Center  
Suite 1100  
Pittsburgh, PA 15219  
(412) 281-2500

8. *Hubert Hudson v. Frank Coppola, et al.*  
No. 00-3369 (3d. Cir. 2000)

a. Summary and Significance of the Case:  
In this case I defended the Housing Authority of the City of Pittsburgh and two of its police officers in a civil rights case brought by a man who was apprehended for drunk and disorderly conduct at one of the Housing Authority's communities. This jury trial was a unique challenge because the plaintiff represented himself at trial. Consequently, the trial took some odd twists and turns that required me to think quickly and respond to some very unorthodox tactics. The judge directed a verdict in my clients' favor on most of plaintiff's claims, but a claim for excessive use of force went to the jury. The jury returned a verdict in our favor after only fifteen minutes.

- b. Judge:  
Trial Court: Hon. Gary L. Lancaster  
U.S. District Court for the

Western District of Pennsylvania

Appellate Court: U.S. Court of Appeals for the  
Third Circuit

c. Co-Counsel:  
None.

d. Opposing Counsel:  
Hubert Hudson, Pro Se  
308 South Third Street  
Duquesne, PA 15110

9. *Paul Mutschler v. Paul Meggitt Kaye, et al.*,  
No. GD94-19312 (Court of Common Pleas of  
Allegheny County, PA)  
*Paul Mutschler v. Lorasen Holdings, Inc., et al.*,  
Civil Action No. 7295 of 2001 (Court of Common Pleas of  
Westmoreland County, PA) (pending)

a. Summary and Significance of the Case:

This case, which was filed over eight years ago, is still pending. We represent an individual in an executive severance and partnership dispute with his former partners and several of their closely held corporations. The individuals we have sued are British nationals who appear to be expatriates due to tax problems with Inland Revenue in the United Kingdom. The case involves complicated corporate, partnership, and post-judgment issues and is further complicated by the offshore status of the defendants and several of their companies. We obtained a verdict and judgment for \$450,000. After the defendants failed to pay the judgment, we pursued a garnishment action against an affiliate and received a judgment against that corporation that is now worth over \$500,000. The second judgment debtor owned valuable real estate in Western Pennsylvania which was transferred for \$10 to another corporate affiliate. At present, we are pursuing a fraudulent transfer action relative to that transaction. This case is significant because we have continued to represent the client pro bono despite the fact that our adversaries essentially broke him financially. We have invested over \$500,000 in unpaid lawyer time in an effort to obtain justice for our client.

a. Judge:

Trial Court: Hon. R. Stanton Wettick  
Court of Common Pleas of  
Allegheny County

Hon. Gary Caruso  
Court of Common Pleas of  
Westmoreland County

Appellate Court: N/A

- c. Co-Counsel:  
Brian T. Himmel, Esquire  
Reed Smith LLP  
435 Sixth Avenue  
Pittsburgh, PA 15219  
(412) 288-4058
- d. Opposing Counsel:  
Thomas E. Birsic, Esquire  
Kirkpatrick & Lockhart, LLP  
535 Smithfield Street  
Pittsburgh, PA 15222  
(412) 355-6538

10. *In re: Ernesto Orellana-Hercules*,  
No. A27-628-430

a. Summary and Significance of the Case:  
In this pro bono matter, I represented a young man who emigrated from El Salvador. I filed an application for asylum and the case was litigated before an administrative law judge of the Immigration and Naturalization Service. The issue was whether Mr. Orellana possessed a well-founded fear of persecution based on his membership in a social group (i.e., as a resident of Teosinte in Chalatenango Province, El Salvador). The case was challenging because although Mr. Orellana had been persecuted, the reasons for the persecution did not fit neatly into one of the categories required to be proven to entitle one to receive asylum. I was very gratified with Judge Nejelski's decision to grant asylum to Mr. Orellana because he was truly afraid to return to El Salvador.

- b. Judge:  
Trial Court: Immigration Judge Richard Nejelski  
Appellate Court: N/A



- c. Co-Counsel: N/A
- d. Opposing Counsel:  
INS District Counsel  
4420 North Fairfax Drive  
Room 500  
Arlington, VA 22203

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

In 1995, the Disciplinary Board of the Pennsylvania Supreme Court appointed me a Hearing Officer. When my term ended in 1999, I was appointed an Alternate Hearing Officer and currently hold that position. In my capacity as a Hearing Officer and Alternate Hearing Officer, I have sat on three lawyer panels that have adjudicated cases brought by the Disciplinary Board against lawyers who have been accused of violating the Rules of Professional Conduct. This unpaid, quasi-judicial position has been a rewarding professional experience and influenced my decision to submit my name to the Judicial Nominating Commission.

In addition to my work as a Hearing Officer, I have served as an arbitrator for the National Association of Securities Dealers. These cases involve securities brokers and dealers who are accused of violating common law and/or federal and state securities laws. Like my work for the Disciplinary Board, these cases are heard by three person panels. Unlike the Disciplinary Board cases, however, I typically am the only attorney on these panels. Accordingly, I am usually asked to serve as Chairperson of the panels to ensure that the arbitration hearings are conducted in an impartial, professional, and expeditious manner. There is a small stipend for this work, but it is essentially *pro bono*. My work arbitrating cases for the NASD has reinforced my desire to serve in the federal judiciary.

Another significant legal activity I have pursued apart from trying cases includes my work on the Governor's Judicial Advisory Commission for the Fifth Judicial District. During the past three years this Commission has met for several days to interview, consider, and report on aspiring judges for vacancies on the Court of Common Pleas of Allegheny County. It has been an honor and a pleasure to serve, without compensation, in an effort to recommend judicial candidates to the

Governor. Soon after his election, Governor Rendell appointed three first-rate lawyers, all of whom were recommended by our Commission, to the Court of Common Pleas of Allegheny County.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

Upon leaving the firm, I will receive no future payments.

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

I will assiduously avoid not only any conflicts of interest, but also the appearance of any conflicts of interest. I will adhere to the Code of Judicial Conduct and refrain from hearing any cases that involve any party with which I have any financial relationship or other beneficial interest.

I own stocks and bonds in certain corporations and my wife and her family have interests in several real estate partnerships, which would present conflicts of interest, that would preclude my participation in cases involving those matters. In addition, I would not hear cases involving Reed Smith or any of my former partners at Titus & McConomy consistent with the Code of Judicial Conduct.

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

I would like to teach, on a pro bono basis, but I do not have any arrangement at present. Before taking on any teaching duties I would seek the approval of Chief Judge Donetta Ambrose.

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

See financial disclosure report.

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

See net worth statement.

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

Yes. I served as Finance Chairman for Bowes for Superior Court. Mary Jane Bowes ran for Pennsylvania Superior Court and was elected on November 8, 2001. My principal responsibility was to raise money for the campaign and I served for about one year. Until my nomination, I served as Co-Chair for Roddey 2003, the re-election campaign for County Executive James C. Roddey.

## III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

As a youth I was frequently instructed by my parents that "from those to whom much is given, much is expected." I have been blessed with a strong family, adequate intellect, great friendships, and good health. From the time I was in high school through the present I have consistently been involved in volunteer work with the disadvantaged. During college I became a Big Brother in the program run by the South Bend Big Brothers Big Sisters program. For approximately the past ten years I have been involved with Big Brothers Big Sisters of Greater Pittsburgh as a volunteer, Director, and past President. For the past eighteen months I have served as a Big Brother to Saadik Moore, a fifth-grader at Miller African-Centered Academy, who participates in our school-based mentoring program. While a resident of Washington, D.C., I volunteered as an English teacher one night a week at Sacred Heart Church School, which was run by devoted nuns who provided English classes to first-generation immigrants from all over the world.

My commitment to serve the disadvantaged has been a consistent part of my legal practice as well. As a law student at Georgetown and as a practicing attorney at Skadden, Arps, et al., I performed legal work for immigrants from Spanish speaking countries through a legal clinic called Ayuda in Adams Morgan. At Ayuda I assisted with client interviews and applications for employment authorization, among other issues. I cannot know the exact amount of hours volunteered at Ayuda, but it is probably between 100-200 hours.

Once I obtained my law license, I maintained an active *pro bono* caseload of political asylum cases. I represented clients from El Salvador, Peru, and Columbia in political asylum cases. I also represented a woman from El Salvador in a domestic violence case. Firm records indicate the following hours spent on these cases, although the actual time investment was probably greater because no bills were sent: Luz Elena Betancur-Vasquez (asylum: 44.25 hours); Carlos Serrano-Canal (asylum: 61.25 hours); Ernesto Orellana-Hercules (asylum: 42.50); Sandra DeLopez (domestic violence: 19.50). The first trial I ever conducted as a lawyer was a *pro bono* case for Mr. Orellana Hercules and one of the greatest feelings of achievement during my legal career was to gain asylum for him from the Immigration Judge.

While in Pittsburgh, I took on a *pro bono* class action case for African-Americans public housing residents who sought to prevent the Department of Housing and Urban Development from converting units at Allegheny Commons East to the

Section S program. I estimate approximately 200 hours on this case. In addition, I worked with Bob Cindrich (now a federal judge here) for a criminal defendant who unwittingly entered a guilty plea. I estimate that I spent 50 hours on this case). In addition, I worked with Paul Titus on a complex death penalty case for which I estimate 200 hours. Finally, I have spent 304.25 hours working on the pending Ten Commandments case referenced in response to question 18.

In sum, I believe all lawyers owe not only a professional, but a moral duty to provide legal services to disadvantaged individuals and groups. I take this responsibility seriously and I will continue to do so as a federal district court judge.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

No.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

There is a Judicial Nominating Commission for the Western District of Pennsylvania and I was recommended by that Commission. I first appeared before the Commission on March 29, 2001. After receiving the Commission's recommendation, I was invited by the White House Counsel's office to interview for a district court position on July 10, 2001. On May 8, 2002, I was invited to the White House to interview for a vacancy on the U.S. Court of Appeals for the Third Circuit. In November of 2002, I received forms from the Justice Department, which I completed very soon thereafter. During December of 2002 and January of 2003, I underwent a background check conducted by the Federal Bureau of Investigation and the Department of Justice. On January 16, 2003, I

appeared before a second Judicial Nominating Commission -- which included different members than the prior Commission -- and was recommended again. I was nominated by President Bush on April 9, 2003.

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

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an

administrator with continuing oversight responsibilities.

Federal judges must be mindful of the separation of powers and possess a due regard for our constitutional structure of government. The federal judiciary should neither loosen nor tighten jurisdictional requirements such as standing and ripeness. The court's duty is to adjudicate "cases" or "controversies" "arising under" federal law consistent with Article III of the Constitution. Each plaintiff deserves to have his, her, or its case adjudicated fully and fairly, without regard to the claims of other putative stakeholders who are not privy to the case. The duty of the federal district judge is to resolve grievances whether they be brought by individuals, corporations, or other groups. Some of these cases will have wide-ranging policy implications, but these implications, if they exist, must necessarily be the result of the adjudication rather than the purpose thereof. Moreover, federal district courts are duty bound to adhere to the precedents of the Supreme Court and the appropriate Court of Appeals.



**STATEMENT OF MARK R. KRAVITZ, NOMINEE TO BE DISTRICT  
JUDGE FOR THE DISTRICT OF CONNECTICUT**

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

I too am humbled and honored to be here, and I thank the Committee for scheduling this hearing.

I also thank Senator Dodd for his very generous remarks and Senator Lieberman for his support and President Bush for nominating me.

I do not have an opening statement, but I would, if the chair would indulge me, like to introduce my family who has joined me today.

Senator CHAMBLISS. Certainly.

Mr. KRAVITZ. My daughter Lindsey, who is all the way down at the end, just this past Sunday graduated from Connecticut College and is off to teach in the Teach for America Program. Next to her is my daughter Jenny, who is currently a teacher but is going back to her academic career, pursuing a graduate degree at Yale in the fall. We are quite proud of both of them.

We are also proud of my son, Evan, who is next to them. He is an eighth-grader at the Hampden Hall School. And last but not least is my wife, Wendy. Wendy and I have been married for 31 years, and we met each other as juniors in high school.

I would like to acknowledge as well, if I may, my mother, Marian Kravitz, and my late father, Paul Kravitz. Neither of them could be with me physically today, but I am certain they are here in spirit.

Thank you, Mr. Chairman.

Senator CHAMBLISS. Well, we are pleased to have such a good-looking family here supporting you today.

Mr. Woodcock, we are glad to have you with us.

[The biographical information of Mr. Kravitz follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Mark R. Kravitz

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

Residence: Guilford, CT

Office: Wigin & Dana, LLP  
One Century Tower  
New Haven, CT 06508-1832

3. **Date and place of birth.**

June 21, 1950, Philadelphia, PA

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

Married to Wendy Evans Kravitz, who is not employed outside the home

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

Georgetown University Law Center; 1972-1975; J.D., May 1975

Wesleyan University; 1968-1972; B.A., May 1972, *magna cum laude*

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

Wigin & Dana, LLP, Partner (09/76-06/78; 09/79-present)  
One Century Tower  
New Haven, CT 06508-1832

University of Connecticut School of Law, Adjunct Professor of Law  
(01/95-present)  
55 Elizabeth St.  
Hartford, CT 06105

Yale University Law School, Visiting Lecturer in Law (01/00-05/00)  
127 Wall St.  
New Haven, CT 06520

Law Clerk to Justice William H. Rehnquist (07/78-07/79)  
Supreme Court of the United States  
First St., N.E.  
Washington, D.C. 20543

Law Clerk to Judge James Hunter, III (07/75-07/76)  
United States Court of Appeals for the Third Circuit  
22614 U.S. Courthouse  
Independence Mall West  
Philadelphia, PA 19106

Covington & Burling, Summer Associate (06/74-08/74)  
1201 Pennsylvania Ave., N.W.  
Washington, D.C. 20004

Cape Cod Sea Camps, Waterfront Director (06/73-08/73; 06/72-08/72)  
East Brewster, MA 02640

American Academy of Appellate Lawyers, Unpaid Director (09/02-present)  
15245 Shady Grove Rd., Suite 130  
Rockville, MD 20850

Friends of the Yale Children's Hospital, Unpaid Chairman and Director  
(Director and Director Emeritus, 1989 to present; Chairman, 1989-1992)  
20 York St.  
New Haven, CT 06504

Guilford Land Conservation Trust, Unpaid Director (1995-2001)  
P.O. Box 200  
Guilford, CT 06437

Board of Ethics, Town of Guilford, CT, Unpaid Member (1994-2001)  
31 Park Street  
Guilford, CT 06437

Connecticut Council on Environmental Quality, Unpaid Member (1991-1995)  
79 Elm St., 6<sup>th</sup> floor  
Hartford, CT 06106

Connecticut Foundation for Open Government, Unpaid Director (1991-2000)  
P.O. 587  
Danbury, CT 06813

Guilford Library Association, Unpaid Director and Treasurer (1992-2000)  
67 Park St.  
Guilford, CT 06437

Community Advisory Board, VA Connecticut Healthcare  
System, Unpaid Director (1993-1997)  
950 Campbell Ave.  
West Haven, CT 06516

The Connecticut Food Bank, Unpaid Chairman and Director (1984-1986)  
150 Bradley Ave.  
East Haven, CT

The Children's Center, Unpaid Director (1976-1986)  
1400 Whitney Ave.  
Hamden, CT

The Community Nursery School, Unpaid President and Director (1984-1986)  
Old Sachem's Head Rd.  
Guilford, CT 06437

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

None

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

Best Lawyers In America, 1991 to date

Fellow, American Academy of Appellate Lawyers, elected 1996

James W. Cooper Fellow, The Connecticut Bar Foundation, elected 1996

Member, The American Law Institute, elected 1992

Recipient, Deane C. Avery Award, 1995 (for “advancing the cause of freedom of information and freedom of speech in Connecticut”)

Managing Editor, Georgetown Law Journal

Phi Beta Kappa, elected 1972

Wesleyan University, graduated Magna Cum Laude and with High Honors in Government

Recipient, Davenport Prize for excellence in Government, Wesleyan University, 1972

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

Member (appointed by Chief Justice of the United States), U.S. Judicial Conference’s Standing Committee on the Rules of Practice and Procedure in the United States Courts, 2001 to date

Member (appointed by the Chief Justice of the Connecticut Supreme Court), Advisory Committee on the Appellate Rules, Supreme Court of the State of Connecticut, 1997 to date

Member (appointed by the Chief Judge of the Second Circuit), Advisory Committee on Appellate Rules, United States Court of Appeals for the Second Circuit, 1999 to date

Member (appointed by the Chief Judge of the District of Connecticut), Civil Justice Advisory Group, United States District Court for the District of Connecticut, 1996-2001

Member, Executive Committee of the Federal Practice Section, Connecticut Bar Association, 1995-2000

Fellow, American Academy of Appellate Lawyers, 1996 to date; Director, Sept. 2002 to date

Member, The American Law Institute, elected 1992 to date

James W. Cooper Fellow, The Connecticut Bar Foundation, elected 1996

Member, Subcommittee on Writs of Error, Connecticut Law Revision Commission, 2002

Chair, Local Rules Subcommittee, Federal Practice Section, Connecticut Bar Association, 1997-2000

Member, Alternative Dispute Resolution Committee, Fellows of the Connecticut Bar Foundation, 1997-2000

Member, Executive Committee, International Section, Connecticut Bar Association, 1985-1990

Member, Connecticut Bar Association Sub-Committee on Legislation Regarding International Arbitration, 1989

Member, Connecticut Bar Association Sub-Committee on Legislation for the Formation of Appellate Court, 1982

Member, American, Connecticut and New Haven County Bar Associations, 1976 to date

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

I am not a member of any organization that is active in lobbying before public bodies. Other organizations in addition to those listed above to which I currently belong are:

Friends of the Yale Children's Hospital  
Guilford Land Conservation Trust  
Connecticut Foundation for Open Government  
Guilford Library Association  
The Connecticut Food Bank  
U.S. Supreme Court Historical Society  
Sachem's Head Yacht Club  
The Benchers

The foregoing list is limited to those civic, social and other organizations with which I am currently actively associated. I have not listed other non-profit organizations which may consider me to be a "member" by virtue of an annual contribution, but with which I have not been actively involved (e.g., The Smithsonian, the local public radio or television station, etc.).

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

Supreme Court of the State of Connecticut, Oct. 1975  
 Supreme Court of the United States, Jan. 1989  
 U.S. Court of Appeals for the Second Circuit, Dec. 1983  
 U.S. District Court for the District of Connecticut, Nov. 1976  
 U.S. Court of Appeals for the First Circuit, Sept. 2002  
 U.S. Court of Appeals for the Third Circuit, Apr. 1976  
 U.S. Court of Appeals for the Fourth Circuit, Dec. 1999  
 U.S. Court of Appeals for the Eighth Circuit, Sept. 1996  
 U.S. Court of Appeals for the Ninth Circuit, Dec. 1999  
 U.S. Court of Appeals for the Tenth Circuit, Dec. 1999  
 U.S. Court of Appeals for the Eleventh Circuit, Dec. 1996  
 U.S. Court of Appeals for the D.C. Circuit, Sept. 1996  
 U.S. Court of Appeals for the Federal Circuit, Oct. 1985  
 U.S. Court of International Trade, Dec. 1984  
 U.S. Court of Federal Claims, Mar. 1998  
 U.S. Tax Court, Oct. 1990

In addition, I have been admitted *pro hac vice* in numerous federal district courts and state supreme and appellate courts. I have never had my admission to the bar of any court, whether regular admission or *pro hac vice* admission, withdrawn or interrupted for any reason.

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

**BOOKS AND TREATISES**

Author, "Survey of Connecticut Privacy and Related Claims Against The Media," in MEDIA PRIVACY AND RELATED LAW, published annually by the Media Defense Resource Center (1995-2002)

Editor, CHAMBERS PRACTICES: A GUIDE TO THE PRACTICES OF U.S. DISTRICT COURT JUDGES AND MAGISTRATE JUDGES IN CONNECTICUT, published by the Connecticut Bar Association, 2000

Contributor, EMERGING PROBLEMS UNDER THE FEDERAL RULES OF EVIDENCE (2d ed. 1991)

**LAW REVIEW ARTICLES**

"Key Differences Between Appeals in the Second Circuit and Connecticut's Appellate Courts, \_\_\_\_ CONN. BAR. J. \_\_\_\_ (2003) (expected publication date, Spring 2003)

"Unpleasant Duties: Imposing Sanctions for Frivolous Appeals," 4 J. APP. PRAC. & PROC. 335 (Fall 2002)

"Developments in the Second Circuit: 2000-2001," 34 CONN. L. REV. 833 (2002)

"Developments in the Second Circuit: 1999-2000," 33 CONN. L. REV. 945 (2001)

"Developments in the Second Circuit: 1998-1999," 32 CONN. L. REV. 949 (2000), *reprinted in* 74 CONN. BAR J. 1 (Aug. 2000)

"Developments in the Second Circuit: 1997-1998," 73 CONN. BAR J. 143 (1999), *reprinted in* 18 QUINNIAC L. REV. 4 (1999)

"Developments in the Second Circuit: 1996-1997," 72 CONN. BAR J. 109 (1998), *reprinted in* 17 QUINNIAC L. REV. 777 (1999)

"CUTPA Liability and Professional Negligence," 9 CONNECTICUT LAWYER 4 (Dec. 1998/Jan. 1999)

"Oral Argument Before the Second Circuit," 71 CONN. BAR. J. 204 (June 1997)

"Compelling Arbitration," 23 LITIGATION 34 (Fall 1996)

"Desegregation of Private Schools: Section 1981 As An Alternative To State Action," 62 GEO.L.J. 1363 (1975)



**PERIODICALS**

- “Mandates,” *The National Law Journal*, Feb. 10, 2003, at B6
- “Charge Errors,” *The National Law Journal*, Dec. 2, 2002, at B5
- “En Banc Voting,” *The National Law Journal*, Oct. 7, 2002, at B7
- “Creating Finality,” *The National Law Journal*, July 8, 2002, at B9
- “A New Judge,” *The National Law Journal*, Apr. 22, 2002, at B9
- “Frivolous Appeals,” *The National Law Journal*, Feb. 11, 2002, at B10
- “New Trials,” *The National Law Journal*, Dec. 3, 2001, at B13
- “General Verdict Rule,” *The National Law Journal*, Sept. 24, 2001, at B10
- “Removal remands,” *The National Law Journal*, June 25, 2001, at A10
- “Stays pending appeal,” *The National Law Journal*, Apr. 2, 2001, at A10
- “Deadlines,” *The National Law Journal*, Jan. 22, 2001, at A14
- “Handling Remittiturs,” *The National Law Journal*, Nov. 6, 2000, at A18
- “Pendent Jurisdiction,” *The National Law Journal*, July 3, 2000, at A15
- “‘Daubert’ On Appeal,” *The National Law Journal*, Apr. 17, 2000, at A14
- “Preserving Error,” *The National Law Journal*, Jan. 17, 2000, at A14
- “Using Certification,” *The National Law Journal*, Oct. 18, 1999, at B17
- “Cross-Appeals,” *The National Law Journal*, June 21, 1999, at B9
- “Settling Cases,” *The National Law Journal*, Apr. 26, 1999, at B7
- “International Rules for the International Net?,” 24 *Connecticut Law Tribune* 49, at A4 (Dec. 7, 1998)
- “Trends in High Places,” 24 *Connecticut Law Tribune* 29, at 15 (July 13, 1998)

- “Will Internet Service Providers Remain Immune,” 24 *Connecticut Law Tribune* 14, at 2A (Mar. 30, 1998)
- “BMW’s Limited Relevance in Connecticut,” 24 *Connecticut Law Tribune* 3, at 14 (Jan. 12, 1998)
- “Pretext Does Not Mean Bias,” 23 *Connecticut Law Tribune* 43, at 17 (Oct. 27, 1997)
- “Turn out the Light: Do we really need false light invasion of privacy?,” 23 *Connecticut Law Tribune* 30, at 30 (July 21, 1997)
- “A Virtual Presence – Personal Jurisdiction and the Internet,” 23 *Connecticut Law Tribune* 17, at 2A (Apr. 21, 1997)
- “Abusing Abuse of Process Claims,” 23 *Connecticut Law Tribune* 6, at 22 (Feb. 3, 1997)
- “The New and Improved *Santopietro*,” 22 *Connecticut Law Tribune* 40, at 21 (Oct. 7, 1996)
- “Justice Rehnquist: A Personal Remembrance,” *The Day*, July 20, 1986, at C3

#### **SPEECHES, PRESENTATIONS**

- Fall 2002 Speaker, ABA Appellate Practice Institute, Reno, NV
- Spring 2002 Speaker, “Winning An Appeal: The Art of Persuasion in Connecticut Appellate Practice,” Connecticut Bar Association
- Spring 2002 Panelist, Appellate Practice in Connecticut, Fairfield County Bar Association, Stamford, Connecticut
- Fall 2001 Panelist, Developments in the Connecticut Supreme Court, Young Lawyer’s Section of the Connecticut Bar Association
- Fall 2001 Speaker, “Oral Argument,” New England 2001 Appellate Judges’ Conference, Providence, RI
- Fall 2001 Panelist, Appellate Practice Before the Second Circuit, Federal Bar Council, Second Annual Fall Bench and Bar Retreat, CT
- Spring 2001 Speaker, Appellate Advocacy Seminar, Connecticut Bar Association
- Fall 2001 Chair, Second Circuit Appeals: Doing It Right, Connecticut Bar Association
- Winter 2001 Speaker, Winning on Appeal: The Art of Persuasion in Connecticut Appellate Practice, Connecticut Bar Association

- Winter 2001 Speaker, New Haven County Bar Association, "Appellate Practice: A Panel Discussion for Trial Attorneys and Appellate Practitioners"
- Fall 1998 Chair, Second Circuit Practice and Procedure – Doing It Right, Connecticut Bar Association
- Aug. 1997 Speaker, Recovering Damages in Civil Litigation in Federal Courts, ABA Annual Meeting, Litigation Section, San Francisco, CA
- Spring 1997 Chair, Second Circuit Appeals: Doing It Right, Connecticut Bar Association
- Spring 1996 Chair, Federal Appellate Practice and Procedure, Connecticut Bar Association
- Summer 1996 Speaker, Address to the Board of Education of the Town of Guilford on a Proposed Drug Policy for High School Athletes
- Winter 1996 Speaker, American Conference Institute, Litigation Management in the 90's, "Issues Relating to Arbitration"
- Winter 1994 Speaker, "International Law for the General Practitioner: Serving Process on Foreign Defendants; Obtaining Discovery Abroad; and, Child Abduction to a Foreign Country," International Law and World Peace Section, Connecticut Bar Association
- Spring 1992 Speaker, Address to the Connecticut Daily Newspaper Association, "Secrecy in Government: The Courts and the Press"
- Spring 1990 Panelist, ABA Annual Meeting, International Law Section, "State International Arbitration Statutes: Should Your State Have One," New York, NY

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

Excellent; September 2002

14. **Judicial Office:** State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I have never held any judicial office

15. **Citations:** If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was

affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Not applicable

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

Member, Board of Ethics, Town of Guilford, CT, 1994-2001  
Appointed by Board of Selectmen of the Town of Guilford

Member, Connecticut Council on Environmental Quality, 1991-1995  
Appointed by Governor

No unsuccessful candidacies for elective office

17. **Legal Career:**

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

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

Following graduation from law school in 1975, I served as a law clerk to the Honorable James Hunter, III, Circuit Judge, United States Court of Appeals for the Third Circuit between 1975 and 1976. Following that clerkship, I joined the New Haven-based law firm of Wiggin & Dana as an associate, where I remained for approximately two years until June 1978. At that time, Wiggin & Dana's offices were located at 195 Church St., New Haven, CT. I then left the firm to become a law clerk to the Honorable William H. Rehnquist, Associate Justice, Supreme Court of the United States, from June 1978 until July 1979.

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

I have never practiced alone

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

Following my clerkship for Justice Rehnquist, I rejoined Wiggin & Dana as an associate in 1979 and became a partner in the firm in 1981. I have remained a partner at Wiggin & Dana to this day. Wiggin & Dana today is a regional law firm of approximately 140 lawyers with four offices. My office is in the firm's New Haven office, located at One Century Tower, New Haven, CT. Beginning in approximately 1995, in addition to my full-time law practice, I began to teach law at the University of Connecticut Law School as an Adjunct Professor of Law and have continued to do so approximately one semester a year since that time though I did not teach in 2002. During the Spring semester of 2000, I was a Visiting Lecturer in Law at the Yale Law School.

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

My law practice is exclusively devoted to civil litigation in state and federal courts and has been since I began the private practice of law. I have appeared in state and federal courts throughout the United States and have also arbitrated cases both in the United States as well as before the Stockholm Chamber of Commerce. I have also appeared before state and federal administrative agencies. Since approximately 1995, my practice has focused extensively on appellate litigation in state and federal appellate courts throughout the United States.

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

My typical clients include individuals, business organizations (both

corporations and partnerships) and non-profit organizations of many kinds, including many educational and health-care institutions.

My practice has focused exclusively on litigation with a recent emphasis on appellate litigation. Substantively, I have handled cases involving virtually every aspect of civil and administrative law, including a wide variety of common law, constitutional and statutory issues but excluding family law issues.

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

I have appeared frequently in numerous state and federal courts throughout the United States (both trial level and appellate courts) and have done so throughout my career.

2. **What percentage of these appearances was in:**
- (a) **federal courts:** approximately 65%
  - (b) **state courts of record:** approximately 35%
  - (c) **other courts.**

The mix of my appearances between federal and state court has varied annually depending upon the cases on which I am working at any given time. Therefore, in some years, I have appeared more or less than 65% in federal courts and in other years more or less than 35% in state court, but that approximate mix of 65%-35% is generally reflective of my court appearances over the course of my legal career. I have also appeared before state and federal administrative agencies as well as before arbitration panels, though my agency and arbitration appearances have been a smaller percentage of my overall practice than my court appearances, probably only 2-5% maximum, depending upon the year in question.

3. **What percentage of your litigation was:**
- (a) **civil:** 100%
  - (b) **criminal:** 0%

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

To the best of my recollection, I have tried 9 cases to judgment or verdict in court or before arbitrators. In 7 of those, I was the lead counsel though I also had assistance from others at my firm during the trial. In 2 cases, I assisted the lead trial counsel as the number two lawyer on the trial team. Several of these trials were very lengthy. For example, the duration of one trial for which I was lead counsel was over two and one-half months; another trial for which I was lead trial counsel lasted over a month and one-half. A third case, for which I was the second member of the trial team, lasted over a month. I have also handled a number of preliminary injunction hearings before state and federal courts which have proceeded to a decision on the merits and which have involved the examination and cross-examination of witnesses and the introduction of documentary evidence. I estimate that I have been lead counsel in approximately 4 such preliminary injunction hearings and have been a member of the trial team in approximately another 3-4. Finally, I have been lead counsel in more than 60 appeals in state and federal appellate courts throughout the United States.

5. **What percentage of these trials was:**  
 (a) jury: 30%  
 (b) non-jury: 70%

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

- (a) **the date of representation;**  
 (b) **the name of the court and the name of the judge or judges before whom the case was litigated; and**  
 (c) **the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.**

- \* Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996). I worked on this case between 1995 and 1996 and was lead counsel following the principal decision by the Montana Supreme Court. Thus, I was lead counsel in the preparation of the original petition for certiorari and reply in the Supreme Court of the United States as well as the second petition for certiorari and reply following the Supreme Court's remand of the case to the Montana Supreme Court for reconsideration in light of Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265 (1995). I was also lead counsel in the preparation of the briefs on the merits before the Supreme Court of the United States, and I argued the case before the Court on April 16, 1996, which ruled in favor of my client 8-1 in an opinion authored by Justice Ginsburg. The case involved the Supremacy Clause to the United States Constitution and the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA") and specifically whether a Montana statute that required disclosure of arbitration in a specified format and typeface on the front page of every contract violated the FAA and therefore the Supremacy Clause. I represented the Petitioner, Doctor's Associates, Inc. ("DAI"), which is the national franchisor for the Subway sandwich chain. Assisting me on the case were: Jeffrey Babbin from Wiggin & Dana, One Century Tower, New Haven, CT, 203-498-4366 and H. Bartow Farr, III, Farr & Taranto, 2445 M Street, N.W., Washington, D.C. 20037, 202-775-0184. Principal counsel for the Respondents was Lucinda Sikes, (also assisted by Alan Morrison), Public Citizen, 1600 20<sup>th</sup> St., N.W., Washington, D.C. 20009, 202-588-1000.
  
- \* AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366 (1999), reversing and affirming Iowa Utilities Bd. v. FCC, 120 F.3d 753 (8<sup>th</sup> Cir. 1997). Between 1996 and 1999, I served as lead counsel for Southern New England Telecommunications Company ("SNET") and ultimately a coalition of mid-sized local exchange carriers and the Independent Telephone & Telecommunications Alliance in this litigation before both the United States Court of Appeals for the Eighth Circuit and in the Supreme Court of the United States. I argued on behalf of these mid-sized local exchange carriers before the Eighth Circuit and filed both a cross-petition for certiorari and a merits brief in the Supreme Court, though I did not argue this case before the Supreme Court. I also represented SNET in the Eighth Circuit in briefing on its motion to stay the FCC's Local Competition Decision. Iowa Utilities Bd. v. FCC, 109 F.3d 418 (8<sup>th</sup> Cir. 1996). SNET prevailed on its stay motion and prevailed in the 8<sup>th</sup> Circuit; in the Supreme Court, SNET and the mid-sized exchange carriers prevailed on several though not all of the issues that they briefed. The case raised numerous issues relating to the interpretation and implementation of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). I was assisted by Jeffrey Babbin and Daniel Klau of Wiggin & Dana, One Century Tower, New Haven, CT, 203-498-4400. The Judges on the Eighth Circuit who decided both the stay and the appeal on the merits were Judges Wollman, Hansen and Bowman. There were hundreds of lawyers representing numerous other parties in this case. The principal lawyers for other parties included: Seth Waxman, Solicitor General, 950 Pennsylvania Ave.,



N.W., Washington, D.C. 20530, 202-514-2217, and Christopher J. Wright, General Counsel, for the F.C.C., 445 12<sup>th</sup> St., S.W., Washington, D.C. 20544, 202-514-2217; David Carpenter and Peter Keisler, Sidley & Austin, One First National Plaza, Chicago, IL, 312-853-7237 for AT&T; William P. Barr and M. Edward Whelan, GTE Service Corp., 1850 M St., Washington, D.C., 202-463-5200; Mark Evans and Michael Kellogg, Kellogg, Huber, Hansen & Evans, 1301 K St., Washington, D.C. 20005, 202-326-7900; and Maureen Mahoney, Latham & Watkins, 555 Eleventh St., NW, Washington, D.C. 20004, 202-637-2250.

\* Granite State Advertising Co. v. City of Stamford, 38 Fed. Appx. 680 (No. 01-7963, 2d Cir. June 25, 2002), affirming No. 00CV1253 (D. Conn. Aug. 17, 2001). I worked on this case from 2001-2002 as lead counsel for the City of Stamford in both the United States District Court for the District of Connecticut and the United States Court of Appeals for the Second Circuit. I argued in favor of a preliminary injunction for the City in the District Court, and I argued the appeal in the Second Circuit. The City prevailed in both the District Court and the Second Circuit. Judge Alan Nevas presided in the District Court. Chief Judge Walker and Judges Jacobs and Leval presided in the Second Circuit. The case involved the City's right to regulate the size and placement of commercial billboards in the City as well as its right to ban off-site commercial advertising from billboards entirely. The legal issues included the First Amendment, mootness, ripeness, standing and Connecticut zoning laws. I was assisted by Suzanne Wachsstock, Wiggin & Dana, 400 Atlantic St., Stamford, CT 06911, 203-363-7600. Principal counsel for Granite State Advertising were Kevin Shea, Clendenen & Shea, 400 Orange St., New Haven, CT, 203-787-1183; and Adam Webb, Dow Lohnes & Albertson, One Ravinia Dr., Atlanta, Georgia, 770-901-8800. Principal counsel for the State of Connecticut, which intervened in support of the City, was Richard Blumenthal, Attorney General, State of Connecticut, 55 Elm Street, Hartford, CT, 860-808-5318.

\* Karl Storz Endoscopy-America, Inc. v. Surgical Technologies, Inc., 285 F.3d 848 (9<sup>th</sup> Cir. 2002). I worked on this case during 2000-2002, though my role was confined to the appellate proceedings and did not include work in the District Court. I was lead counsel on appeal and briefed and argued the appeal on behalf of Karl-Storz Endoscopy of America-Inc. ("Storz"). The issue was one of first impression under the Lanham Act, 15 U.S.C. § 1121, and was whether the Lanham Act extended its protections to repairs or was limited to sales transactions only. Storz lost in the District Court but prevailed on appeal in the United States Court of Appeals for the Ninth Circuit. The Judges who presided in the Ninth Circuit were Kozinski, Thomas and Whyte (sitting by designation). I was assisted by William Speranza of Wiggin & Dana, 400 Atlantic St., Stamford, CT 06911-0325, 203-363-7600, who was trial counsel. The principal lawyer for the defendants on appeal was John Edwards, Johnson & Edwards, 402 W. Broadway, Suite 1140, San Diego, CA

92101, 619-696-6211, who argued on appeal.

- \* Leydon v. Town of Greenwich, et al., 257 Conn. 318 (2001). I worked on this case in both the Connecticut Appellate Court (57 Conn. App. 712 (2000)) and in the Connecticut Supreme Court; I did not represent my client in the trial court. My client was the Lucas Point Association (“LPA”), a private landowners’ association that held title to property over which the Town of Greenwich held an easement that provided the only landward access to Greenwich Point Park, a beach located on the Connecticut shore. The easement, which was very narrow and had been created in the 1940s, limited access to Town residents only. In addition, the Town, which was represented by other counsel, had enacted an ordinance (which had been in existence for decades) that restricted access to Greenwich Point Park to Greenwich residents only. The plaintiff (a resident of a neighboring town) asserted that the Town’s ordinance violated the First Amendment and Connecticut’s common law. The LPA intervened in the lawsuit to oppose plaintiff’s prayer for relief, which sought an order allowing him to use the Town’s easement to cross the LPA’s property in order to gain access to Greenwich Point Park. Plaintiff sought to invalidate a term of the easement, which restricted its use to Greenwich residents only. The legal issues insofar as the Town was concerned involved the First Amendment and Connecticut’s common law. Insofar as the LPA was concerned, the issues were confined to the common law as well as the Fifth Amendment’s taking clause. Plaintiff prevailed against the Town of Greenwich in the Supreme Court, which invalidated Greenwich’s ordinance. However, the LPA prevailed on its claims in the Supreme Court; the Supreme Court held that plaintiff had no constitutional or common law right to cross the LPA’s private property to gain access to the beach. I was assisted by Suzanne Wachsstock, Wiggin & Dana, 400 Atlantic St., Stamford, CT, 203-363-7600. Principal counsel for the plaintiff was Brenden Leydon, Toohar & Wool, 1100 Summer St., Stamford, CT 06905, 203-324-6164. Principal counsel for the Town was Ralph G. Elliott, Tyler, Cooper & Alcorn, CityPlace—35<sup>th</sup> Fl., Hartford, CT 06103, 860-725-6200.
  
- \* Doe v. Yale University, 252 Conn. 641 (2000). I represented Yale University and its School of Medicine in the post-verdict proceedings in this case and worked on the case during 1999 and 2000. I was lead counsel on appeal and argued the appeal in the Connecticut Supreme Court. Plaintiff was a former resident in the School of Medicine’s internal medicine program who stuck herself with a needle while performing a procedure and developed HIV as a consequence of the needle stick injury. A jury found Yale liable and awarded plaintiff approximately \$15 million. On appeal, there were three legal issues: whether plaintiff’s claims were barred by the Workers Compensation Act, since as a part of her residency program she was employed at Yale-New Haven Hospital at the time of injury and received workers compensation benefits; whether Connecticut recognized a cause of action for

educational malpractice; and whether the trial court erred in its instructions regarding expert testimony. The Supreme Court reversed the verdict and remanded for a new trial. Justices Borden, Palmer, Vertefeuille, Hennessy, Sullivan, Callahan and Leuba presided and the opinion was written by Justice Palmer. I was assisted by William Doyle from Wiggin & Dana, One Century Tower, New Haven, CT 06508, 203-498-4400, who was lead trial counsel, and Wesley Horton of Horton, Shields & Cormier, 90 Gillett Street, Hartford, CT 06105, 860-522-8338. Principal counsel for Dr. Doe were David Rosen, Rosen & Dolan, 400 Orange St., New Haven, CT 06511, 203-787-3513 and Michael Koskoff, Koskoff, Koskoff & Beider, 350 Fairfield Ave., Bridgeport, CT 06604, 203-336-4421.

- \* Beverly Hills Concepts v. Schatz & Schatz, Ribicoff & Kotkin, 247 Conn. 48 (1998). I represented the Schatz & Schatz law firm in this appeal to the Connecticut Supreme Court from an approximately \$16 million damages award, the largest legal malpractice award in Connecticut at the time. The issues on appeal involved proximate causation and the standards for proof of damages and expert damage testimony under Connecticut's common law. The Connecticut Supreme Court heard the case *en banc* and, in an opinion authored by Justice Katz, the Court reversed the award and directed that judgment should enter for my client, the law firm. I was assisted on the appeal by Daniel Klau, Wiggin & Dana, One CityPlace, Hartford, CT 06103, 860-297-3700. Principal counsel for the plaintiff was Jeffrey J. Tinley, Tinley, Nastri, Renehan & Dost, LLP, 60 North Main St., 2d Fl., Waterbury, CT 06702, 203-596-9036.
- \* Connecticut Hospital Association v. Weicker, 46 F.3d 211 (2d Cir. 1995), *rev'g*, 842 F. Supp. 637 (D. Conn. 1994). I worked on this case on behalf of all the acute care hospitals in Connecticut and their trade association, the Connecticut Hospital Association ("CHA"), during 1994-1996. In this lawsuit, the hospitals sought greater reimbursement for Medicaid patients under the Boren Amendment, 42 U.S.C. § 1396a(a)(13)(A). I represented my clients before the United States District Court for the District of Connecticut (Judge Warren Eginton), and argued the case in the United States Court of Appeals for the Second Circuit before Judges Jacobs, Altimari and Pratt. The case involved preliminary injunction proceedings, an associated appeal and proceedings on remand. On remand, the case was referred to mediation before Yale Law School Professor Robert Burt (203-432-4960), as a result of which the State, Federal Government and hospitals entered into a comprehensive consent decree regarding Medicaid reimbursement rates for in-patient services at acute care hospitals in Connecticut. I was assisted in the case by Alan Schwartz, Wiggin & Dana, One Century Tower, New Haven, CT 06508, 203-498-4400. Principal counsel for the State was Attorney General Richard Blumenthal and Assistant Attorney General Arnold Menchel, Office of the Attorney General, 55 Elm St., Hartford, CT, 860-808-5318. U.S. Attorney Christopher Droney and Assistant U.S. Attorney General Deirdre Martini, U.S. Attorney, District of Connecticut, U.S. Courthouse,

Bridgeport, CT 06604, 203-696-3000 were the principal counsel to the U.S. Government.

- \* Connecticut Association of Child Caring Agencies v. Rose Alma Senatore, 1993 WL 392911 (Conn. Superior Court 1993). In this case, I represented every residential treatment center for disadvantaged children in the State and their trade association, the CACCA, in a lawsuit seeking greater reimbursement for the child caring agencies. The key legal and factual issue was whether the State, through its Department of Children and Youth Services and Department of Education, were properly reimbursing the agencies under state law for the services they provided to children. I was lead trial counsel for the child care agencies and CACCA and tried the case before Superior Court Judge Robert Satter in Hartford for approximately 2 ½ months. Judge Satter ruled against the child care agencies and the case was settled while on appeal by way of an agreement among the agencies and the State. The State was represented by the Attorney General's Office and in particular Ralph Urban, 55 Elm St., Hartford, CT, 860-808-5330.
- \* Hammond v. United States, 764 F.2d 88 (2d Cir. 1985), aff'g, 84 F. Supp. 163 (D. Conn. 1984). I worked on this case from approximately 1984 through 1985 and was lead counsel for the Day Publishing Company and its co-publishers who filed the case. I was lead counsel in both the United States District Court for the District of Connecticut and in the United States Court of Appeals for the Second Circuit. I argued the case in both courts. Then-District Court, now Second Circuit, Judge José Cabranes presided at the trial level. The appeal was argued before Second Circuit Judges Kearse, VanGraafeiland and Pierce; Judge Kearse authored the opinion for the court. The Day's co-publishers prevailed in both the District Court and in the Second Circuit. The question presented involved the interpretation of the U.S. Tax Code, Connecticut law of trusts and trust documents. The Court held that The Day paper was the beneficiary of a trust established to hold all of its shares. D. Patrick Mullarkey from the U.S. Department of Justice in Washington, D.C. was principal counsel for the U.S. in the District Court and Robert Pomerance of the Tax Division of the United States Department of Justice was principal counsel for the U.S. on appeal.

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

The most significant cases I have been involved with are listed in response to Question 18. The most significant non-litigation activities with which I have been involved are my work on the various rules advisory committees on which I sit, particularly my work on the Judicial Conference's Standing Committee on the Rules of Practice and Procedure in the United States Courts.

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

Upon my withdrawal from Wiggin & Dana, LLP, I would expect to receive compensation under the Wiggin & Dana plan for retired partners in a sum certain that will be determined and paid over a specified period of time.

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

I will adhere to the procedures and provisions of the Code of Conduct for United States Judges and the Ethics in Government Act and any other relevant rules of ethical conduct. I will adopt appropriate procedures to learn of and resolve potential conflicts of interest in the manner provided by the law. In addition, I expect to implement appropriate procedures with the Clerk's Office to ensure that for a period that is appropriate I do not hear matters in which my former law firm or former clients are involved.

3. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.**

No

- 4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)**

See Financial Disclosure Report

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

See Financial Net Worth Statement and schedules

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

No

## III. GENERAL (PUBLIC)

1. **An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.**

Throughout my career I have donated my legal services. This donated legal work falls into four broad categories:

\* I have been lead pro bono counsel for parties in three cases where I was appointed by the court to represent an indigent party. In one case, I filed a petition for certiorari in the Supreme Court of the United States on behalf of an indigent defendant. See State v. Colton, 516 U.S. 1140 (1995). Two of the cases were before the United States Court of Appeals for the Second Circuit, and I was appointed by that court to brief and argue the appeals. See Cuocco v. Moritsugu, No. 98-2954 (2d Cir. July 28, 2000) (unpublished opinion); Davidson v. Scully, 114 F.3d 12 (2d Cir. 1997). The total pro bono time that I personally provided for these cases was approximately 150 hours, although associates from my firm assisted me and provided additional pro bono time. In addition to these cases, for which I was the lead lawyer, I have supervised many other lawyers in the firm who have been the lead counsel in pro bono cases. It would be very difficult to estimate the amount of time that I spent supervising others in that work.

\* My work as a director, officer and often founder of the many non-profit organizations listed in answer to Question 10, many of which serve the disadvantaged, has involved the provision of pro bono legal services to those organizations. For example, I prepared incorporation papers, 501(c)(3) applications and bylaws for both the Connecticut Food Bank, which provides food for those in need throughout Connecticut, and the Friends of the Yale Children's Hospital, each of which I was involved in founding. Also, in addition to my service as a director, I have provided pro bono legal advice and legal services from time to time to the other listed organizations. These services have ranged from contract review to zoning matters to dispute resolution and legal research. I also donated substantial legal services to the Games Organizing Committee of the Special Olympics, which held the World Special Olympic Games in New Haven. The approximate amount of free legal services provided to those organizations has varied year by year and is difficult to estimate with any degree of accuracy, though I would estimate that I have provided in excess of 50 hours of free legal services each year to the organizations listed in addition to the time I devoted to service as a director of those organizations.

\* I have regularly donated my legal services to the Office of Attorney General for the State of Connecticut and other lawyers who are preparing for arguments in the Supreme Court of the United States or the United States Court of Appeals for the Second Circuit. These services have principally involved reviewing and commenting upon briefs and also serving on moot courts prior to arguments. For example, within the last 12 months, I have provided such donated legal services in two cases which Connecticut Attorney General Richard Blumenthal argued before the Supreme Court of the United States. See Porter v. Nussle, 122 S.Ct. 983 (2002); Connecticut Dept of Public Safety v. Doe, 538 U.S. \_\_\_\_ (2003). I estimate that each of those cases involved approximately 30 hours of my time. I have also provided similar services to legal clinics at the Yale Law School.

\* Finally, I have provided free legal services in connection with the work that I have done for the Bar Association, Bar Foundation and Judicial committees listed in response to Question 9. This work has ranged from helping to draft legislation to create Connecticut's Appellate Court, drafting court rules and organizing and conducting educational programs for lawyers on alternate dispute resolution and appellate practice. I have devoted a substantial amount of time to those activities over the years. For example, in 2001, I recorded over 60 hours of nonbillable time to these Bar-related legal services.

2. **The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates – through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?**

I do not currently belong to, and have never held membership in, an organization that invidiously discriminates on the basis of race, sex or religion.

3. **Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).**

There is no selection commission in this jurisdiction. I was interviewed for the position to which I have been nominated in November 2002 by two members of the White House Counsel's Office and a member of the Office of Legal Policy of the U.S. Department of Justice. In late December 2002, I was informed by the White House Counsel's Office that the President intended to nominate me subject to consultation with the U.S. Senators from Connecticut and an F.B.I. background check. In February 2003, I was interviewed



by an F.B.I. agent and also interviewed by an attorney in the Office of Legal Policy, and subsequently provided oral and written information to both the F.B.I. and Office of Legal Policy. On March 27, 2003, I was informed by a member of the White House Counsel's Office that the President had that day sent my nomination to the United States Senate.

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

No one has discussed such a case, issue or question with me

5. **Please discuss your views on the following criticism involving "judicial activism."**

**The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped-many of the prerogatives of other branches and levels of government.**

Some of the characteristics of this "judicial activism" have been said to include:

- a. **A tendency by the judiciary toward problem-solution rather than grievance-resolution;**
- b. **A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;**
- c. **A tendency by the judiciary to impose broad, affirmative duties upon governments and society;**
- d. **A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and**
- e. **A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.**

A district court judge should endeavor to decide each case fairly and impartially, without imposing his or her own personal views. In so doing, a judge must consider the facts as presented by the litigants, or determined by the jury, in the particular matter before the court. Having determined the facts, the judge must next identify and apply controlling law to

resolve the dispute. Pertinent law in a given case may include the state or federal Constitutions, statutes and administrative regulations, as well as controlling opinions of the Supreme Court of the United States and the Court of Appeals for the circuit in which the district court lies. It is not the role of a judge to formulate public policy or to make judgments about the wisdom of particular policy choices reserved to other branches of government. Also, by recognizing and enforcing jurisdictional requirements and prudential limitations, including those for standing and ripeness, a district judge can ensure that the issue presented is appropriate for decision and that he or she does not reach beyond the proper bounds of his or her authority.

**STATEMENT OF JOHN A. WOODCOCK, NOMINEE TO BE  
DISTRICT JUDGE FOR THE DISTRICT OF MAINE**

Mr. WOODCOCK. Thank you, Mr. Chairman.

Like the others, Mr. Chairman, I thank you for the opportunity to come here today and to address you.

Like the others, I have no opening statement, but I would like to thank President Bush, and Senator Snowe and Senator Collins for their really marvelous comments.

If I could engage your indulgence for a moment, I would like to introduce my family.

Senator CHAMBLISS. Sure.

Mr. WOODCOCK. My wife of nearly 30 years, Beverly, is here, along with my oldest son, Jack, who traveled all the way downstairs from the Governmental Affairs Committee to be here today. My second son, Patrick, is here today. He is a junior at Bowdoin College. And my youngest son, Chris, is a junior at Hampden Academy, which is a local public school.

In addition, if I may, Mr. Chairman, my sister, Emmy Templeton, came down to be here today from New Jersey; and my younger sister, Libby Woodcock, traveled all the way down from Vermont, where she serves as an assistant U.S. attorney, to be here today.

I would like to recognize them as well.

[The biographical information of Mr. Woodcock follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

John Alden Woodcock, Jr.

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

Residence:

Hampden, ME

Office Address:

P.O. Box 1127  
136 Broadway  
Bangor, ME 04402-1127

3. Date and place of birth.

July 6, 1950

Bangor, ME

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

Married

Beverly Ann Newcombe Woodcock

Substitute Teacher  
M.S.A.D. # 22  
Main Road  
Hampden, ME 04444

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

University of Maine School of Law  
246 Deering Avenue  
Portland, ME 04102  
September, 1973 to May 1976  
Juris Doctorate: May 29, 1976

University of London (London School of Economics)  
Aldwych  
London, England.  
September 1972 - September 1973  
Master of Arts: December 18, 1973

Bowdoin College  
Brunswick, ME 04011  
September 1968 - June 1972  
Bachelor of Arts: June 3, 1972

Drew University  
36 Madison Avenue  
Madison, N.J. 07940  
January, 1971 - June 1971: (Semester abroad: London, England)

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

I. Employment:

Weatherbee, Woodcock, Burlock & Woodcock, P.A.  
Director and Employee  
136 Broadway  
Bangor, ME 04402-1127  
March 1991 to date

Mitchell & Stearns, P.A.  
Director and Employee  
99 Franklin Street  
Bangor, ME 04401  
January 1, 1980 - March 1991

Stearns, Finnegan & Needham, P.A.  
Director and Employee  
One Merchants Plaza  
Bangor, ME 04401  
August, 1976 to January 1, 1980

State of Maine  
Office of the District Attorney  
Part Time Employee: Assistant District Attorney  
97 Hammond Street  
Bangor, ME 04401  
March 1977 - February 1978

Skelton, Taintor & Abbott  
Employee: Summer Law Clerk  
95 Main Street  
Auburn, ME 04212  
June 1975 - August 1975

Maine Municipal Association  
Employee: Summer Intern  
60 Community Drive  
Augusta, ME 04330  
June 1974 - August 1974

Eastern Maine Builders  
Employee: Laborer  
171 Riverside Drive  
Eddington, ME 04428  
July 1972 - August 1972

II. Business Affiliations:

WWBW Realty, Inc.  
136 Broadway  
Bangor, ME 04401

Shareholder: 1/3rd interest in the building in which the law firm is located from March 1991 to date.

WTW Associates  
136 Broadway  
Bangor, ME 04401  
1/3rd interest in a joint venture from 1988 to 2000, which owned two apartment buildings in Bangor.

III. Trusteeships in Charitable or Educational Organizations.

A. Current Trusteeships:

Eastern Maine Healthcare Systems  
Current Director  
October 4, 2000 to date  
489 State Street  
Bangor, ME 04401

Eastern Maine Healthcare  
Current Director (Vice Chair)  
January 25, 1983 to date  
489 State Street  
Bangor, ME 04401

Eastern Maine Medical Center  
Current Trustee (Chair)  
January 16, 1980 to date  
489 State Street  
Bangor, ME 04401

Bowdoin College  
Current Trustee  
October 1996 to date  
Brunswick, ME 04011

University of Maine School of Law  
Member: Board of Visitors  
2002 to date  
246 Deering Avenue  
Portland, ME 04102

## B. Past Trusteeships:

Rosscare  
 Former Trustee  
 April 26, 1990 through March 13, 2002  
 489 State Street  
 Bangor, ME 04401

Eastern Maine Charities  
 Former Trustee  
 April 26, 1990 through March 13, 2002  
 489 State Street  
 Bangor, ME 04401

M.S.A.D. # 22  
 Former Director  
 1988-1989 (est)  
 Main Road  
 Hampden, ME 04444

Maine State Commission on Arts and Humanities  
 Former Commissioner  
 1982-83 (est)  
 Augusta, ME 04330

Bangor Symphony Orchestra  
 Former Trustee  
 1978-82 (est)  
 44 Central Street  
 Bangor, ME 04401

Good Samaritan Agency  
 Former Trustee  
 1978-1980 (est)  
 100 Ridgewood Drive  
 Bangor, ME 04401

Bangor Children's Home  
 Former Member of the Board of Managers  
 1977-2001 (est)  
 218 Ohio Street  
 Bangor, ME 04401



Bowdoin College Alumni Council  
Former Member (President)  
1992-1996  
Brunswick, ME 04011

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

None.

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

Bowdoin College:

Maine Scholar: 1968-69  
Cum Laude Graduate: 1972  
Magna Cum Laude In History: 1972

University of Maine School of Law

Managing Editor: Maine Law Review: 1975-76

Barrister: John Waldo Ballou Inn of Court

Fellow: Maine Bar Foundation

Distinguished Service Award: 2003  
Eastern Maine Healthcare

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

Member: Penobscot County, Maine State and American Bar Associations

Member: Defense Research Institute

Member: Advisory Committee on Professional Responsibility  
Maine Supreme Judicial Court

Co-Chair: Federal Practice Section of the Maine State Bar  
Association

Member: Local Rules Committee, United States District Court  
for the District of Maine

Member: Federal Bench-Bar Liaison Committee, United States  
District Court for the District of Maine

Member: Maine Trial Lawyers Association

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

Member: Maine Trial Lawyers Association.

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

United States Court of Appeals  
First Circuit  
January 31, 2000

United States District Court for the District of Maine  
December 6, 1976

Maine Supreme Judicial Court  
September 29, 1976

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

press reports about the speech, and they are readily available to you, please supply them.

I have participated as a speaker periodically in seminars and continuing legal education programs; however, none of these presentations has been reduced to writing.

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

My health is excellent. My last physical examination was on January 23, 2003.

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

None.

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

Not applicable.

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

A. Appointive Positions:

- 1) Commissioner: 1982-83 (est)

Maine State Commission on Arts and Humanities

- 2) Director: 1988-89 (est)  
M.S.A.D. # 22  
Hampden, ME

B. Elective Positions:

- 1) Moderator: 1998  
District Wide Budget Meeting  
M.S.A.D. # 22

17. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:
  - 1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;  
  
No.
  - 2. whether you practiced alone, and if so, the addresses and dates;  
  
No.
  - 3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

March 1991 to date  
Weatherbee, Woodcock, Burlock & Woodcock, P.A.  
136 Broadway  
Bangor, ME 04402-1127  
Director and Employee

January 1980 to March 1991  
Mitchell & Stearns  
99 Franklin Street

Bangor, ME 04401  
Director and Employee

August 1976 to January 1980  
Stearns, Finnegan & Needham, P.A.  
One Merchants Plaza  
Bangor, ME 04401  
Director and Employee

March 1977 to February 1978  
State of Maine  
Office of the District Attorney  
97 Hammond Street  
Bangor, ME 04401  
Part Time Employee: Assistant District Attorney

- b.
  1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?
  2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

1976-80: Stearns, Finnegan & Needham

After law school, I joined the small law firm of Stearns, Finnegan & Needham in Bangor, Maine. Stearns Finnegan had a general practice with expertise in business law, estate planning, utility law, real estate law, divorce law, and general litigation. As an associate, I assisted with all areas of the firm's practice, gradually devoting more time to litigation.

From March 1977 to February 1978, I worked part-time as an Assistant District Attorney for Penobscot and Piscataquis Counties. I had the opportunity to learn trial law under then Deputy District Attorney Eugene Beaulieu, who later became a United States Magistrate Judge. During that time, I handled all criminal appeals from both counties to the Maine Supreme

Judicial Court. I also prosecuted innumerable trials at the District and Superior Court levels. Shortly after I started with the District Attorney's Office, I was assigned a "jury day" each week and participated as lead prosecutor in approximately twenty criminal jury trials during my tenure.

1980-1991: Mitchell & Stearns

In 1980, Stearns, Finnegan & Needham merged with Mitchell, Ballou & Keith to form the firm of Mitchell & Stearns. Mitchell, Ballou & Keith had an extensive insurance defense practice. Two of my new partners, John Ballou and Edward Keith, were leading lights of the Maine Bar. After his death, the local Inn of Court was named in Mr. Ballou's honor. Mr. Keith was the part-time and later full-time U.S. Magistrate Judge. Since 1980, the majority of my practice has reflected the clientele of Mitchell & Stearns, representing insurance companies or their insureds the defense of a variety of civil actions.

In 1983, I began to represent Great Northern Paper Company before the Maine Workers' Compensation Commission in the defense of its workers' compensation claims. Great Northern has been self-insured and I have worked closely with management to minimize its workers' compensation exposure. As with many northern paper mills, the Great Northern mills have been bought and sold over the last 20 years. I have continued to represent the mills through serial owners: Great Northern Nekoosa, Georgia-Pacific Corporation, Bowater, Incorporated, and now Great Northern Paper, Inc.

In the mid-1980's, Maine had an extremely litigious workers' compensation system. I represented Great Northern in literally hundreds of matters before the Workers' Compensation Commission. My representation of Great Northern resulted in my participation in a number of appeals to the Maine Supreme Judicial Court. From 1976 to the present, I have been involved in 23 separate appeals to the Maine Supreme Judicial Court involving workers' compensation issues. During this

time, I maintained a trial practice in state and federal courts, acting as lead counsel in the prosecution and defense of products liability cases, personal injury cases, municipal law cases, and other similar litigation.

1991 to present: Weatherbee, Woodcock, Burlock & Woodcock

In 1991, I left the firm of Mitchell & Stearns to form the smaller law firm of Weatherbee, Woodcock, Burlock & Woodcock, specializing in litigation. From 1991 to date, I have continued to maintain an active litigation practice, primarily representing insurers and their insureds in a wide range of legal matters. Early on, my practice was more heavily concentrated in the workers' compensation field; however, with the McKernan Reforms in 1993, the workers' compensation portion of my practice diminished and the general litigation portion of my practice correspondingly grew.

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

I have been engaged in the active practice of trial law ever since I joined the District Attorney's Office in 1977. For example, this winter I had four cases pending in the United States District Court for the District of Maine: 1) a products liability case in which I represented a ladder manufacturer; 2) a life insurance case in which I represented the Personal Representative of an Estate against an insurance company; 3) an insurance coverage case; and, 4) a bailment case. My last trial was a jury waived in state court in February 25-26, 2003. On February 24, 2003, I received a decision from the Maine Law Court on the case of *University of Maine Foundation v. Fleet*, 2003 ME 20. I currently have one appeal pending before the Maine Supreme Judicial Court.

I have been involved in 47 separate appeals to the Maine Supreme Judicial Court on issues ranging from criminal law to trust law. With rare exceptions, each case I argued before the Maine Supreme Judicial Court represents a case I tried as lead counsel to judgment at the trial court level.

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

- A) 20% Federal
- B) 60% State
- C) 20% Other

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

Over the past decade, I have not engaged often in the practice of criminal law. While I was an Assistant District Attorney in the late 1970s, I prosecuted extensively. This estimate is for the last ten years:

- A) 99% civil
- B) 1% criminal

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

I have not kept a record of the cases I have tried to completion and I know of no way that an accurate figure could be established. In state and federal courts, I am certain that I have tried over 250 civil cases to judgment. I have handled no fewer than 1,000 workers' compensation matters to decree through the administrative law process. With the exception of two



or three of those cases, I have been the lead and sole trial counsel for my client.

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

Over the last five years, I estimate that 50% of cases tried to judgment were jury cases and 50% were court trials. My guess, however, is that I have tried more judge trials than jury trials over the course of 26 years of practice.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:
- (a) the date of representation;
  - (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
  - (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1) *University of Maine Foundation v. Fleet Bank: Trust Law.*

The Maine Supreme Judicial Court decided this case on February 24, 2003. It was on appeal from a decision of the Hancock County Probate Court. Judge Patterson was the Probate Judge. I was the lead and sole counsel for Fleet Bank. Charles E. Gilbert, III of Gilbert & Greif, P.A., 82 Columbia Street, Bangor, ME 04401 (207) 947-2223, represented the University of Maine Foundation.

A) *University of Maine Foundation v. Fleet Bank, 2003 ME 20.*

B) The issue before the Maine Supreme Judicial Court was one of trust law. Since 1953, Fleet Bank has been the trustee of a testamentary trust created by the Will of Charles E. Gilbert, the great uncle of the Foundation's lawyer. The Gilbert Trust provided (among other things) for specific annual distributions to certain individuals during their lives. Any excess income after payment to those individual beneficiaries was to be paid over to the University of Maine Foundation to fund a scholarship fund and a loan fund. The trust was to terminate upon the death of the last income beneficiary. The principal of the Trust now exceeds \$7,000,000.00.

In 2000, the Foundation approached Fleet and presented it with signed waiver forms from the three remaining life income beneficiaries. The Foundation demanded that Fleet agree to a premature termination of the Trust. Fleet refused, citing the express language in the Will that the Trust was not to terminate until the death of the last life income beneficiary. The Foundation initiated an action in the Probate Court to force Fleet to terminate the Gilbert Trust and to turn the principal over to the Foundation.

By decision dated July 23, 2002, Judge Patterson of the Probate Court ordered a partial termination of the Trust. He ordered that Fleet retain sufficient money to pay the life income beneficiaries and turn the remainder over to the Foundation immediately. Both Fleet and the Foundation appealed this decision to the Maine Supreme Judicial Court.

The legal issue, one of first impression in the State of Maine, was whether a trust can be terminated with the consent of all the beneficiaries, if the termination contravenes the express intent of the settlor. The Maine Supreme Court decided that the Probate Court had the authority to order a partial premature termination of the trust.

C) I represented Fleet Bank, the trustee of the Charles E. Gilbert Trust.

D) I handled all aspects of this case from the original demand for termination by the Foundation to the Brief on appeal. No other lawyer within the firm has performed any work on the case.

2) *James Tweedie, et ux. v. David Witham, et al.: Slander of Title and Tortious Interference With An Advantageous Business Relationship.*

This case has just been decided, but we have not as yet received a copy of the decision. The case was tried for three days in August and September, 2002 before Justice Jeffrey Hjelm. Attorney Peter Roy of Roy, Beardsley, Williams & Granger, 6 Water Street, Ellsworth, ME 04605-0723 (207) 667-7121 represents the Plaintiffs. Two of the co-defendants, Robert Macomber and Robert DeSimone, are pro se.

A) *James Tweedie, et ux. v. David Witham, et al.*  
Hancock County Superior Court, Civil Action Docket No. CV-99-38.

B) This law suit arises out of the failed sale of a motel located on Mount Desert Island, Maine. The disputed property, called the Park Entrance Motel, is located directly on the shore of Frenchman Bay directly across from the main entrance to Acadia National Park. It is a property of substantial potential value and, in fact, ultimately sold for \$5,300,000.00.

This case is a manifestation of an inordinately complex set of business dealings among the parties, which have already found their way on three occasions to the Maine Supreme Judicial Court. *Key Bank v. Park Entrance Motel*, 640 A.2d 211 (Me. 1994); *Union Trust v. MacQuinn-Tweedie*, 2001 ME 43, 767 A.2d 289; *Macomber v. MacQuinn-Tweedie*, Law Court Docket No. HAN-02-212. The essence of the litigation involves a Purchase and Sale Agreement entered into between my client, David Witham, and James and Lisa Tweedie, the then owners of the motel property. Having executed an Agreement and having received a \$10,000.00 deposit, the Tweedies reneged on the Purchase and Sale Agreement. The co-

defendants, Robert Macomber and Robert DeSimone, who are alleged to have been business partners of Mr. Witham, filed a *lis pendens* in the Hancock County Registry of Deeds, alerting potential purchasers of the motel that there was a pending binding arbitration regarding the Park Entrance Motel.

The Tweedies' claims against David Witham include a slander of title count and a tortious interference with an advantageous business relationship count. The Tweedies' law suit asserts that in filing the *lis pendens*, Messrs. Macomber and DeSimone were acting in furtherance of a joint venture or partnership with Mr. Witham, that the statements in the *lis pendens* were false, and that the *lis pendens* prevented the sale of the motel to a third party by affecting vendible title. The Tweedies have demanded damages in excess of \$1,275,000 plus the imposition of punitive damages against Mr. Witham.

The Clerk of the Superior Court has informed me that Justice Hjelm, in a twenty-one page decision, has granted judgment in favor of Mr. Witham, but I have not as yet received a copy of the decision.

C) David Witham

D) I have been sole and lead counsel for Mr. Witham in this matter.

3) *Robert Hogan v. Great Northern Paper, Inc.: Workers' Compensation.*

The Robert Hogan case presented two issues: one major and the other minor. The Maine Supreme Judicial Court issued an opinion in the case of *Bernard v. Mead*, 2001 ME 576, 765 A.2d 576, which interpreted a statutory provision in the Maine Workers' Compensation Act to restrict an inflation escalator in the calculation of weekly disability benefits for injured workers. Following *Bernard*, the Maine Legislature enacted legislation that overturned the Maine Supreme Court's interpretation of the statute. The *Hogan* case raised

questions about retroactive application of economic legislation and separation of powers in Maine. There was also a less significant issue involving the calculation of partial disability benefits when an employee had been receiving other disability benefits from a source other than the employer.

The case was initially decided by the Maine Workers' Compensation Board in favor of the employee. Frederick F. Costlow, Richardson, Whitman, Large & Badger, One Merchants Plaza, Bangor, ME 04402-2429 (207) 945-5900 represented the employee. I represented Great Northern Paper, Inc. as insured by OneBeacon Insurance Company. Except for one hearing, which was covered by my partner, I was the sole lead counsel throughout the litigation. Great Northern was the Appellant.

A) *Hogan v. Great Northern Paper, Inc.*, 2001 ME 162, 784 A.2d 1083.

B) In its *Hogan* decision, the Maine Law Court did not reach the separation of powers issue, finding it had not been preserved below. The Court had the opportunity to reach these issues in a case that had been consolidated for argument with *Hogan*. *Bernier v. Data General Corp.*, 2002 ME 2, 787 A.2d 144. The Court ruled in favor of Great Northern on the second issue on the proper treatment of outside disability payments to the employee.

C) I represented Great Northern Paper, Inc. as insured by OneBeacon Insurance Company.

D) With the exception of one hearing that was covered by my partner, I participated in this litigation as the sole lead counsel from trial through appeal.

4) *Bowie v. Delta Airlines: Workers' Compensation*.

In 1993, the Maine Legislature enacted a wholesale revision of Maine's Workers' Compensation Act, known as the McKernan Reforms after then Governor of the State of Maine, John R. McKernan. Litigation ensued,

challenging the applicability of the new law. One of those challenges was the *Bowie* case. I represented three Maine employers as *amici curiae* in the appeal. The employee was represented by Peter Bickerman, Verrill & Dana, 45 Memorial Circle, Augusta, ME 04332-5307 (207) 623-3889; the employer / insurer were represented by Jane Skelton, 209 State Street, Bangor, ME 04401, (207) 947-6500.

A) *Bowie v. Delta Airlines, Inc.*, 661 A.2d 1129 (Me. 1995).

B) The McKernan Reforms established a presumption that, if an employee voluntarily retired from active employment, he or she would not be entitled to wage replacement benefits. This case addressed the question of how this provision would be applied. In the *Bowie* case, the Maine Supreme Judicial Court ruled in favor of the employer and applied the new legislation to a retired employee.

C) Great Northern Paper, Inc.  
Champion International Paper  
Eastern Maine Medical Center

D) I participated only on behalf of the *Amici Curiae*. I filed a Brief on appeal, but under the rules of Court, did not participate in oral argument.

5. *Vernley Cyr v. Arthur Hurd, et ux.: Personal Injury.*

This was a difficult personal injury case. I represented the owners of an apartment building in Lincoln, Maine. In the early morning hours of April 28, 1983, Mr. Cyr, a man in his early twenties, had climbed an exterior staircase leading to the top floor apartment. Mr. Cyr had been drinking alcohol earlier that evening. When he found the door at the top of the stairs locked and no one at home, he turned to descend the stairs, slipped, tumbled over the handrail, and landed on the ground, breaking his neck. He was rendered quadriplegic. The case was tried over the course of about five days before a Superior Court Jury in Penobscot County. After long deliberation, the Jury

concluded that the Defendants were negligent, that Mr. Cyr himself was negligent, but that his negligence exceeded the negligence of the Defendants. Under Maine law, a judgment was entered for the Defendants and against Mr. Cyr. The jury verdict was appealed to the Maine Supreme Court, which affirmed the verdict.

Mr. Cyr was represented by Paul W. Chaiken, Rudman & Winchell, 84 Harlow Street, Bangor, ME 04402-1401, (207) 947-4501. I represented Mr. and Mrs. Hurd as lead counsel. I was assisted by Angela Farrell, Farrell, Rosenblatt & Russell, 61 Main Street, Bangor, ME (207) 990-3314.

A) *Cyr v. Hurd*, 554 A.2d 345 (Me. 1989).

B) This case was especially hard fought. The Plaintiff, a young man, made an extremely sympathetic appearance. He was represented by an excellent trial lawyer. The trial involved numerous motions in limine, the presentation of a "day in a life" video, and many contentious evidentiary rulings. Given the potential size of any verdict, the decision to take the matter to trial was particularly difficult.

C) Arthur and Carole Hurd.

D) I acted as lead counsel throughout the trial and was assisted by Attorney Farrell. With her assistance, I also briefed the case on appeal. I argued the case before the Maine Supreme Judicial Court.

6. *Lindsay v. Great Northern Paper, Inc.: Employment Discrimination & Workers' Compensation.*

In the early 1980s, Great Northern Paper adopted a "no fault" absenteeism policy. After granting an employee a certain number of excused absences, this policy counted all other absences from work against the employee, regardless of the reason for the absence. The no-fault absenteeism policy was adopted to avoid the paternalistic practice of evaluating the legitimacy of the employee's excuse for an absence from work.

Frederick Lindsay, a Great Northern employee, missed work a total of 14 times in a 12 month interval. Mr. Lindsay sustained a work-related back injury on November 10, 1982 and was absent from work the 15<sup>th</sup> time. Applying its no-fault absenteeism policy, Great Northern disciplined Mr. Lindsay for the total of fifteen absences, placing him out of work without pay for two weeks. Mr. Lindsay petitioned the Workers' Compensation Commission, claiming that Great Northern had discriminated against him because his assertion of a work-related injury had occasioned the discipline. The Commission ruled in favor of Mr. Lindsay; Great Northern appealed.

The employee's lawyer was Jonathan S.R. Beal, Fontaine & Beal, 482 Congress Street, Portland, ME 04112-7590 (207) 879-1879. I was the lead and sole counsel for Great Northern.

A) *Lindsay v. Great Northern Paper Co.*, 532 A.2d 151 (Me. 1987).

B) The Maine Supreme Judicial Court ordered two oral arguments in the *Lindsay* case before issuing a decision affirming the Commission. The Maine Law Court split 4-3 on the decision. The *Lindsay* decision was extremely controversial in Maine. The ruling raised concerns about whether employers could apply neutral policies to work-injured employees without discriminating against them.

C) Great Northern Paper Company

D) I was sole lead counsel in the case, both at trial and through the appellate process.

7) *Product Liability Case.*

In the 1980s, I represented a national manufacturer in a product liability case. The case was settled on appeal with strict provisions about confidentiality. I am unable, therefore, to be specific about the case.



The case involved a house fire at night in which a little girl died. The mother, who was home at the time of the fire, thought she had gotten all the children out of the house and, after counting, realized one was missing. Due to the flames, she failed in her attempt to climb the stairs to rescue her daughter. The trial of the case took approximately one week before a Jury. The evidence was both highly emotional and highly technical. In effect, the Defendant presented expert testimony from which the Jury could have concluded that the fire did not originate with its product. The Plaintiffs presented expert testimony from which the Jury could have concluded that the fire not only originated from the product, but resulted from a defect in the design of the product. The Jury returned a substantial verdict in favor of the Plaintiffs. The case was settled on appeal. I acted as lead counsel at trial, during appeal, and at settlement discussions.

I have listed this case because it was such a difficult case to try. I represented a national manufacturer against a local, sympathetic couple, who had clearly suffered an enormous tragedy. The testimony of the mother, who described the death of her child, was heart wrenching. On the other hand, the expert testimony, both for the Plaintiffs and for the Defendant, was complex, requiring knowledge of fire investigative techniques and electrical engineering. The presiding Justice later informed me that I had convinced her that the product had not caused the fire. I did not, however, convince the Jury.

The second reason I listed this case is to make the point that we often gain more from losing than we do from winning. In preparing and trying this case, I learned that from an advocate's viewpoint, it is vital in evaluating a client's exposure to consider seriously the power of sympathy, the limits of science, and the essential humanity of our justice system.

8) *Dunton v. Eastern Fine Paper Company: Workers' Compensation.*

The *Dunton* case addressed *inter alia* the issue of the proper role of an appellate court in reviewing administrative findings. Prior to *Dunton*, the Maine Supreme Judicial Court had issued two decisions that implied it would perform an independent analysis of the evidence, if the administrative body itself had reviewed a written record and had not received testimony from live witnesses. In *Dunton*, the Maine Law Court reaffirmed its more limited appellate role, holding that it was required to give deference to the factual findings of administrative tribunals, which acquire specialized expertise in narrow fields.

I represented the employee in this appeal. The two employers / insurers were represented by Michael P. Friedman, Rudman & Winchell, 84 Harlow Street, Bangor, ME 04402-1401 (207) 947-4501 and Stephen Hessert, 415 Congress Street, Portland, ME 04112-4600 (207) 774-7000.

A) *Dunton v. Eastern Fine Paper Co.*, 423 A.2d 512 (Me. 1980)

B) The *Dunton* case is a seminal Maine case. It has been cited over sixty times by the Maine Supreme Judicial Court for its holding on the proper standard for appellate review of administrative factual findings. In issuing its ruling, my client, Rodney Dunton, prevailed on appeal.

C) Rodney Dunton

D) I represented Mr. Dunton at the Commission level and wrote the Brief on appeal. Due to a scheduling conflict, the oral argument was made by one of my partners.

9) *Tibbetts v. Tibbetts: Divorce Law.*

In 1970, the Maine Legislature enacted a version of the Uniform Marriage and Divorce Act, which required the Divorce Court to separate marital property from non-marital property. By the mid-1970s, however, there was

still considerable confusion in Maine how to address non-marital property used during the marriage to purchase jointly held marital property. In *Tibbetts*, the Law Court set the standards for the treatment of non-marital property used to purchase marital assets. I represented David Tibbetts; Errol Paine, now deceased, represented Donna Tibbetts.

A) *Tibbetts v. Tibbetts*, 406 A.2d 70 (Me. 1979).

B) The *Tibbetts* opinion compared a marriage to a partnership and mandated that any non-marital contributions to the marital estate be set aside to the contributing spouse. It also required that the trial court consider appreciation on the non-marital contribution. An important case in Maine divorce law, the *Tibbetts* opinion has been cited 34 times in subsequent decisions by the Maine Supreme Judicial Court. The result of the case for my client was that the initial property division by the Court was reassessed to reflect the then current value of his ex-wife's \$5,000.00 contribution of non-marital property toward the purchase of a jointly-owned homestead.

C) David R. Tibbetts

D) I handled only the appeal of this case. The trial at the District Court was handled by my partner.

10) *State v. Boucher: Criminal Law*.

As Assistant District Attorney, I briefed and argued the Alphonse Boucher appeal. Mr. Boucher was represented by Attorney John F. Logan, Gross, Minsky & Mogul, 23 Water Street, Bangor, ME 04401, (207) 942-4644. Mr. Boucher had been convicted of assault with intent to rape. There were two issues on appeal. The first was the admissibility of the results of a police line up and the second was the admissibility of photographs of the victim, depicting injuries she had sustained during the assault.

A) *State v. Boucher*, 376 A.2d 478 (Me. 1977).

B) The significance of the *Boucher* case was two-fold. First, contrary to the Appellant's contention, the Maine Law Court found the line up procedure used by the Bangor Police Department to be "exemplary" and the opinion described the procedure in detail. The police procedure became the template for other line ups throughout the State of Maine, since it had gained the imprimatur of Maine's highest court. The second significant point of law was the ruling on the admissibility of the photograph of the injuries sustained by the victim at the time of the assault. The *Boucher* Court's rationale for the admission of the photographs was that they corroborated the victim's description of the assault, a ruling that was subsequently used as a proper basis for the admission of similar photographs in subsequent cases. The *Boucher* opinion has been cited not only by the Maine Supreme Judicial Court, but has also been cited in subsequent ALR articles.

C) I represented the State of Maine.

D) I did not participate in the trial of this case. I handled only the appeal.

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

I have participated as a member of the Maine Supreme Judicial Court's Advisory Committee on Professional Responsibility for a number of years. In 2000, the Maine Supreme Judicial Court referred the question of lawyer advertising to the Committee for its review. Reflecting a national debate, lawyer advertising had become a controversial topic in Maine. One television advertisement in particular, depicting lawyers striking their palms with baseball bats and promising to fight for their clients,

provoked much public and professional discussion and was one of the catalysts for the Court's reference to the Committee.

Maine already had a general prohibition against false and misleading lawyer advertising, but the question was whether Maine should adopt a more specific set of restrictions. The Committee reviewed extensive submissions, held a public hearing at the annual meeting of the Maine State Bar Association, reviewed ABA Model Rules, analyzed applicable caselaw, and debated the issues internally. The discussions centered around the need to avoid restricting free speech rights under the First Amendment, while at the same time protecting the public from overly provocative and misleading messages.

Ultimately, the Committee recommended the adoption of a series of "aspirational goals" for lawyer advertising. The Committee came to the conclusion that an additional set of more specific restrictions, forming the basis for discipline, would likely run afoul of First Amendment protections. On the other hand, the Committee felt obligated to respond to the pleas from the Bar to give guidance to lawyers who elect to advertise. The "aspirational goals" were intended to guide, not punish, lawyers and at the same time respect their right to free speech.

The Maine Supreme Judicial Court currently has this recommendation under advisement.

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

The law firm in which I am a Director and Shareholder intends to dissolve formally, if I am confirmed by the United States Senate. The law firm is a professional corporation. At the dissolution date, the assets of the law firm will be appraised and distributed among the then existing shareholders. While all the details of the dissolution have not been set, it is anticipated that the firm's accounts receivable and work in progress will be distributed, as received, in accordance with the percentage of stock ownership. The realty company that owns the building where the law firm is located intends to dissolve as well and the assets of the realty company, which consist only of the building itself, will be distributed upon sale.

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

If confirmed, I will recuse myself in accordance with the Rules of Judicial Conduct from any case in which I have a potential conflict of interest. I currently serve as Chair of the Board of the Trustees of the Eastern Maine Medical Center, as Vice Chair of its parent board, Eastern Maine Healthcare, and as a Director of its superparent, Eastern Maine Healthcare Systems. I have informed the Administration and Boards that I intend to resign from those positions if confirmed. I also serve as a member of the

Board of Trustees of Bowdoin College and a member of the Board of Visitors of the University of Maine School of Law. If possible, I will remain on those educational boards, but will comply with any restrictions on my activities on those boards.

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

**No.**

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

**See attached Financial Disclosure Report.**

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

**See attached Net Worth Schedule.**

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

**Yes.**

**In 2002, my brother and law partner, Timothy Woodcock, ran for the Republican nomination for United States Congress in the Second District of Maine. His primary run was unsuccessful. I was intimately involved in his campaign from the exploratory committee to the steering committee. I did not, however, have a title in the campaign.**

## III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I have occasionally taken cases upon referral by Maine's Volunteer Lawyers Project. I have found, however, that very often the VPL referrals in Maine require expertise in certain legal sub-specialties, such as divorce law, landlord-tenant law, child and protective custody, areas of law in which I commonly do not practice. Therefore, I have devoted a significant amount of volunteer time and energy to service on a substantial number of community boards. Such work has included participation as a board member for the local hospital and health care system, my college, and law school, and as Attorney-Coach for a high school Mock Trial Team.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

I do not belong to any organization that discriminates on the basis of race, sex, or religion. I have never belonged to any organization that discriminates on the basis of race or religion. While I was an undergraduate at Bowdoin College, I belonged to a fraternity, Psi Upsilon, the national organization of which did not allow the admission of women. Bowdoin was an all-male institution when I joined Psi U and membership in the local chapter was restricted to



Bowdoin students. While in college, I served as a student representative to a College Committee that successfully recommended to the Governing Boards that Bowdoin become co-educational.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

Yes. The recommendation of the Selection Committee was confidential and not revealed to the candidates.

The judicial selection process began with a request for an expression of interest by potential candidates. Each candidate submitted a resume to Senator Snowe's office. The candidates were then asked to complete an extensive questionnaire, detailing their education, professional experience, and other relevant information.

The Selection Committee, which consisted of 12 individuals from throughout the State of Maine, conducted interviews in Bangor on November 23, 2002. Following this interview, I was separately interviewed on November 25, 2002 by the Committee Chair, Derek Langhauser. I was subsequently notified by Senator Olympia Snowe and Senator Susan Collins that they would recommend my name for nomination to the President.

Following the Senators' recommendation, on December 10, 2002, I was interviewed in Washington, D.C. by Judge Alberto R. Gonzales, Counsel to the President. I have also been interviewed by the Department of Justice and the Federal Bureau of Investigation.

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

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

To respond to this question, I start with the premise that the United States of America is a constitutional democracy. In creating three branches of government, the Constitution contemplates a division of responsibility, directing the elected representatives of the people to create and administer the law and leaving to the judicial branch the duty to interpret the law. The balance among the three branches works

properly only when each branch remains true to its constitutional framework. The Judiciary exceeds its constitutional limitation when it acts as a legislature, creating law under the guise of interpretation, and when it acts as an executive, administering law under the guise of enforcement.

The Judiciary is not designed to develop and implement public policy. Though nominated and confirmed by the elected representatives of the people, the federal Judiciary is neither initially selected nor subject to direct removal by the people themselves. Institutionally, a trial is not a mechanism for analysis of public policy. Bound by rules of evidence, subject to the limitations of advocacy, required to follow the law as interpreted by higher courts, the trial court Judge is well qualified to bring justice to the parties before the court, but distinctly unqualified to make the policy decisions the Constitution leaves to the other two branches of government.

Limited by its constitutional duty to address only cases presented to it, properly viewed, the role of the United States District Court is restrained. The holdings of the United States Supreme Court and the Courts of Appeals are conclusively binding on the judgments of the trial court. Further, the trial court must presume the constitutionality of every duly enacted law and can reach a constitutional question only if it is essential to do so to decide the case before it.

In brief, it is the duty of the federal trial court Judge to apply the policy decisions of Congress and the President as interpreted by higher courts to the parties who come to the court for justice. To do otherwise would be to substitute the judgment of an individual in place of the will of the people and would violate not only the Constitution, but also the Judge's oath of office.

Senator CHAMBLISS. We thank all of you for being here and for supporting these outstanding nominees. It is always nice to have your family stand by you in moments of glory, and that is what we are here today to talk about.

Mr. Greer, I am going to start with you. You have had extensive experience in the legislative branch of government. You were a State Senator in the Tennessee General Assembly, and you were involved in the process of making law in that capacity.

In my view, a judge's role is not to create law but to follow the law as is created by the legislature. Do you believe that the proper role of a Federal judge is to uphold the legitimate will of the people as expressed in law created by the legislature, or to impose his or her own view of what is wise or just?

Mr. GREER. Thank you, Mr. Chairman. That is a very important question for a judge.

I frankly believe that my experience in the legislature has given me an unusual perspective maybe on this issue. I have had the great fortune in my life to be able to serve in all three branches of government. I was in the executive branch when I served as a county attorney, and earlier than that, on then Governor Alexander's staff. As you said, I was in the State Senate for 9 years, and I have been a practicing attorney for more than 20 years now.

I think that experience has given me a very clear understanding of the difference between the role of a legislator and the role of a judge, and I agree with your statement on that. My role as a judge will simply be to apply and interpret the statutes based upon their plain meaning as passed by the Congress and to apply Sixth Circuit and Supreme Court precedent to the cases I am hearing, and not to let my personal feelings or my political beliefs or any other factor influence my decision.

Senator CHAMBLISS. Good. I notice you have been involved in extensive pro bono work during your years of law practice. Would you tell the Committee a little bit about that, please?

Mr. GREER. Yes, Mr. Chairman, I will. I have had a typical small-town practice throughout those years. I have done wills and deeds and various other documents on numerous occasions for clients who could not pay for them. I have taken a number of cases, both civil and criminal, on a pro bono or reduced fee basis.

The other thing I have done is that I have regularly throughout my 20 years of practice accepted appointments in the Federal courts under the Criminal Justice Act to represent indigent defendants, typically three or four of those cases a year, and I have also accepted cases in the Sixth Circuit on appeal through the Criminal Justice Act as well.

Senator CHAMBLISS. Good.

Mr. Hardiman, we will move to you. I understand that you have done a substantial amount of volunteer and pro bono work during your years of practicing law also. For example, I understand that when you were at Skadden Arps here in D.C., you spent a substantial amount of time volunteering at Ayuda, a legal aid clinic for Spanish-speaking persons. Could you tell us about some of the cases that you handled while you were there, doing that volunteer work at Ayuda?

Mr. HARDIMAN. Yes, certainly, Mr. Chairman, I would be happy to do so.

I would be remiss—I forgot someone in the introduction, and I apologize—Mrs. Carol Bergin is here with us, too, and I would like to get that in the record.

I appreciate your question. My time spent at Ayuda, a legal aid clinic here in Washington, was some of the most valuable time that I spent as a law student and as a lawyer. I was privileged to study in Mexico and became fluent in Spanish and have always been committed to pro bono work, so I volunteered at Ayuda, in the office, on a regular basis, and I did everything from fingerprinting and interviewing persons of Hispanic origin who entered the country without inspection and who were seeking work authorization permits. That is how I started at Ayuda, and then, when I got my law degree and my license to practice here in the District of Columbia, I represented several immigrants who had entered without inspection.

In fact, my first case as a trial lawyer while I was at Skadden Arps was a pro bono case on behalf of an immigrant from El Salvador whose name was Ernesto Orellana-Hercules, and I was quite pleased that we were able to gain a victory in immigration court before immigration Judge Nejelski. We obtained political asylum for Mr. Hercules. And although that was my first case, and it did not involve millions of dollars or the types of clients that Skadden Arps typically had, to this day, that is still one of the most important cases I have ever handled and perhaps the most important, and an experience I will never forget.

I also represented a woman named Lucelena Betancourt, who was an immigrant from Colombia. She was a judge who was threatened by the cocaine cartels down there, and I represented Ms. Betancourt pro bono.

So I had a steady diet of referrals, pro bono referrals, from Ayuda, and I was quite privileged to handle those cases, and I thank Skadden Arps for encouraging that type of legal work.

Senator CHAMBLISS. You have served in several quasi-judicial capacities. In 1995, the Disciplinary Board of the Pennsylvania Supreme Court appointed you as a hearing officer, and when your term ended in 1999, you were appointed as an alternate hearing officer, a position which I understand you currently hold.

In addition, you have served as an arbitrator for the National Association of Securities Dealers. Can you describe your duties in these positions and how these experiences will benefit you as a Federal judge?

Mr. HARDIMAN. Certainly, Mr. Chairman. Thank you for that question.

I was privileged to be appointed to the Pennsylvania Disciplinary Board, a board which is appointed by the Supreme Court of Pennsylvania.

Those cases were an eye-opener for me. We were dealing with lawyers who had been accused by their clients of a variety of misfeasance, typically very sad stories by good folks in Pennsylvania whose lawyers had really let them down very badly. And I am pleased to say that in Pennsylvania, a portion of our dues as members of that bar go to the Lawyers' Fund for Client Security, which

helps reimburse financial harm suffered at the hands of wayward lawyers.

Sitting on those panels with two other fellow panelists on the Disciplinary Hearing Board really helped me think that I wanted to serve in the judiciary. It was an awesome responsibility. It was a lot of hard work, but it was very rewarding to do that, and I like it so much that I volunteered to be an arbitrator for the National Association for Securities Dealers, dealing with, of course, very different subject matter, but the same type of procedural mechanisms were generally employed, and I enjoyed and have enjoyed that experience very much as well.

Senator CHAMBLISS. I served 8 years on the State Bar of Georgia Disciplinary Board, and it was the only time in my career when I was able to prosecute. And it is one of the most revealing and interesting experiences I have ever had, and I commend you for your work there.

For the past 3 years, I know you served on the Governor's Judicial Advisory Commission for the Fifth Judicial Circuit. Could you describe your responsibilities in that position?

Mr. HARDIMAN. Yes, Mr. Chairman.

I was a member of a six-person panel appointed by the Governor. Our district was Allegheny County, southwestern Pennsylvania, and we were charged with the responsibility of vetting candidates who were applying for the trial court in Allegheny County—a very important job that our Committee took very seriously. We have had a couple of unfortunate incidents. We have a judge who is under Federal indictment right now for bribery on that court, and we also had another judge resign due to erratic behavior and other very serious problems.

So it was an honor to serve on that Committee because we knew that it was incumbent upon us to find persons not only of scholarship and legal experience, but also people of integrity who would discharge their judicial duties faithfully. So it was a great privilege to serve in that capacity, Mr. Chairman.

Senator CHAMBLISS. Thank you.

Mr. Kravitz, we will move to you. You have had the privilege of clerking for two Federal judges, including a Supreme Court Justice. What sort of experience did you glean from that that you think will help you when you get to the Federal bench?

Mr. KRAVITZ. Well, I had the great privilege of clerking for two wonderful judges. Judge Hunter has since died, and obviously, Justice Rehnquist has gone on to become Chief Justice.

I think I learned a number of things. First, Judge Hunter on the Third Circuit had uncommon common sense and good judgment, and he was the first to tell you he was perhaps not Oliver Wendell Holmes, but he brought to bear to legal issues this great common sense and judgment—and good judgment. And that, I hope, I learned and would serve me well, because I believe that all judges when they approach legal issues clearly have to approach them applying the law faithfully, but also have to—particularly, I think, at the district court level—remember common sense and display good judgment.

I also clerked for two people—I will go on to Justice Rehnquist in a second—but both Judge Hunter and Justice Rehnquist are

very personable, kind, warm people. You might think with a conservative justice that that may not be true, but in fact, both of them were. Both of them were not intimidating people. Both of them refer to themselves as “Jim Hunter” or “Bill Rehnquist.” And those qualities as well, it seems to me, will stand me in good stead, if I have learned my lessons well, which is to not have the robes go to one’s head, to maintain one’s feet planted firmly in the ground. A Federal court—any court, but a Federal court in particular—can be intimidating to people, and to have a manner that puts them at ease, is courteous to people and respectful of people, is important in my judgement, and I think I have learned that as well.

Then, finally, Justice Rehnquist was a great teacher. He used to subject his clerks to walks down the Mall—we did not think of security in those days—where we would have to be quizzed on a case that was about to be argued, and you did not have any notes, you did not have anything with you—no crutches to rely on. And he was a great teacher in terms of forcing us to articulate our views, gently showing when the views perhaps did not hang together or that I did not know something about a case, and the beginning of the process of being able to pull together lots of information and to think clearly, particularly on my feet, which has helped me in my practice, and I think will help as a district court judge as well.

So I was quite privileged to have held those positions and hope that I will make both of them proud of me.

Senator CHAMBLISS. Great. You also, as all good lawyers do, have done a significant amount of pro bono work. I notice you regularly donate your services to the Connecticut Attorney General’s Office by helping prepare its attorneys for appellate oral arguments. Would you tell us a little bit more about that, please, how you got involved in that and some of the things that you do from a practical standpoint?

Mr. KRAVITZ. Sure. I appreciate the question, because like my fellow nominees, I believe that a lawyer holds a privileged position in our society, and that with that privilege comes responsibility, and I have always tried to discharge that responsibility in a variety of ways.

I have been very, very active with charitable and nonprofit organizations, as is set forth in my questionnaire, founding—one of the founders along with others—the Connecticut Food Bank in terms of the initial board, and a founder of the Friends of the Children’s Hospital at Yale New Haven Hospital.

In addition, I have been appointed to represent individuals and have also worked on bar committees dealing with pro bono activities, but I also regularly make my services available, frankly, not only to the Attorney General’s Office but to the Yale clinics, to help lawyers get prepared for arguments. I have done a fair amount of arguments now not only at district court levels but at circuit levels and State Supreme Court levels and at the U.S. Supreme Court, and I have been fairly regularly called upon to play the role of judge, examining lawyers and putting them through their paces before argument. And I think that that, too, will stand me in good stead, because I have had the chance not only to be on one side of the bench as an advocate but also, although a pretend role, put

on the mantle of a judge and try to think through or force the lawyers to think through carefully the cases that they are about to argue.

Senator CHAMBLISS. Great. Thank you very much.

Moving on to Mr. Woodcock, in a somewhat similar vein, I was interested to read about your position as a coach of a local high school mock trial team. Would you tell the Committee a little bit about your involvement with the team as well as what you have gained from that experience?

Mr. WOODCOCK. Thank you very much, Mr. Chairman, for mentioning that.

The Hampden Academy mock trial team is part of a nationwide program. Each State has high school mock trial teams. Those students participate not only as witnesses but also as attorneys, doing opening statements and closing arguments.

I have been the attorney coach of the Hampden Academy mock trial team for the past 8 years, and I am very proud to say that of those 8 years, on three occasions, the Hampden Academy team represented the State of Maine in national competition. We went to Nashville, Tennessee, to Omaha, Nebraska, and to Minneapolis. It is a remarkable experience to watch these young men and women take hold of the law and move it forward, and even more remarkable is to sit in a courtroom and see grandparents and parents cheering on a cross-examination. That is very gratifying.

Senator CHAMBLISS. Were any of your three sons on those teams?

Mr. WOODCOCK. Yes, they were all on the team. My eldest son, Jack, was on the team that went to Nashville, and my second son, Patrick, was on the Nashville and Omaha team, and my third son, Christopher, was on the team that participated in Minneapolis and won a national witness award when he participated.

Senator CHAMBLISS. How about that? He had good coaching.

Since I had that same experience of coaching my son, I used to always get asked the question: Were you tougher on them than all the other team members? Maybe I ought to ask them that.

[Laughter.]

Mr. WOODCOCK. I have a great respect for the Fifth Amendment, and I will take the Fifth on that.

[Laughter.]

Senator CHAMBLISS. I understand.

You have spent over 25 years as a successful advocate for your clients. What do you think is the biggest challenge you will face in your new role if you are confirmed as a district court judge?

Mr. WOODCOCK. I think making the transition from advocacy to judicial bearing is always a challenge. Over the course of practicing law for numerous years, 26 years, one of the benefits I have had the opportunity to engage in, along with many other practicing lawyers, is that we go from judge to judge to judge, and we see different judges, and we are able to try to determine what characteristics of a judge we feel would be appropriate.

Those three characteristics that I feel most appropriate for a judge are legal competence, which we take as a given, common sense, and temperament. And those things I hope to bring to the bench if confirmed by the Senate.



Senator CHAMBLISS. Gentlemen, let me say to each of you individually and collectively that it is pretty obvious why you have been nominated for your respective judgeships. You all possess, obviously, great legal experience and competence, or you would not be here, but you touched on something there, Mr. Woodcock, and that is temperament, and just from your responses here today, I think each of you possesses that necessary judicial temperance that we need to see more often from the bench than we sometimes do.

I will tell you that you may receive written questions from other members of the Committee—they have until 5 p.m. on Wednesday, May 28 to submit written questions, and if there are any, they will be submitted to you in short order following that.

That being said, if there are no further questions or participation from anyone on the Committee, we will stand adjourned.

Thank you very much.

[Voice of unidentified woman in audience:]

VOICE. Mr. Chairman, we are in opposition to Judge Wesley based on his documented corruption at the New York Court of Appeals.

Senator CHAMBLISS. I will issue a warning that we will have order. The Committee will stand in recess until the police can restore order. Everyone remain seated.

[Pause.]

VOICE. Are you directing that I be arrested?

Are you directing that I be arrested?

Senator CHAMBLISS. I am directing that the police restore order.

VOICE. Are you directing that I be arrested?

[Pause.]

Senator CHAMBLISS. Outside witnesses are welcome to submit letters supporting or opposing nominees for the Committee's consideration, but it is not our usual procedure to invite outside witnesses to testify either in support or in opposition to the nomination.

I realize that this lady is disappointed that she is not able to make any statement this afternoon, but her disappointment in no way condones any disruption of this hearing.

Again, we will stand adjourned.

Thank you very much.

[Whereupon, at 3:32 p.m., the Committee was adjourned.]

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

## QUESTIONS AND ANSWERS

Responses To Senator Richard J. Durbin's  
Questions for Thomas Michael Hardiman

1. In your Senate questionnaire, you state that the most important case you have personally handled is *Dailey v. DeFazio*, in which you represented the Republican Committee of Allegheny County in a challenge to a redistricting plan. You are politically active and presently serve as the treasurer of the Republican Committee of Allegheny County. Are you prepared to recuse yourself in cases that come before you in which the Republican Party is a litigant?

Response:

In my Senate questionnaire I listed the ten most significant litigated matters which I personally handled. The cases were organized primarily in chronological order, beginning with the most recent cases. In addition, I sought to provide a representative sample of cases, including federal, state, trial, and appellate cases. The most recent trial I included was *Dailey v. DeFazio*, in which I represented the Republican Committee and several individuals who claimed violations of, *inter alia*, constitutional rights. At the time I litigated the *Dailey* case, I served as Treasurer of the Republican Committee of Allegheny County, an office to which I was elected in 2000. I was nominated by President Bush on April 9, 2003 and the following day I resigned as Treasurer of the Republican Committee of Allegheny County. I am no longer politically active.

Title 28, Section 455 of the United States Code and Canon 3(C)(1) of the Code of Conduct for United States Judges provide: A judge "shall disqualify himself [or herself] in any proceeding in which [the judge's] impartiality might reasonably be questioned . . . ." Accordingly, if I am fortunate enough to be confirmed, I would follow the statute and the Code of Conduct in all instances when making recusal decisions.

2. In your Senate questionnaire, you state that the second most important case you have personally handled is *Modrovich v. Allegheny County*. In this case, you defended on a *pro bono* basis the display of a large Ten Commandments plaque in the Allegheny County, Pennsylvania courthouse.

(a) Do you believe that every American – Christian or non-Christian – has a right to have the tenets of his or her religious beliefs displayed in government buildings? Why or why not?

Response:

Canon 5 of the ABA Model Code of Judicial Conduct provides that a judicial candidate shall not "make statements that commit or appear to commit the

candidate with respect to cases, controversies or issues that are likely to come before the court.” In light of Canon 5 and its Commentary, I am not at liberty to express a personal opinion regarding whether every American has a right to post his or her religious beliefs in government buildings. I will carefully follow precedents of the United States Supreme Court and the U.S. Court of Appeals for the Third Circuit in deciding any case, including those arising under the Establishment Clause.

- (b) **How do you reconcile the official government action of publicly posting the tenets of a particular religion with the Establishment Clause of the Constitution?**

Response:

In the *Modrovich* case, Allegheny County has argued that its purpose in accepting the donation of The Commandments Plaque was secular, *viz.*, to honor the rule of law and to remember those who perished fighting for the rule of law during World War I. This case has been stayed pending a decision of the U.S. Court of Appeals for the Third Circuit in another case involving the Establishment Clause. If confirmed, I would carefully follow binding precedents of the Supreme Court and the Court of Appeals for the Third Circuit, including those involving the Establishment Clause.

- (c) **Why did you choose to work on this case?**

Response:

In *Modrovich*, I and a team of Reed Smith lawyers have represented Allegheny County since the firm was asked by our County Executive to undertake the matter on a *pro bono* basis after he received a large volume of correspondence from citizens urging the County to defend the case. Allegheny County has defended the case by arguing that The Commandments plaque, which was affixed to the County Courthouse in 1917 and is one of 20 plaques on that building, should be allowed to remain there despite the Plaintiffs' objections.

3. **I would like to know your views on privacy rights.**

- (a) **Do you believe in and support a constitutional right to privacy?**

Response:

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court enunciated a constitutional right to privacy. As with all other areas of the law, if confirmed I

would faithfully adhere to the precedents of the Supreme Court and the Court of Appeals for the Third Circuit regarding the constitutional right to privacy.

- (b) **If so, do you believe the constitutional right to privacy encompasses a woman's right to have an abortion?**

Response:

In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court held that the constitutional right to privacy encompasses a woman's right to have an abortion. The Court reaffirmed this holding in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). As with all other areas of the law, if confirmed I would faithfully adhere to the precedents of the Supreme Court and the Court of Appeals for the Third Circuit, including those precedents regarding abortion rights.

- (c) **Do you agree with the recent comments of your home-state Senator Rick Santorum that "if the Supreme Court says that you have the right to consensual [gay] sex within your home, then you have the right to bigamy, you have the right to incest, you have the right to adultery?" Please explain.**

Response:

Although I am not familiar with the full context of the remarks quoted above, I understand that they were made with respect to the case of *Lawrence v. Texas*, which is now pending before the Supreme Court of the United States. As a nominee, it would be inappropriate for me to comment on a case currently pending before the Supreme Court. However, if confirmed, I would be bound to follow and would follow all decisions of the Supreme Court.

4. **You are a member of the Federalist Society. Do you agree with the following excerpt from the Federalist Society's statement of purpose? Please explain.**

**"Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law."**

Response:

I am a member of the Federalist Society, which is a large organization with a diverse membership. The Federalist Society provides fora for debate on a wide variety of topics and works hard to ensure that a broad spectrum of views are represented at its events. The Federalist Society does not lobby, takes no political positions, and does not engage in litigation. I am a

member because I believe that the organization is committed to fair, reasoned, and civil debate on matters of importance to all Americans. During the past thirteen years I have spent very little time on law school campuses. I have been to the University of Pittsburgh School of Law and the Duquesne University School of Law to interview students seeking employment and, on occasion, have attended programs. (The only programs I recall included three held at Duquesne University to hear Archibald Cox, Kathleen Kennedy Townsend, and Justice Sandra Day O'Connor). Based on my time spent at the law schools, I have not discerned any ideology -- liberal, conservative, or otherwise. With respect to the legal profession, I have not experienced any dominant ideology. Rather, I have heard a diverse range of opinions on all matters, legal and otherwise, from the hundreds of lawyers with whom I have come into contact during my years of practicing law.

**5. According to its mission statement, one of the goals of the Federalist Society is "reordering priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law." Which priorities, if any, do you believe need to be reordered? What is your belief about the role of federal judges and the courts in reordering such priorities? On which traditional values should there be a premium, and why?**

Response:

I believe Article III jurists hold a unique place within our constitutional government. Unlike the legislature, which enacts laws that reflect a variety of public policy judgments, the judiciary's role is primarily interpretive. The inferior federal courts are duty-bound to interpret the laws as written and to adhere to the precedents of the Supreme Court. I do not believe it appropriate for federal judges to "reorder priorities"; that task belongs to the legislative branch of government, which reflects the will of the people.

**6. During the last presidential election, President Bush pledged that he would appoint "strict constructionists" to the federal judiciary, in the mold of Supreme Court Justices Clarence Thomas and Antonin Scalia.**

**(a) How would you describe the judicial philosophy of Justices Scalia and Thomas?**

Response:

In deference to sitting members of the Supreme Court, I do not believe it appropriate for a nominee to an inferior federal court to comment upon the judicial philosophies of sitting Justices of the Supreme Court. Nor am I sufficiently familiar with the full body of work of either Justice Scalia or Justice Thomas to describe adequately their judicial philosophies. I understand, however, that Justice Scalia has described himself as a textualist.

- (b) **How would you describe your own judicial philosophy, and how do you believe it is different from or similar to Justices Scalia and Thomas?**

Response:

Although I have never been a judge, based upon my experience adjudicating matters on behalf of the Disciplinary Board of the Supreme Court of Pennsylvania and the National Association of Securities Dealers, I would characterize my judicial philosophy as follows: First and foremost, all parties to the controversy are entitled to a full and fair hearing. Second, there must be mutual respect and professionalism among the tribunal, the litigants, and their counsel. Third, my obligation in deciding the matter is to hear all the evidence, weigh it carefully, and decide the facts according to the weight of the evidence. Finally, I must read the controlling legal authority, understand it, and apply it honestly to the facts of the case. In sum, I believe district court judges should decide each case honestly and fairly on the merits.

- (c) **As a judge, would you interpret the Constitution strictly according to its original understanding in 1789?**

Response:

If confirmed, I would interpret the Constitution as written and as interpreted by the Supreme Court during the past 214 years.

- (d) **Do you think that the Supreme Court's most important decisions in the last century – *Brown v. Board of Education*, *Miranda v. Arizona*, *Roe v. Wade* – are consistent with strict constructionism? Why or why not?**

Response:

*Brown*, *Miranda*, and *Roe* are all important precedents of the Supreme Court to which I would faithfully adhere if confirmed as a district court judge. *Brown* served as the basis for landmark civil rights legislation in the 1960's. *Miranda* recently was reaffirmed in the *Dickerson* case, and *Roe* was reaffirmed by *Casey*. The phrase "strict constructionism" is subject to various understandings. Certain provisions of the Constitution are more amenable to "strict construction" than others. For example, the age requirements for Representatives (twenty-five), Senators (thirty) and President (thirty-five) and the Sixth Amendment right to a jury trial in criminal cases are straightforward. Other constitutional provisions, most notably the Equal Protection Clause and the Due Process Clause, require deeper analysis and have evolved over many decades of precedents. Furthermore,

the doctrine of *stare decisis* plays an important role in cases involving constitutional provisions that have been the subject of numerous cases over long periods of time.

**7. List three Supreme Court cases (other than *Plessy v. Ferguson* and *Dred Scott v. Sandford*) with which you disagree, and explain why.**

Response:

District court judges are required to decide cases on the factual and legal records presented to them. During my study of Supreme Court jurisprudence, I was never privy to a complete record before the Court. Accordingly, I cannot state with any degree of certainty the cases with which I disagree. More fundamentally, whether I disagreed with a decision of the Supreme Court is irrelevant because district court judges are bound to follow faithfully the precedents of the Supreme Court and the governing Court of Appeals. Finally, I would not want to comment on precedents to the extent that such comment could be construed as committing to rule a certain way in a case that might come before me. Nevertheless, if confirmed I would be required to decide cases in areas where precedents of the Supreme Court may be in tension. Subject to these inherent limitations, I cite the following:

- (1) *Korematsu v. United States*, 323 U.S. 214 (1944). In *Korematsu*, the Supreme Court upheld the incarceration and dispossession of American citizens of Japanese ancestry. Without questioning the motives of the authorities who made this decision, query whether it comports with the current state of Supreme Court jurisprudence interpreting the Equal Protection Clause and the Due Process Clause.
- (2) *Buck v. Bell*, 274 U.S. 200 (1927). In *Buck*, the Supreme Court upheld a Virginia statute authorizing the sterilization of inmates of state institutions who were deemed to be insane or imbeciles. Like *Korematsu*, query whether *Buck* remains good law in light of subsequent Supreme Court decisions.
- (3) *Lochner v. New York*, 198 U.S. 45 (1905). In *Lochner*, the Supreme Court invalidated a New York Law seeking to protect the health and safety of workers. The Court's decision in *Lochner* has been criticized extensively and its validity is in question.

The foregoing cases are offered as examples of the process of judicial decisionmaking in seeking to reconcile cases when their validity may be called into question in light of subsequent precedents, intervening events, and the passage of time.

**8. In terms of judicial philosophy, please name several Supreme Court Justices, living or dead, whom you admire and would strive to emulate on the bench.**

**Response:**

If confirmed, I would be obliged to adhere to the decisions of the Supreme Court. Some of the Justices I admire include: John Marshall, Felix Frankfurter, Robert Jackson, and Byron White. Although I admire each of these Justices for different reasons, the role of a district court judge differs markedly from that of a Supreme Court justice. Thus, I cannot state that I would seek to emulate any of these justices should I be fortunate enough to be confirmed.



**Responses To Senator Edward M. Kennedy's  
Questions for Thomas Michael Hardiman**

1. **In Borough of Edgewood v. Cisneros, you represented plaintiffs in an unsuccessful challenge to a consent decree put in place to remedy illegal racial discrimination in public and federally assisted housing in Allegheny County (Sanders Consent Decree).**

a. **In your questionnaire you describe your clients as the Borough Council of Edgewood and "two African-American residents." Did you pursue race discrimination claims on behalf of the African-American clients in this case?**

Response:

No.

**Did you represent any other clients in this case?**

Response:

Yes. I represented all plaintiffs in the case, including the Borough of Edgewood, Bernard Robinson and Hudie Evans and seven of the Borough Councilmembers (Jay Bush, Jean Davin, Regis Griffin, Chris Kefalos, Joseph Young, James Yucas, and Stephen Zelenko).

b. **In seeking to enjoin the Sanders Consent decree, you filed suit not only against the U.S. Department of Housing and Urban Development and Allegheny County, but also against the Neighborhood Legal Services Association. Please explain why you filed claims against the Neighborhood Legal Services Association.**

Response:

Under the Sanders Consent Decree, a representative of Neighborhood Legal Services Association ("NLSA") was a member of the Sanders Task Force. The Task Force was principally responsible for implementing all aspects of the Sanders Consent Decree, including the selection of "scattered site" housing. The NLSA delegate to the Task Force not only had a vote, but was the only party on the Task Force that possessed a veto over Task Force decisions. In our claim for injunctive relief (Count V), we sued all members of the Task Force, including NLSA, because our clients sought to enjoin the Task Force from purchasing homes in Edgewood.

- c. **You indicated in your questionnaire that you "worked to broker a settlement" while the case was on appeal. Please describe the work that you did to broker the settlement, the nature of the settlement, if any, that was achieved in this case, and detail at what point of the litigation these settlement discussions took place.**

Response:

Prior to filing our Complaint in Equity, we initiated settlement discussions in an effort to resolve the dispute. Our initial offer was that Edgewood would purchase a few homes and gift them to families that were eligible for scattered site housing under the Sanders Consent Decree. There were two purposes for this offer: (1) it would keep the homes on the tax rolls and (2) by owning the homes, the families would maintain the properties better than the Housing Authority and the pride of ownership would conduce to a better environment for the neighborhood. We were told that these offers were rejected because "Sanders is not a home ownership program." After we filed the Complaint, the District Court dismissed the action for lack of standing and for failure to state a claim upon which relief may be granted. While our appeal to the Court of Appeals for the Third Circuit was pending, I initiated settlement discussions again in an effort to reach an agreement under which the County Housing Authority would purchase three homes in Edgewood rather than the eight that were originally planned. During the pendency of the appeal, the Allegheny County Housing Authority advised us that it had received approval from the Department of Housing and Urban Development to purchase only three homes in Edgewood. This oral representation was never memorialized in a formal, written settlement agreement.

- d. **The district court dismissed your complaint in this case and the Third Circuit affirmed in an unpublished order. Please provide the district court opinion in this case.**

Response:

A copy is enclosed.

2. **You have been involved in a number of cases involving real estate and housing matters. Please detail any cases (including the outcome) in which you have**  
 (a) **represented defendants in challenges brought under the Fair Housing Act or state and local civil rights statutes or**

Response:

*Alexander v. Riga*, 208 F. 3d 419 (3d Cir. 2000): In this case I represented a husband and wife who were sued for violations of the Fair Housing Act and the Civil Rights Act of 1866. The case was tried to a jury in federal court and the jury returned a verdict which resulted in judgment for my clients. The case was appealed, however, and the U.S. Court of Appeals for the Third Circuit reversed the order of the trial court and judgment was entered for plaintiffs. We filed a Petition for Writ of Certiorari with the U.S. Supreme Court, which denied the Petition.

*Staszak v. Pennsylvania Human Relations Comm.*, 564 Pa. 720 (2000): In *Staszak* I defended a man accused of discrimination based on disability. The Pennsylvania Human Relations Commission entered judgment against our client. We appealed and the decision was reversed by Commonwealth Court of Pennsylvania and a judgment was entered in our client's favor. The Commission filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court, which was denied.

*Mary Jo Melton v. Penn Park Development, et al., U.S. Department of Housing and Urban Development*, No. 03-92-0825-8: In this administrative matter I represented a corporation that performed credit checks for residential landlords. After investigating the matter, the Department of Housing and Urban Development found no probable cause against our client.

**(b) represented plaintiffs bringing claims under the Fair Housing Act or state and local civil rights statutes.**

Response:

I have not represented any plaintiffs who have brought claims under the Fair Housing Act or state and local civil rights statutes. However, I have represented several plaintiffs who have brought claims under federal civil rights laws for various violations of federal constitutional rights.

**3. In your questionnaire, you indicate that you have handled 54 cases that have gone to verdict or judgment.**

**a. How many cases have you tried to judgment? Please briefly describe each case.**

Response:

I have tried the following nineteen cases to judgment:

1. *Dailey v. DeFazio*, C.A. No. 02-0830 (W.D. Pa. 2001): In this case I represented several plaintiffs and the Republican Committee of Allegheny County in a challenge to a redistricting of councilmanic districts in Allegheny County. The case involved claims of violations of the Voting Rights Act, the Civil Rights Act, and state law claims. The trial court declared the redistricting plan invalid.
2. *Nudi v. DeFazio*, C.A. No. 02-0830 (W.D. Pa. 2002): After Allegheny County Council passed a third redistricting plan, we filed another case challenging its legality. The issues in this case, which were similar to the claims we raised in the first trial, were limited to constitutional claims for violation of the Equal Protection Clause and the Administrative Code of Allegheny County. The court upheld the redistricting plan in this case.
3. *Hudson v. Housing Authority for the City of Pittsburgh*, 2001 U. S. App. LEXIS 8648 (3d Cir. 2001). I was sole counsel to the Housing Authority in a case brought by a pro se litigant who alleged that the police violated his Fourth Amendment rights. The jury returned a defense verdict.
4. *Lucas Systems v. ESB Bank et al.*, No. GD01-9445 (Allegheny County). In *Lucas*, I was lead counsel to defendants in an action for specific performance brought by a technology company. The case involved issues regarding contract law, construction issues, and remedies. We received a very favorable result and post-trial motions are pending before the court.
5. *Alexander v. Riga*, 208 F. 3d 419 (3d Cir. 2000). In this case I was lead counsel to defendants who were sued for violations of the Fair Housing Act and the Civil Rights Act of 1866. After trial I handled the appeal to the Court of Appeals for the Third Circuit and a Petition for Writ of Certiorari filed with the Supreme Court.
6. *First City v. Hengelsberg*, No. GD99-4950 (Allegheny County). I represented the plaintiff in this action on a guaranty agreement. The court awarded judgment in our favor, and both parties filed appeals. I argued the appeal in Superior Court, which recently reversed and remanded the case to the trial court.
7. *Stanley v. Steuben Woods Associates*, No. 99-CV-359 (Jefferson County, Ohio). In *Stanley*, I was lead counsel to several defendants involved in the development and construction of a condominium project that were sued for breach of contract, fraud, and violations of the Ohio Condominium Act. We prevailed on all counts except the Condominium Act claim on which the jury found one of our clients liable, but awarded no damages.

8. *Powell v. Housing Authority for the City of Pittsburgh*, No. SA99-746 (Allegheny County). In *Powell* I was lead counsel to the Housing Authority in a case involving safety in public housing which raised issues of federal administrative law. The plaintiff claimed that her eviction pursuant to regulations promulgated by the Department of Housing and Urban Development was illegal because the regulations were inconsistent with federal statutes regulating safety in public housing. We lost this case at the trial court and on appeal before Commonwealth Court. The Pennsylvania Supreme Court granted our Petition for Allowance of Appeal and unanimously reversed the lower court. I argued the case in the Court of Common Pleas, Commonwealth Court, and the Pennsylvania Supreme Court.

9. *Smith v. Coyne*, 722 A.2d 1022 (Pa. 1999). In *Smith*, I was lead counsel for a consortium of "mom and pop" landlords, which intervened in a constitutional challenge to Rule 1008(B) of the Pennsylvania Rules of District Justice Procedure. Plaintiffs claimed violations of federal and state constitutional rights. The trial court agreed and invalidated Rule 1008(B) as unconstitutional. We appealed to the Supreme Court of Pennsylvania as a matter of right and the Supreme Court unanimously reversed the trial court's decision. I argued the case in the Pennsylvania Supreme Court on behalf of all defendants and intervenors.

10. *Merlot Tarpaulin & Sidekit Mfg. Co., Inc. v. Refuse Transfer*, No. AD98-5213 (Allegheny County). In *Merlot*, I represented the plaintiff in a commercial contract dispute with a trucking company to whom my client had supplied several patented tarp systems for large trailers. The defendant filed counterclaims for breach of express and implied warranty. The court awarded damages to the defendant and the verdict was affirmed on appeal by Superior Court. I was counsel in both the trial and the appeal.

11. *Ravin v. First City Company*, 692 A.2d 577 (Pa. Super. 1997). I was sole counsel to a real estate management company and a partnership that were sued on ten counts involving claims for breach of contract, unjust enrichment, quantum meruit, and promissory estoppel. We prevailed on all claims and the case was affirmed by Superior Court.

12. *Dyer v. Hirsch*, No. AR95-5634 (Allegheny County). This case involved a purchase and sale agreement for residential real estate and construction issues related thereto. I represented the plaintiffs/sellers and the seminal issue in the case was whether the buyers could rescind the contract by aggregating "defects" to exceed the dollar value in the contract that triggered the buyers' right to rescind. The trial court ruled for the defendants and Superior Court affirmed. I conducted both the trial and the appeal.

13. *The A. G. Mauro Co. v. The Stadium Authority of the City of Pittsburgh*, No. GD94-10832 (Allegheny County). I served as second-chair to (now) Judge Cindrich of the Western District of Pennsylvania. This was an action for injunctive and declaratory relief in which we represented some thirty corporations that had suites at Three Rivers Stadium. The trial court issued a Declaratory Judgment in our clients' favor.
14. *Mutschler v. Kaye*, No. GD94-19312 (Allegheny County). In *Mutschler*, I served as co-counsel to the plaintiff in two cases in which our client made numerous claims, sounding both in tort and contract, against his former partners and employer. We received a judgment in the first trial and in the second trial, which was a garnishment action against an affiliate of the original judgment debtor. We are preparing for trial next month on a fraudulent conveyance claim against another affiliate of the judgment debtors in the first two cases.
15. *Goldman v. Ames Dept. Stores*, 1994 U.S. Dist. LEXIS (S.D.N.Y. 1994) (reported on appeal). In *Goldman*, I second-chaired a trial in the bankruptcy court in which we represented Ames Department Stores, which was a debtor-in-possession under Chapter 11 of the Bankruptcy Code. We successfully defended this case, which was brought by the owners of a shopping center in which Ames was a tenant.
16. *First City v. Chrysler Financial Corp.*, No. GD93-11298 (Allegheny County). In this case, I served as second-chair in an action to enjoin the Defendant from calling a letter of credit for over \$2,000,000. The court granted our Motion for Preliminary Injunction.
17. *Comserv v. First City South*, No. GD92-15659 (Allegheny County). This case was a replevin action in which I represented the Defendant, which owned a shopping center. Plaintiff brought a tort claim for conversion of equipment. The trial court denied plaintiff's claim.
18. *Lokes v. Advance Gregg Security*, No. GD 91-10964 (Allegheny County, Pa.). I served as associate counsel in this case, defending a security firm that was accused of gender and age discrimination after it discharged the plaintiff. The trial court directed a verdict for our client.
19. *Rmax, Inc. v. Alliance General Ins. Co.*, No. GD88-00251 (Allegheny County). In this case I represented the plaintiff, which manufactured roofing membranes, in a bad faith claim against its insurance carrier. The trial court ruled that Alliance had acted in bad faith and judgment was entered in our favor.

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**b. What is the length of your longest trial? Please describe the claims in the case.**

Response:

My longest trial was *Lucas Systems v. ESB Bank et al.*, No. GD01-9445, which lasted eleven days in the Court of Common Pleas of Allegheny County. In this case, I was lead counsel to defendants in an action for specific performance brought by a technology company. The case involved issues regarding contract law, construction issues, and remedies. We received a very favorable result and post-trial motions are pending before the court.

My longest jury trial was *Stanley v. Steuben Woods Associates*, No. 99-CV-359 (Jefferson County, Ohio). The case lasted nine days and I was lead counsel to several defendants involved in the development and construction of a condominium project that were sued for breach of contract, fraud, and violations of the Ohio Condominium Act. We prevailed on all counts except the Condominium Act claim on which the jury found one of our clients liable, but awarded no damages.

Responses To Senator Patrick J. Leahy's  
Questions For Thomas Michael Hardiman

1. In *Alexander v. Riga*, you represented landlords who violated the Civil Rights Act and the Fair Housing Act by repeatedly refusing to show an apartment to African-American applicants. The District Court found that your clients "represented that an apartment was not available for inspection or rental, when it was," displaying a "callous indifference" to federally protected rights. You argued that plaintiffs who have suffered discrimination should be required to make a separate showing of harm to collect damages despite the fact that a jury had established that your clients engaged in intentional racial discrimination. The Third Circuit stated that your argument "trivializes the role of civil rights law in eradicating discrimination."
  - a. Please explain your understanding of the standard required for a victim of racial discrimination to collect nominal damages when a finding of discrimination has been established.

Response:

The U.S. Court of Appeals for the Third Circuit held in *Alexander v. Riga* that a victim of racial discrimination is entitled to a jury charge that nominal damages are mandatory. The Court also wrote: "This entitlement [to nominal damages] is not automatic, however, 'but rather it is incumbent upon the plaintiff to make a timely request for nominal damages.'" *quoting Campos-Orrego v. Rivera*, 175 F.3d 89 (1<sup>st</sup> Cir. 1999). Accordingly, plaintiffs are entitled to a charge that nominal damages are mandatory when discrimination has been found, but this right is waivable. In *Alexander v. Riga*, I represented Maria and Joseph Riga, husband and wife, who were sued for violations of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 and 1982 and the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* Prior to the commencement of trial, the plaintiffs abandoned their claims under the Civil Rights Act of 1866 and advanced their claim under the Fair Housing Act. After an eight day jury trial, a jury of seven people returned Special Verdicts indicating that Mrs. Riga had discriminated against the plaintiffs, but found that discrimination was not the legal cause of harm. Accordingly, the jury awarded no damages to the plaintiffs. On appeal, the U.S. Court of Appeals for the Third Circuit found that the District Court abused its discretion when it failed to enter judgment in favor of the plaintiffs and when it failed to find that plaintiffs were "prevailing parties." *Alexander v. Riga*, 208 F.3d 419, 428 (3d Cir. 2000). The Court of Appeals affirmed the lower court's decision not to award compensatory or nominal damages, finding that plaintiffs' counsels' failure to object to the jury charges constituted a waiver. *Id.* at 428-29. Although the Court of Appeals upheld plaintiffs' waiver on the nominal damages



issue, the panel wrote: "The District Court apparently felt that this case involved 'merely' a violation of 'purely statutory rights,' and that, therefore, nominal damages were not required. In our opinion, this stance trivializes the role of civil rights law in eradicating discrimination." *Id.* at 429. The District Court's decision was based on a legal principle enunciated by the U. S. Court of Appeals for the Eighth Circuit on a matter which had not been addressed previously by the Court of Appeals for the Third Circuit. In *Walker v. Anderson Elec. Connection*, 944 F.2d 841 (8<sup>th</sup> Cir.), *cert. denied*, 506 U. S. 1078 (1998), the Court drew a distinction between absolute constitutional rights for which nominal damages are mandatory and statutory rights for which such damages are discretionary. The Third Circuit took a different view of this issue in *Alexander v. Riga*.

- b. In a unanimous opinion, the Third Circuit found that Judge Standish of the U.S. District Court for the Western District of Pennsylvania committed an abuse of discretion when he adopted your argument and improperly advised the jury on the issue of nominal damages in this case. As you are aware, you are nominated to Judge Standish's seat. If you are confirmed to fill this seat, what assurances can you provide the Committee and the citizens of your district that you will enforce the current rights ensured by our anti-discrimination laws?

Response:

I assure the Committee that if confirmed, I would faithfully adhere to all precedents of the United States Supreme Court and the U. S. Court of Appeals for the Third Circuit. Additionally, I would faithfully discharge the oath of office to: "administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties . . . under the Constitution and laws of the United States . . ." Consistent with the oath, I would faithfully enforce all laws of the land, including our civil rights and anti-discrimination laws.

Moreover, I understand that the role of an advocate differs from that of a judge. As an advocate, I am required to represent my client zealously within the bounds of the law. As the ABA Model Rules of Professional Conduct states: a lawyer may make any argument if "there is a basis in law and fact for doing so, that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

2. Also during the course of litigation in *Alexander v. Riga*, you issued a number of *ex parte* subpoenas in violation of Rule 45 of the Federal Rules of Civil Procedure.

- a. **Are you familiar with the requirements imposed on counsel by Rule 45? What is your current understanding of the requirements imposed on counsel when subpoenaing information from third parties?**

Response:

On September 6, 1996, we served a document subpoena upon OK Grocery by hand delivery upon its counsel. I erroneously neglected to ensure that we served a copy of this subpoena upon opposing counsel. To the best of my knowledge, this was the only occasion when I committed such an error. I am familiar with the requirements of Fed. R. Civ. P. 45 and in particular with the requirement regarding prior notice to the parties when serving subpoenas for the production of documents. Rule 45(b)(1) states: "Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b)."

- b. **What responsibilities do attorneys have to supervise their employees and ensure that their actions comport with the Federal Rules of Civil Procedure?**

Response:

I believe that lead counsel on each case is responsible for conducting the litigation properly. The lawyer in charge on any case should try to ensure that those acting under his or her direction and supervision act professionally and represent the client's interests zealously within the bounds of the law.

- c. **Were you reprimanded for your actions in this case? Have you been referred to the Bar or any other disciplinary body for violations of the Federal Rules of Civil Procedure? Have you issued *ex parte* subpoenas without following the Rules in other cases?**

Response:

I was not reprimanded for my actions. I am unaware of any complaint ever being lodged against me with the Bar or the Disciplinary Board for alleged violations of laws or any Rules of Professional Conduct. Other than the single instance in the *Riga* case, I am unaware of any other matter in which I or my colleagues issued subpoenas without serving them on opposing counsel.

- d. What role do you believe district court judges should play in monitoring the discovery process to ensure that the Rules are followed?**

Response:

I believe that district court judges play an important oversight role regarding the conduct of cases from inception to conclusion, including the discovery process. Whenever counsel have a discovery dispute they cannot resolve, district court judges should promptly make themselves available to resolve the matter to facilitate the efficient administration of justice.

- 3. Over the past decade you have contributed significant financial support to Republican campaigns and have served in a number of Republican offices in the state of Pennsylvania. What can you say to assure this Committee and prospective parties that you will be a fair judge, an impartial adjudicator, who will not use the federal bench to achieve the legal, political or philosophical goals of your friends in the Republican party or of the party itself?**

Response:

During the past ten years I have made financial contributions to Republicans and Democrats for various reasons. However, I recognize a critical distinction between one's role as a private citizen on the one hand and the role of a judge on the other. On April 10, 2003, one day after my nomination by President Bush on April 9, 2003, I resigned as Treasurer of the Republican Committee of Allegheny County and I have ceased political activities. I am mindful of a judge's obligations to eschew any form of political activity and if confirmed, I would not engage in any political activity. Furthermore, I do not believe that judges should seek in any way to "achieve the legal, political or philosophical goals" of one's friends or a political party. Rather, the duty of a judge is to faithfully adhere to the precedents of the Supreme Court and the governing Court of Appeals without regard to one's own beliefs. I believe that those who know me best, people in the community in which I work, have confidence that I would be a fair, impartial adjudicator if I am fortunate enough to be confirmed. As an example, I have enclosed two letters of support from prominent Democrat members of the Allegheny County community. Finally, if confirmed, I would recuse from any case in which my impartiality might reasonably be questioned in accordance with Canon 3.C. of the Code of Judicial Conduct.

4. **On the eve of your Committee hearing, we received the American Bar Association's evaluation of your nomination to the Western District of Pennsylvania. As you are no doubt aware, some of the members on the Standing Committee on the Federal Judiciary concluded that you are "not qualified" for a lifetime appointment to the district court.**

a. **Please share with the Committee any insights you have about why some attorneys in your community would suggest that you are "not qualified" to be a district court judge.**

Response:

I have no personal knowledge of any attorneys in my community who have opined that I am not qualified to serve as a federal district court judge. Despite the tensions inherent in litigation work, I have always worked hard to be collegial, professional, and pleasant. With very few exceptions, I have enjoyed excellent working relationships with opposing counsel. I am unable to speculate as to why the ABA provided the rating it did. The ABA has not explained why at least one of its members gave me the rating of "not qualified," while a substantial majority rated me "qualified."

b. **According to your Senate Questionnaire, you have tried at least 54 cases to verdict or judgment. Please indicate specifically how many of these cases were the result of default judgments and how many were the result of motions to dismiss. How many of these cases resulted in bench or jury trials? If any of these cases involved trials, please list the approximate duration of the trial proceedings and whether you served as chief or sole counsel in these trial proceedings.**

Response:

1. Of these 54 cases, 19 were verdicts entered after trial, 9 were judgments entered on a motion to dismiss, 0 were the result of default judgments, and the remaining 26 cases were cases decided on summary judgments or confessions of judgment upheld after depositions, briefing, and oral argument. Of the nineteen trials, I was sole or lead counsel in fourteen. These cases were of the following duration:
  - 11 days (one case)
  - 9 days (one case)
  - 8 days (one case)
  - 5 days (one case)
  - 4 days (two cases)

3 days (four cases)  
 2 days (four cases)  
 1 day (five cases)

- c. **In your Senate Questionnaire, you indicated that as a law firm partner, your current private practice involves an "active civil and criminal litigation practice." Please indicate the number of cases during this timeframe that have involved criminal litigation. Have any of these criminal cases resulted in a trial to verdict and sentencing? If so, in how many of these cases did you serve as chief or sole counsel?**

Response:

I stated in my Senate Questionnaire that I have been engaged in an active civil and criminal litigation practice in federal and state courts. The majority of my practice has been civil in nature. Nevertheless, for several years I defended a corporation in a criminal and civil Medicare fraud case which I began as associate counsel and then became lead counsel. In addition, I was sole counsel to an individual in a criminal and civil securities fraud case. Other criminal defense work includes work as lead counsel for a client that I cannot disclose because the grand jury investigation is ongoing. I have also defended as sole counsel approximately 20 cooperating witnesses in grand jury proceedings. In addition, I was sole counsel to an individual in a rape case that was dismissed after the preliminary hearing. Finally, I have served *pro bono* as associate counsel on post-conviction matters for two men who committed multiple homicides.

- d. **Considering that the vast majority of your litigation experience is in the specialized area of real estate, please describe what steps you will take, if confirmed, to prepare yourself for the complex issues of criminal law that will comprise a substantial portion of the docket handled by federal district courts.**

Response:

In my Senate Questionnaire, I indicated that I have specialized knowledge in real estate litigation. Nevertheless, I am a generalist who has undertaken a wide variety of cases. Apart from the criminal experience referenced above, I have handled cases involving federal laws regarding: civil rights, taxation, securities, labor, employment, as well as administrative, election, and bankruptcy law. I have brought and/or defended claims arising

under the First, Fourth, Fifth, Sixth, Seventh, Eleventh, and Fourteenth Amendments to the United States and/or Pennsylvania Constitutions. In addition, I have handled cases involving state law issues sounding in tort, contract, and quasi-contract. In sum, I have a broad spectrum of litigation experience. I believe this breadth of experience would serve me well if I am fortunate enough to be confirmed. As with all areas of the law, I will studiously evaluate the facts and the law of each case to try to reach a just result consistent with the precedents of the Supreme Court and the U. S. Court of Appeals for the Third Circuit. Finally, I will seek guidance from all sitting members of the bench as well as written materials I have received from the Administrative Office of the United States Courts.

5. **In your Senate Questionnaire, you noted that you appeared before two different Judicial Nominating Commissions for the Western District of Pennsylvania in 2001 and 2003.**

**Who were the members of both commissions and which candidates did they recommend for nomination?**

Response:

I do not know the identities of all of the members of the Nominating Commissions before which I appeared, but I recall the following persons: Karen Shapira, William Pietragallo, Diana Irey, George Miles, Christopher Gleason, Eugene Berry, Clyde Slease, Christopher Donahue, Nora Barry Fischer, and H. Woodruff Turner. I do not know all the identities of all the candidates recommended for nomination, but I believe that some of those recommended included: Joy Flowers Conti, David Cercone, Arthur Schwab, Terrence McVerry, Alexander Lindsay, Kim Gibson, Ronald Folino, William Ward, Mary Beth Buchanan, John McGinley, and Jill Rangos.

**Please describe the types of questions that you were asked during these interviews.**

Response:

During my appearances before the Nominating Commissions I was asked numerous questions, most of which I cannot recall. The questions I recall are: Why do you want to be a judge? What is your practice like? What is the most important thing you learned from your time in Mexico? Why are you willing to consider taking such a large pay cut? Are you prepared to serve for life? Do you have a problem with mandatory minimum sentences? Do you believe non-violent drug offenders should go to jail?

**How did you learn of the judicial vacancy and the nominating commissions?**

Response:

I learned of the judicial vacancy and the nominating commission through an advertisement in the Pittsburgh Legal Journal.

**Were you recommended to the nominating commissions by your home state Senators?**

Response:


No.

**Were you asked to apply for this position and if so, by whom?**

Response:

No.

## SUBMISSIONS FOR THE RECORD




United States Senate  
**Committee on the Judiciary**

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Committee Information

Statement of  
**The Honorable Lamar Alexander**  
United States Senator  
Tennessee

May 22, 2003  PRINTABLE  
VERSION

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Statement of Sen. Lamar Alexander to the Senate Judiciary Committee in support of Ronnie Greer, nominee for U.S. District Court Judge for the Eastern District

May 22, 2003

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Statement of Sen. Lamar Alexander to the Senate Judiciary Committee in support of Ronnie Greer, nominee for U.S. District Court Judge for the Eastern District

May 22, 2003

The point I would like to recognize today is the breadth of Ronnie Greer's knowledge and the breadth of his skills.

He has tried approximately 200 cases in state or federal courts as sole or chief counsel.

He has unusually broad experience in both civil and criminal litigation in state and federal courts.

In civil law, Mr. Greer has practiced in the areas of personal injury, criminal defense, environmental law and bankruptcy.

He has represented many defendants in criminal cases in both state and federal courts and has represented numerous cases for indigent clients on a pro bono basis. He also routinely accepted several criminal cases appointed by the federal courts each year.

During his service in the Tennessee General Assembly as a state senator, he was named Tennessee Conservation League's Legislator of the Year and served as chairman of the Senate Environment Conservation and Tourism Committee.

Ronnie Greer knows East Tennessee. He knows the law. I have known him since he was student body president at East Tennessee State University.

He is one of the exceptional citizens in our state. We are fortunate the President decided to nominate him to be U.S. District Court Judge for the eastern district.

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**Statement of Senator Saxby Chambliss, Acting Chairman**

**Before the Committee on the Judiciary  
United States Senate**

**on**

**The Nominations of  
Richard C. Wesley to be U.S. Circuit Judge for the Second Circuit;  
J. Ronnie Greer to be U.S. District Judge, Eastern District of Tennessee;  
Thomas M. Hardiman to be U.S. District Judge,  
Western District of Pennsylvania;  
Mark R. Kravitz to be U.S. District Judge, District of Connecticut; and  
John A. Woodcock to be U.S. District Judge, District of Maine**

**May 22, 2003**

Today the Committee has the privilege of considering the nominations of five outstanding lawyers to be federal judges. I commend President Bush for nominating each of them, and I look forward to their testimony. Since we have so many senators here this morning who wish to speak in support of these nominees, I will keep my remarks brief.

The first nominee from whom we will hear is **Richard Wesley**, who has been nominated for a position on the Second Circuit. A graduate of Cornell law school, Judge Wesley's distinguished career included private practice and a stint as assistant counsel to the Minority Leader of the New York State Assembly before he was elected to the Assembly himself in 1983. He began his judicial career in 1987, when he was elected to the Seventh Judicial District of the Supreme Court of

New York. He then served as the Supervising Judge for the Criminal Courts within the Supreme Court, and in 1994 Governor Cuomo appointed him to the Appellate Division of the Supreme Court. In December 1996, Governor Pataki nominated him to the New York Court of Appeals, the highest court in the state. He was confirmed by a unanimous vote of the New York State Senate on January 14, 1997. Judge Wesley's sixteen years as a judge at both the trial and appellate levels, plus his prior service as a state assemblyman, have given him the experience and background to make an outstanding Second Circuit judge.

In addition to Judge Wesley, we will hear from four nominees for the federal trial court bench. **Ronnie Greer**, who has been nominated for the Eastern District of Tennessee, has extensive experience in both the private and public sectors of the legal community. For the past 20 years, Mr. Greer has maintained a diverse general legal practice consisting of considerable litigation in the areas of state and federal criminal defense, personal injury, and workers compensation. For eight years, Mr. Greer also served as a senator in the Tennessee General Assembly, where he was a member of the Judiciary Committee and chairman of the Environment, Conservation and Tourism Committee.

Our nominee for the Western District of Pennsylvania is **Thomas Hardiman**. Mr. Hardiman, currently a partner with the Reed Smith law firm, graduated from Georgetown University Law Center, where he served for two years on the *Georgetown Law Journal*. Despite the demands of a private practice career that has included tenures with several prestigious firms, he has made ample time for pro bono and volunteer work, including eight years of work as a volunteer for Big Brothers / Big Sisters of Greater Pittsburgh.

Our nominee for the District of Connecticut is another Hoya. **Mark Kravitz** attended Georgetown University Law Center, where he was the managing editor of the *Georgetown Law Journal*. Following graduation, he clerked for Third Circuit Judge James Hunter III and for then Justice William Rehnquist on the U.S. Supreme Court. In recognition of his outstanding legal skills, he has been named in the publication *The Best Lawyers In America*. Mr. Kravitz is currently a partner with the law firm of Wiggin & Dana.

**John Woodcock**, the final district court nominee we will consider today, has been nominated for the District of Maine. He possesses over 25 years of litigation experience and has been involved in 47 separate appeals to the Maine Supreme Judicial Court on issues ranging from criminal law to trust law. He has also

volunteered his time as a member of several community boards and he serves as the attorney-coach for the local high school mock trial team. The Committee recently received a letter from former Clinton Administration Secretary of Defense William Cohen praising Mr. Woodcock's skills as a litigator. He writes, "I have known John Woodcock for many years....The U.S. District Court for the District of Maine has a long practice of excellence in its judicial appointments and the nomination of John Woodcock is in every way consistent with that tradition." I will submit a copy of this letter for the record, without objection.

I am pleased to have these nominees before the Committee today, and I look forward to hearing from them.



UNITED STATES SENATOR · MAINE  
**SUSAN COLLINS**  
P R E S S R E L E A S E



For Immediate Release  
Contact: Megan Sowards

May 22, 2003  
202-224-2523

**Statement of Senator Susan M. Collins  
Nomination Hearing of John A. Woodcock  
to be United States District Judge for the District of Maine**

It is my distinct pleasure to speak on behalf of John Woodcock's nomination to be a District Judge for the District of Maine.

I have known John and his wife, Beverly, for many years. John recruited me several years ago to serve on the board of Eastern Maine Medical Center, which he has chaired for 23 years. This is typical of John's service to his community; he has devoted countless hours volunteering his time and energy to his alma mater Bowdoin College, Eastern Maine Charities, the Maine State Commission on Arts and Humanities, the Good Samaritan Agency, and the Bangor Children's Home, just to name a few.

The Woodcock family has a tradition of public service that spans generations. Two of John's sons have worked as members of my staff. Jack currently serves on my Government Affairs Committee staff, while Patrick worked for me in my Bangor office. Their hard work and professional demeanor is proof that the apple does not fall far from the tree. I am pleased that they could be here today for this hearing.

Let me tell you more about John Woodcock's qualifications to be a federal judge. He began practicing law nearly 30 years ago, and has built a distinguished career as a litigator. John has served as an Assistant District Attorney for the State of Maine, and has worked in private practice as an associate and member of several law firms in Maine. In 1991, he joined several

colleagues to form the Bangor law firm of Weatherbee, Woodcock, Burlock & Woodcock.

During his career, John has served as lead counsel in 47 separate appeals to the Maine Supreme Judicial Court on issues ranging from criminal law to trust law.

John has also taken an active role in improving the standards of the legal profession, serving on the Maine Supreme Judicial Court's Advisory Committee on Professional Responsibility. As a member of this Committee, John worked to draft a series of aspirational goals to help guide lawyers who elect to advertise with their professional obligations in this area.

Those of us familiar with John's sterling character and stellar legal career were not surprised when the American Bar Association's Standing Committee on the Federal Judiciary unanimously rated him as "well qualified." Indeed, it would be difficult to come up with any candidate better suited to serve as a federal judge in the State of Maine.

John has the intelligence, temperament, and integrity to serve on the federal bench. I have every confidence that he will faithfully follow the law as interpreted by higher courts and bring justice to the parties before him. I wholeheartedly and enthusiastically support John Woodcock's nomination for a federal district court judgeship, and I hope that the Committee will unanimously approve his nomination.

###



# BILL FRIST

U.S. SENATE MAJORITY LEADER • TENNESSEE

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FOR IMMEDIATE RELEASE:  
May 22, 2003

Bob Stevenson (202) 224-4445  
Paul Jacobson (202) 2241865  
Nick Smith (202) 224-3355

**Senate Judiciary Committee  
Nomination Hearing of Ronnie Greer to the  
U.S. District Court for the Eastern District of Tennessee  
Statement by U.S. Majority Leader Bill Frist, M.D.**

Mr. Chairman, I am fortunate today to have the opportunity to address you in support of J. Ronnie Greer's nomination as a United States District Court Judge for the Eastern District of Tennessee. And I thank the Chairman and the Ranking Member and all the members of the Committee for allowing me to do so.

People who hail from the mountains of northeast Tennessee are known for their loyalty, their steadfastness, and their can-do spirit, and Ronnie Greer personifies that tradition.

For the last 19 years, Judge Thomas Hull has served as District Judge in Tennessee's Eastern District, and his distinguished career will long be remembered. While Judge Hull leaves big shoes to fill, I am confident Ronnie Greer is up to the task.

Ronnie is a highly accomplished public servant who has served as an attorney in Tennessee's judicial system with great distinction for more than 20 years. His academic career speaks for itself – he graduated at the top of his class at the University of Tennessee Law School and was invited to be on Law Review.

Since starting his own law office in Greeneville, Ronnie has represented numerous clients on a wide range of issues, and he has considerable experience before the federal courts. Recognizing the need to help his fellow man, he has not hesitated to accept the appointments of indigent clients, representing them in both the District Court and the Sixth Circuit Court of Appeals.

Ronnie has also had a distinguished career in politics and public service outside of his law practice. He was a State Senator in Tennessee's General Assembly for nine years, ably serving the people of District One. There he served on both the Judiciary Committee and as Chairman of the Environment, Conservation and Tourism Committee.

Ronnie also served as a Special Assistant in Governor Lamar Alexander's first term, forming a friendship and a bond that continues to this day. I know our colleague will further attest to Ronnie's talents and commitment to public service.

--cont--

I tell you, Mr. Chairman, you can't demand respect from the people of northeast Tennessee, you have to earn it, and Ronnie has done so without any question. He is known for his sense of fair play and his compassion for others. With his easy-going, thoughtful manner, yet quick mind and keen legal ability, he has the temperament and judgment required for the federal bench.

Mr. Chairman, Ronnie Greer's dedication to the citizens of our state, his love of the law, and his desire to serve his country make him an ideal choice to serve as a U.S. District Judge. He has my highest recommendation and unqualified support, and I thank your Committee for scheduling Mr. Greer's hearing so promptly.



## ReedSmith

Thomas M. Hardiman  
 Direct Phone: 412 288 4230  
 Email: thardiman@reedsmith.com

435 Sixth Avenue  
 Pittsburgh, PA 15219-1886  
 412.288.3131  
 Fax 412.288.3063

June 16, 2003

The Honorable Orrin G. Hatch, Chairman  
 U.S. Senate Committee on the Judiciary  
 224 Dirksen Senate Office Building  
 Washington, D.C. 20510

Dear Chairman Hatch:

In response to Question 1.B. of Senator Kennedy's written questions, I stated that "I continue to be unaware of any occasion other than the one mentioned in the Riga case in which I or my colleagues issued an *ex parte subpoena*." In response to Senator Leahy's Question 2.A., I stated: "To the best of my knowledge, [September 6, 1996] was the only occasion when I committed such an error." I write to supplement my answers to these questions.

I have undertaken a detailed review of the Riga file and discovered that two additional *ex parte subpoenas* were issued in that case. I learned that on November 12, 1996, we served a document *subpoena* upon the Pennsylvania Human Relations Commission. In addition, on November 19, 1996, we faxed a document *subpoena* to Merit Protective Systems. The following day, November 20, 1996, I took the deposition of the Plaintiff, Ronald Alexander. At the completion of that deposition, opposing counsel notified me of this error. I agreed to consult the Rules of Civil Procedure and after recognizing our error, on November 22, 1996, we sent to opposing counsel all of the requested documents and agreed to provide notice of all other *subpoenas*. I understand that opposing counsel may have claimed that five *ex parte subpoenas* were sent in this case, but my research indicates that after the issue was brought to our attention, we issued 21 more *subpoenas* and according to the correspondence file, all were served upon opposing counsel. Moreover, I continue to be unaware of any instance in any other case where I or my colleagues repeated this honest mistake.

I also understand that there may be some confusion regarding my statement in my Senate Questionnaire that I "worked to broker a settlement" in the case of Edgewood v. Cisneros. So there is no misunderstanding, I want to clarify that there was no formal written settlement agreement to conclude the matter. Instead, I was advised by the Allegheny County Housing Authority that the Department of Housing and Urban Development had agreed to limit the number of homes in Edgewood to three. I was further advised that this agreement could not be memorialized in writing because it was against HUD's policy to do so. Nonetheless, the matter was concluded without further litigation in reliance upon the verbal assurance that there would be no more than three homes in Edgewood. It was in this context that I used the word "settlement" in my Senate Questionnaire.

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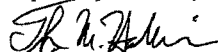
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Hon. Orrin G. Hatch  
June 16, 2003  
Page 2

ReedSmith

I apologize for any confusion that may have arisen with respect to these matters. I would be happy to answer any further questions the Committee may have regarding these cases or any other matter.

Respectfully submitted,



Thomas M. Hardiman

cc: The Honorable Patrick J. Leahy  
The Honorable Edward M. Kennedy

**Statement of Senator Patrick Leahy  
Judicial Nominations Hearing  
May 22, 2003**

Today, I welcome the nominees on this hearing who come to us from five different states. I welcome Richard Wesley, nominated to the United States Court of Appeals for the Second Circuit, which covers Vermont, New York and Connecticut, as well as J. Ronnie Greer to be United States District Judge for the Eastern District of Tennessee, Thomas M. Hardiman to be United States District Judge for the Western District of Pennsylvania, Mark R. Kravitz to be United States District Judge for the District of Connecticut, and John A. Woodcock to be United States District Judge for the District of Maine. Mr. Kravitz, your reputation precedes you. I have heard from a number of judges and lawyers in Connecticut for whom I have great respect about your universally recognized fitness to serve on the federal bench.

This is already the tenth hearing the Republican majority has held for judicial nominees this year. Ten hearings before Memorial Day with seven more months left in the year. As of today, the Committee will now have held hearings for 42 judicial nominees overall including 11 circuit court nominees.

This stands in sharp contrast to the way President Clinton's nominees were treated by the Republican majority. I recall that, during the entire year of 1996, when vacancies were higher and growing, this Committee held only six hearings all year and those hearings included only five circuit court nominees. Thus, the Republicans have now considered more than twice as many circuit court nominees in one-third the amount of time they considered President Clinton's nominees that year. In 1997, the Committee only had nine hearings all year and included only nine circuit court nominees. During the entire year of 1999, only seven hearings were held on judicial nominees and, during the entire year of 2000, only eight judicial nominations hearings were held.

This year, with a Republican in the White House, the Senate Republican majority has gone from second gear -- the restrained pace it had said was required for Clinton nominees -- to overdrive for the most controversial of President Bush's nominees.

This year, in spite of the lack of cooperation by the Administration and the overbearing exercise of power by the majority, we have cooperated with Committee action and voted on 31 judicial nominees during the first four months of this year. We have proceeded in the Senate to vote on the confirmations of 25 judicial nominees this year, including five controversial nominees to the circuit courts, which makes 125 of this President's judges confirmed overall.

That compares most favorably when contrasted with how Republicans treated President Clinton's nominees. In the 1996 session, for example, the Senate did not confirm a single circuit judge all year and confirmed only 17 judges that entire session. In 1999, the third year of the last presidential term, and in 1997, the Senate did not reach the level we have already attained of 25 confirmations until October.

A good way to see how much faster Republicans are processing judicial nominations for a Republican president is to compare where we are in May of this year to May of any year during

the last Democratic administration when the Republicans controlled the Senate. Over the last six and one-half years of Republican control under President Clinton, the Republicans held *less than three* judicial nominations hearings, on average, by May 22<sup>nd</sup>, and had considered only three circuit court nominees, on average by this time. On this day, in 1995, only four hearings had been held for judicial nominations; in 1996, only three hearings; in 1997, only two hearings; in 1998, only six hearings; in 1999, zero hearings; and in 2000, only four judicial nominations hearings were held by May 22<sup>nd</sup>. Today, we participate in our tenth hearing this year.

Republicans have moved two to three times more quickly for President Bush's circuit court nominees than for President Clinton's, yet vacancies in the courts stand at half of what they were during many of those years. Of note, by this point in 1999, the third year of President Clinton's last term, the Committee had not held or scheduled a single judicial nominations hearing. In fact, no hearing for a judicial nominee was held until June of that year.

The number of judicial vacancies has gone down from the 110 we inherited when Democrats assumed the Senate majority in the summer of 2001 to 46 – the lowest level it has been in 13 years. While I was Chairman I was able to cut it from 110 to 60, despite dozens of new vacancies that occurred during that time. I recall that Senator Hatch said in September of 1997 that 103 vacancies (during the Clinton Administration) did not constitute a “vacancy crisis.” He also repeatedly stated that 67 vacancies meant “full employment” on the federal courts. We now stand at 46 vacancies for the entire federal judicial system.

I welcome Judge Wesley, who comes to us with the support of both his home-state Senators. As I have noted throughout the last three years, the Senate is able to move expeditiously when we have consensus nominees. Unfortunately, far too many of this President's nominees have records that raise serious concerns about whether they will be fair judges to all parties on all issues.

Judge Wesley currently serves as an Associate Judge on the New York Court of Appeals, New York's highest state court. Over the course of his judicial career to date, he has also served on New York state trial and appellate courts. He served for four years as a Member of the New York State Assembly. He has received a unanimous rating of “Well-Qualified” from the American Bar Association. I welcome him and his family, and I look forward to hearing from him today.

I note that Judge Wesley is the third nominee of President Bush's to the Second Circuit that the Senate will consider. While I was Chairman last year, the Senate confirmed Judge Reena Raggi and Judge Barrington Parker to the Second Circuit Court of Appeals. Judge Wesley is nominated to fill the only remaining vacancy on that important court.

I also welcome today four nominees to the federal trial courts, who come to us from Tennessee, Pennsylvania, Connecticut, and Maine.

Today we will also hear from Mark R. Kravitz, nominated to the United States District Court for the District of Connecticut. Mr. Kravitz is an accomplished lawyer who has served as a litigator for more than 25 years with the law firm of Wiggin & Dana in New Haven. He currently heads

their appellate practice and received a "Well-Qualified" rating from the ABA. He served as a clerk for Justice Rehnquist, who in 2001 appointed him as a member of the U.S. Judicial Conference's Standing Committee on the Rules of Practice and Procedure in the United States Courts – but he is supported by both of his home-state Senators. I look forward to hearing from him.

J. Ronnie Greer is nominated to the United States District Court for the Eastern District of Tennessee. He makes President Bush's fifth judicial nominee from Tennessee. Under Democratic control last year, the Senate confirmed two district court nominees for Tennessee and Judge Julia Smith Gibbons to the Sixth Circuit Court of Appeals. This March, the Senate confirmed its third Tennessee district court nominee, Judge Daniel Breen. Mr. Greer comes to us with more than 20 years of litigation experience, representing primarily individuals in criminal, personal injury, and other matters.

Thomas Hardiman is nominated to the United States District Court for the Western District of Pennsylvania. He is the 12<sup>th</sup> nominee of President Bush's to the federal courts in Pennsylvania that the Senate will have considered. While I was Chairman, the Senate held hearings for and confirmed 10 nominees to the district courts in Pennsylvania plus Judge D. Brooks Smith to the Third Circuit Court of Appeals.

A look at the federal judiciary in Pennsylvania indicates that President Bush's nominees have been treated far better than President Clinton's. Today, there is no state in the union that has had more federal judicial nominees confirmed by this Senate than Pennsylvania. This is in sharp contrast to the way vacancies in Pennsylvania were left unfilled during Republican control of the Senate when President Clinton was in the White House, particularly regarding nominees in the western half of the State.

Just last week, on May 16, 2003, Jon Delano wrote in the Pittsburgh Business Times, in an article titled, "Despite Bush's Protests, Court Vacancies Are Down," about how this President's nominees in the western part of Pennsylvania have been treated more fairly than President Clinton's nominees. He wrote:

Take the Western District of Pennsylvania, for example. During the years of the Santorum filibuster, that court of 10 judges had as many as five vacancies. Today, the Senate has confirmed four Bush appointees -- Judges Joy Conti, David Cercone, Terry McVerry, and Art Schwab -- and the fifth nomination, attorney Tom Hardiman, has just been sent to the Senate.

With the elevation and confirmation of Judge Brooks Smith to the U.S. Court of Appeals, the president still needs to name one more judge to the local court, but once completed, Mr. Bush, with less than three years in office, will have named -- and the Senate will have confirmed -- six of the 10 judges on the local federal court. That hardly sounds like obstructionism."

Despite the best efforts and diligence of the senior Senator from Pennsylvania, Senator Specter, to secure confirmation of all of the judicial nominees from every part of his home state, there

were seven nominees by President Clinton to Pennsylvania vacancies who never got a hearing or a vote. Yet, the Democrats have turned the other cheek to this past Republican obstruction and delay and have worked to fill vacancies fairly and promptly in all parts of Pennsylvania.

I would also note that the Committee just received Mr. Hardiman's rating from the American Bar Association last night, on the eve before the hearing. It was a partial "Not-Qualified." That raises concerns which we have not had time to investigate, as would be standard practice. We do not know the basis for this rating. But a review of his available materials indicates that his litigation experience is thin for someone nominated to a federal trial court and there are other controversial issues. I look forward to hearing from him today, and I hope that we have time to explore the basis for his Not Qualified rating in the future.

We also will hear today from John A. Woodcock, nominated to the United States District Court for the District of Maine. Mr. Woodcock has served as a litigator in private practice for more than 20 years, and has specialized in workers' compensation. He worked earlier in his career as an Assistant District Attorney for Penobscot and Piscataquis Counties, where he handled all criminal appeals to the Maine Supreme Judicial Court. I also commend him for his considerable work with health care and educational associations. Just this year, he received the Distinguished Service Award from Eastern Maine Healthcare for his significant contributions and longstanding dedication and commitment to the health and well-being of the people of central, eastern and northern Maine. He received a "Well-Qualified" rating from the American Bar Association and comes with the support of both of his home-state Senators.

I welcome all of these nominees and their families and look forward to hearing their testimony today.

#####



*City of Pittsburgh*

*Tom Murphy, Mayor*

April 28, 2003

The Honorable Orrin G. Hatch  
104 Hart Senate Office Building  
Washington, D.C. 20510

Re: Thomas M. Hardiman, Judicial Nominee

Dear Senator Hatch:

I am writing in support of Thomas M. Hardiman, who was nominated on April 9, 2003 to serve on the United States District Court for the Western District of Pennsylvania. I have served as the Mayor of Pittsburgh since 1994 and I am familiar with Tom's work as a trial lawyer.

For the past several years Tom has served as litigation counsel to the Housing Authority for the City of Pittsburgh, whose Board I appoint. The Housing Authority's efforts to provide safe, sanitary housing are an integral part of my administration's efforts to improve the quality of life for all Pittsburghers.

Tom has handled numerous cases for the Housing Authority and he has prevailed in each one. Most of the cases have involved public safety issues, which are important not only to our public housing residents, but to our entire community. Two of these cases reached the Pennsylvania Supreme Court. In both cases, the Supreme Court reversed lower court rulings that would have undermined our efforts to promote public safety and the general welfare.

In addition to his litigation work, Tom has served the Housing Authority well in its relations with the Office of Inspector General of the Department of Housing and Urban Development. As co-counsel to the Authority in its most recent audit, Tom skillfully handled sensitive issues and exercised good judgment and discretion throughout.

In sum, I recommend Tom Hardiman enthusiastically for the position of U.S. District Judge.

Respectfully,

A handwritten signature in black ink, appearing to read "Tom Murphy".

Tom Murphy

cc: The Honorable Patrick J. Leahy  
The Honorable Viet D. Dinh

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JAMES M. FLYNN, JR.  
DEPUTY CONTROLLER

MICHAEL H. WOLCZIK  
SOLICITOR

May 9, 2003

The Honorable Orrin G. Hatch  
104 Hart Senate Office Building  
Washington, DC 20510

Re: Thomas M. Hardiman, Judicial Nominee

Dear Senator Hatch:

I am pleased to submit this letter on behalf of Thomas M. Hardiman, who was nominated on April 9, 2003 by President Bush to fill a vacancy for a seat on the United States District Court for the Western District of Pennsylvania. I have known Tom Hardiman, both personally and professionally, for almost ten years.

I am a lawyer and certified public accountant who has served in the public sector since 1992, when I was elected Councilman for the City of Pittsburgh. In 1999 I was the Democratic nominee for Controller of Allegheny County, an office I assumed in January of 2000 after gaining election with 67% of the vote.

I first met Tom in 1994, when a mutual friend introduced us. Tom and I shared a desire to work together for the betterment of Pittsburgh and the entire region, irrespective of partisan differences. From our first meeting forward, Tom supported my political career until he could no longer do so because of his election as Treasurer of the Republican Committee of Allegheny County in 2000. Although Tom's duties with the Republican Committee precluded him from supporting me or other Democrats, we have remained close. Our friendship remains strong despite the fact that I am the Democratic nominee for County Executive, challenging Tom's good friend, Jim Roddey.

From our first encounters, I was impressed with Tom's legal acumen and civic-minded spirit. When constituents of mine who resided in the public housing community called Allegheny Commons East were concerned about changes that HUD was making to the community, I asked Tom to handle the matter. Recognizing that my constituents were indigent, Tom readily agreed to handle the matter on a pro bono basis. I was impressed by Tom's diligence and attentiveness to the concerns of his clients in this case. More importantly, the members of the Residents' Advisory Council spoke in glowing terms about Tom's work on their behalf. Not only did Tom invest well over \$30,000





worth of legal time in this matter, he arranged for his firm to cover all out-of-pocket expenses as well. As a fellow lawyer, I was impressed by Tom's commitment to this pro-bono work and his eagerness to help some of the least fortunate among us.

Based on Tom's work for the public housing residents of Allegheny Commons East, I referred to him a legal matter affecting the Spring Hill Civic League, a non-profit community organization engaged in a dispute with a developer. Tom handled this matter with skill and professionalism throughout. Once again, recognizing the financial limitations of his non-profit client, Tom agreed to waive a substantial portion of his fee.

In sum, I enthusiastically support the nomination of Thomas M. Hardiman to the U.S. District Court because I know him to be intelligent, generous, and fair. I have no doubt that he will make an exceptional federal judge.

Respectfully submitted,



Dan Onorato

Cc: The Honorable Patrick J. Leahy  
The Honorable Viet D. Dinh



**NOMINATIONS OF ALLYSON K. DUNCAN, OF NORTH CAROLINA, NOMINEE TO BE CIRCUIT JUDGE FOR THE FOURTH CIRCUIT; ROBERT C. BRACK, OF NEW MEXICO, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF NEW MEXICO; SAMUEL DER-YEGHIAYAN, OF ILLINOIS, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS; LOUISE W. FLANAGAN, OF NORTH CAROLINA, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF NORTH CAROLINA; LONNY R. SUKO, OF WASHINGTON, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF WASHINGTON; EARL LEROY YEAKEL III, OF TEXAS, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TEXAS; KAREN P. TANDY, OF TEXAS, NOMINEE TO BE ADMINISTRATOR OF THE DRUG ENFORCEMENT ADMINISTRATION, DEPARTMENT OF JUSTICE; AND CHRISTOPHER A. WRAY, OF GEORGIA, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE**

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**WEDNESDAY, JUNE 25, 2003**

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

The Committee met, pursuant to notice, at 2:04 p.m., in room SD-215, Dirksen Senate Office Building, Hon. Lindsey Graham, presiding.

Present: Senators Graham, Chambliss, Durbin and Edwards

**OPENING STATEMENT OF HON. LINDSEY GRAHAM, A U.S.  
SENATOR FROM THE STATE OF SOUTH CAROLINA**

Senator GRAHAM. Thank you very much for coming to our hearing today. We have about an hour of time allotted with a lot of people to hear from on a very important subject, and we are going to have votes coming up pretty quickly too.

With that said, I will enter my opening statement into the record.

Senator GRAHAM. Senator Chambliss, if you have anything you would like to say at this time—

Senator CHAMBLISS. No, sir.

Senator GRAHAM. You defer.

We will get right into it. We are glad to have the panel here of Senator Dole and Senator Edwards, and speak.

**PRESENTATION OF ALLYSON K. DUNCAN, NOMINEE TO BE  
CIRCUIT JUDGE FOR THE FOURTH CIRCUIT, AND LOUISE W.  
FLANAGAN, NOMINEE TO BE DISTRICT JUDGE FOR THE  
EASTERN DISTRICT OF NORTH CAROLINA, BY HON. JOHN  
EDWARDS, A U.S. SENATOR FROM THE STATE OF NORTH  
CAROLINA**

Senator EDWARDS. Mr. Chairman, under ordinary circumstances, a hearing like this would not draw a lot of attention. This nominee is a consensus nominee. We are talking about Judge Duncan. She enjoys the support of both Senators from her State, and her nomination is supported by leaders of both political parties.

Under ordinary circumstances, this hearing would hardly be noticed, but, Mr. Chairman, this is no ordinary event for the people of North Carolina. In fact, it is an historic and important milestone for our State, and we believe it calls for celebration. The last time a North Carolina judge joined the Fourth Circuit Court of Appeals was 23 years ago, when Sam Ervin, III, son of Senator Sam, was confirmed.

North Carolina is the only State in the Union with no judges on a Federal appellate court, and we have the longest standing vacancy in the Federal appeals court system. In fact, in the entire 112-year history of the Fourth Circuit, North Carolina has had only 6 judges. Compare that with our neighbor, Virginia, which has 5 current judges on the court.

So you can see, Mr. Chairman, that this hearing is a very special occasion for us.

We are also very proud to be able to introduce Allyson Duncan, a nominee who will restore the voice of North Carolina to a very important Federal court and break a logjam, which has damaged our State for too many years. This historic development is the result of a new approach which I hope will be a model for the future. In this case, President Bush reached out to Senator Dole and to me before he made a decision. He consulted with us. He sought our advice. And in making his decision, the President selected a nominee who represents the mainstream of our State.

I commend the President for consulting with us and for making an excellent nomination. If he takes this approach with respect to future judicial nominations, including nominations to the Supreme

Court, we have a real opportunity to find common ground in the search for excellence on the Federal bench.

I also want to take a moment to commend my colleague from North Carolina. From her very first day in office, Senator Dole and I have pledged that we would work together on behalf of the people of North Carolina. This hearing is a demonstration of that commitment, and I commend her for working with me on this nomination and on all of the issues that are so important to the State of North Carolina.

Mr. Chairman, it is a great pleasure to welcome Allyson Duncan and to introduce her to the Judiciary Committee.

I have a longer statement which describes her extraordinary background and career, and I would like to make that a part of the record. But I will summarize here by saying she has a distinguished record as a lawyer, as a professor of law and as a judge. She is highly regarded in the legal community in our State, and her colleagues recently elected her President of the North Carolina Bar Association, the first African-American and only the third woman to hold that position. She was sworn in just last weekend.

We also have letters, Mr. Chairman, from Evelyn Higginbotham, Mel Watt and A.P. Carlton, ABA president, and I ask now that they included in the record.

Chairman GRAHAM. Without objection.

Senator EDWARDS. I would also recognize, Mr. Chairman, we have a Congressman from North Carolina, Mel Watt and Frank Ballance in attendance for this hearing.

Judge Duncan's wonderful family is also with her. Her husband, Bill Webb, her son, Charles Webb, and her aunt, Helen Blackburn. And I would like for them, if they could, to stand and be recognized at this time

[Applause.]

Chairman GRAHAM. Welcome.

Senator EDWARDS. Mr. Chairman, when the Senate confirms Allyson Duncan, which I hope will happen very soon, her confirmation will make a number of firsts. She will be the first North Carolinian to join the Fourth Circuit in over 20 years. She will be the first African-American woman to serve on that distinguished court, and most important, I hope she will be the first in a series of bipartisan consensus judicial nominations from our State.

Mr. Chairman, I would also like to point out that we have another distinguished North Carolinian before the Committee today, Louise Wood Flanagan, now a U.S. magistrate judge, is the nominee for the U.S. District Court for the Eastern District of North Carolina. Like Allyson Duncan, she brings a record of excellence and achievement, and I am happy to support her nomination.

Judge Flanagan's family, her husband Michael Flanagan and her daughter Kate, are also here, and I would like to ask them to stand and be recognized at this time.

Chairman GRAHAM. Welcome.

[Applause.]

Senator EDWARDS. Missing from this family portrait is Judge Flanagan's 5-year-old little girl, Anna Louise, whom her parents, for their piece of mind, decided not to bring to this proceeding.

[Laughter.]

Senator EDWARDS. As the father of a 5-year-old, I cannot imagine why they made that decision.

Judge Flanagan, we look forward to hearing from you today. Judge Flanagan, I think you will make a fine judge for the people of North Carolina, and we are proud to have you here.

Mr. Chairman, I would just conclude by asking that my full statement be made part of the record.

Chairman GRAHAM. Without objection.

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

Senator GRAHAM. Senator Dole?

**PRESENTATION OF ALLYSON K. DUNCAN, NOMINEE TO BE CIRCUIT JUDGE FOR THE FOURTH CIRCUIT, AND LOUISE W. FLANAGAN, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF NORTH CAROLINA, BY HON. ELIZABETH DOLE, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA**

Senator DOLE. Mr. Chairman, I would like to sincerely thank you for holding this historic hearing today. Our free society is based on the reasoned, dispassionate judgment of men and women in the judicial branch of our Government who share a sense of honor and duty to our country and to our Constitution. I have the privilege of introducing two such individuals today, but before I extol the virtues of these talented and experienced nominees, I hope you will indulge me for a few minutes to recount just why this hearing is historic for North Carolina and the Nation.

As many of you have heard me say, I believe the advise and consent role is one of the Senate's most important constitutional responsibilities and one of the most solemn duties of a U.S. Senator. Judges interpret and apply the laws that govern our Nation, including our fundamental rights and liberties protected in the Constitution. However, there is now a nearly 10 percent vacancy rate in the U.S. courts of appeals and 15 seats have even been declared judicial emergencies by the Judicial Conference of the United States.

On the Fourth Circuit Court of Appeals, which hears Federal appeals from North Carolina, South Carolina, Virginia, West Virginia and Maryland, one North Carolina vacancy is the longest on the entire Federal bench, dating back nearly a decade to July 31, 1994.

In April, the President's counsel, Alberto Gonzales, sent a letter stating that there are currently 4 vacancies on the Fourth Circuit Court. He noted that North Carolina is the largest State in the Fourth Circuit, and historically the number of judges roughly corresponds with population. By this measure, we should have 4 to 5 judges on the court. Right now we have none. In fact, North Carolina has had no representation on the Fourth Circuit Court in nearly 4 years and 2 seats have stood empty on North Carolina's Eastern District Court for 2.5 years and 5.5 years, respectively.

Vacant Federal benches contribute to overcrowded dockets, overburdened judges and understaffed courts. So I am pleased that with this hearing today we are taking steps to fill these vacancies and to address this disparity for North Carolina.

In addition, this hearing represents a number of significant firsts for our State. And if I could just underscore what Senator Edwards had said, Allyson Duncan is the first woman from North Carolina to be nominated to the Fourth Circuit Court of Appeals. She is also the first African-American woman to be nominated to the Fourth Circuit, and Louise Flanagan is the first woman to be nominated to serve as a district court judge for North Carolina's Eastern District.

For these individuals today, and for so many other qualified men and women, being nominated to serve on the Federal bench by the President of the United States marks the pinnacle of a long and remarkable legal career. For those who are confirmed, it represents an opportunity to use their wisdom and legal training to uphold our Constitution and protect the rights and freedoms upon which our Nation was founded.

As I campaigned for the U.S. Senate, I told the people of North Carolina that I believe each and every judicial nominee deserves a hearing and a vote by the full Senate. Judiciary Committee members who object to a nominee should state their reasons and vote their conscience and the Committee should promptly report the nomination to the Senate floor, with a favorable, unfavorable or no recommendation.

I believe in the capability, independence and prudence of the members of this institution, and I have faith that my colleagues in the Senate, though we may disagree on the approach, all seek to do what is right for this country. And if a person has concerns about an issue or a nominee, then I believe that he or she should make a persuasive case to the other members of this body in a forthright, open and honest debate. This process is established in our Constitution, and it is what our representative democracy is all about.

Mr. Chairman, we are here today because the process is working for these two North Carolina nominees. I am pleased to be able to support Allyson Duncan of Raleigh, who has been nominated by the President for the Fourth Circuit Court of Appeals from North Carolina.

Ms. Duncan, I know that this is not an entirely new experience for you, having testified before Congress in the past, but I want to welcome you to the Senate today and tell you how delighted I am that we are here to move forward with your nomination.

Mr. Chairman, Ms. Duncan's resume is most impressive, as you have heard, marked with numerous positions of significant responsibility in both the public and the private sectors.

More importantly, Ms. Duncan's work ethic and the results of her work are highly respected by her peers. Currently, an attorney with the Raleigh law firm of Kilpatrick Stockton, Ms. Duncan is the president, as you have heard, of the North Carolina Bar Association and an active member of the North Carolina Association of Women Attorneys, the North Carolina Center for Public Policy Research, and the Duke University Women's Health Advisory Board.

She previously served by appointment on the North Carolina Utilities Commission, holding several leadership positions on the National Association of Regulatory Utility Commissioners. Prior to

that, she was a judge on the North Carolina Court of Appeals and a professor of law at North Carolina Central University.

Ms. Duncan has also worked as an appellate attorney for the Equal Employment Opportunity Commission here in Washington, arguing employment discrimination cases before the Federal courts of appeals.

Throughout her career, she has received numerous awards, recognizing her contributions to the legal profession and her leadership in business and education. I believe that Ms. Duncan comes extremely well-prepared for this important position, and I am delighted to recommend her to you.

Given the number of vacancies still remaining on the Fourth Circuit Court, I know she will have her work cut out for her from the moment she arrives, and I am confident that she will meet her duties with professionalism, impartiality and competence.

I am also pleased today to support Magistrate Judge Louise Flanagan of Elizabeth City, who has been nominated to serve on the Eastern District Court of North Carolina. Serving as a magistrate judge for the Eastern District since 1995, Louise Flanagan is consistently praised by her colleagues for her integrity and fairness in the courtroom. She has earned their professional and personal respect for her service, commitment and sound judicial temperament.

Hugh Overholt, a former judge advocate general of the Army, writes, "I am of the opinion that Judge Flanagan is in the top 1 percent of the attorneys I have known."

And J. Douglas McCullough, a judge on the North Carolina Court of Appeals, calls Ms. Flanagan, "an honest person with much personal integrity."

Their lofty comments are but an example of the regard in which Judge Flanagan is held.

Whether in previous positions with the law firms of Ward and Smith in Greenville, North Carolina, or Sonnenschein, Nath and Rosenthal in Washington or at the Center for National Security Law, Ms. Flanagan's accomplishments are numerous on behalf of the public and the institutions she has served.

I am certain she will bring excellent judgment, integrity and character to the Federal bench.

Mr. Chairman, today marks the first time in a decade that the Committee has held a hearing on a North Carolina nominee to the Fourth Circuit Court. I am reminded of a quote by Supreme Court Justice Sandra Day O'Connor earlier this year. "The faith that people have in their Government is shaped, in part, by the makeup of it, who is there," she said. How true, indeed.

Today, we have 2 highly qualified judges before us and an amazing opportunity to further demonstrate the diversity that makes our Nation great. Ms. Flanagan, Ms. Duncan, you have my full support throughout this process as you undertake this noble step in your respective careers, and I hope that other well-qualified candidates who have been sent forth might join you soon.

Thank you, Mr. Chairman.

Senator EDWARDS. Mr. Chairman, we would also just like to thank our colleagues for giving us the courtesy of allowing Senator Dole and I to go first.



Senator DOLE. Yes. Thank you very much.

Senator GRAHAM. Thank you. It is very impressive people to hear about, and I am honored to be here to chair the Committee when we are all agreeing on something.

[Laughter.]

Senator GRAHAM. Thank you both. Thank you very much.

If you do not mind, I think we will proceed as follows: Senator Chambliss is going to fill in for me here in a bit, but we would like to have Senators Domenici and Bingaman come up next, if possible. I know you have something to do, and then we will go to Senators Chambliss and Miller next.

**PRESENTATION OF ROBERT C. BRACK, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF NEW MEXICO, BY HON. PETE DOMENICI, A U.S. SENATOR FROM THE STATE OF NEW MEXICO**

Senator DOMENICI. Mr. Chairman, members of the Committee, our nominee is Robert C. Brack. He is accompanied by his wife Sheila, who sits behind him. I would like you to recognize her. Would you please stand, Sheila. This is the judge, and that is his wife.

Thank you very much, Mr. Chairman.

Senator GRAHAM. Welcome. Welcome very much. Thank you for coming.

Senator DOMENICI. First, I am very pleased that Senator Bingaman joins me here today. Both of us support this nominee. It is not an understatement to say that the situation in the District of New Mexico that he is being assigned to is dire—dire from the standpoint of being overcrowded, overloaded and in desperate need of additional judges.

It is particularly bad, fellow Senators, along the Southern border of New Mexico, around the community of Las Cruces, where over 60 percent of the district's, that is, the State, the district's criminal cases are filed, and there is no judge sitting in that community.

Because Judge Brack will be assigned to Las Cruces, I am pleased that the Committee has agreed to my request to move quickly on this nomination. He is desperately needed to fill the vacancy, which is so overcrowded that I believe it ranks among the highest in the Nation, in terms of overcrowding of the criminal docket.

When Congress authorized a temporary judgeship for the District of New Mexico last year, the President asked for suggestions. I was very pleased to submit to him qualified judges, qualified nominees, but I was most pleased that the man that we have with us today was selected as the choice.

He comes from Southern New Mexico, an area that does not very often get nominees to the Federal bench. That side of New Mexico is very thrilled. It is not like an ordinary event. It is a real celebration to have one of their own nominated to the bench. He will have to leave them, but they are very proud and pleased that one of their own will leave them to join the very distinguished bench, at least that is how New Mexicans still see the court, and I am very glad that they do.

He comes highly reputed. I will not go through his achievements, other than to say one of the best things that I can say to the Judiciary Committee, when they look at one of our nominees, is what kind of lawyer do we have and, frankly, I am here to tell you we have a superb lawyer. This man tried lawsuits of all types. From the very smallest to the very largest of class action lawsuits, he tried them. He won them, and he lost them, but he tried them with great distinction, and had a fabulous reputation, when he did the next thing, which permits us to be certain that he will be a good judge. He took the bench.

A district bench is the bench of general jurisdiction in our State. Everything is tried there, all the felony cases, all of the civil cases, and he sat there for a number of years and was distinguished as one of the best district judges in the State of New Mexico.

Frankly, with the extreme lists that you have to hear from today, and the tremendous witnesses that you have, I know that what I have said is more than ample, and with that, I will stop and ask that you hear from my colleague and put the rest of my statement in the record where it can be looked at, if necessary, and eventually get the judge before you as soon as possible.

Thank you very much.

Senator GRAHAM. Thank you, Senator. Without objection, your statement will be entered.

Senator Bingaman?

**PRESENTATION OF ROBERT C. BRACK, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF NEW MEXICO, BY HON. JEFF BINGAMAN, A U.S. SENATOR FROM THE STATE OF NEW MEXICO**

Senator BINGAMAN. Thank you, very much, Mr. Chairman. I am very pleased to support the nomination of Judge Brack to the U.S. District Court. I particularly want to thank Senator Domenici and the President both for giving me an opportunity to visit with Judge Brack before his nomination was made.

I had not personally visited with him before that, but I had heard of him and heard of his great reputation as a lawyer for nearly 20 years in Clovis, practicing some of that time with a very good friend of mine, Ted Hartley. But I think his reputation preceded him, as far as I was concerned, and then his reputation as a District Judge in our State court system has been excellent as well.

So I think he is a very good choice for this position. He will do a good job on our Federal court in New Mexico, and I again commend Senator Domenici for recommending him and the President for choosing him for this important position. I urge the Committee to act swiftly to confirm his recommendation and to recommend that the full Senate confirm his nomination.

Thank you.

Senator EDWARDS. Thank you, Senator, for your statement. Thank you very much.

At this time, Senator Chambliss from Georgia and Senator Miller, if you would like to come up.

**PRESENTATION OF CHRISTOPHER A. WRAY, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, BY HON. SAXBY CHAMBLISS, A U.S. SENATOR FROM THE STATE OF GEORGIA**

Senator CHAMBLISS. Thank you very much, Mr. Chairman. I am pleased to be here today to introduce to the Committee Mr. Christopher A. Wray, a fellow Georgian, who is President Bush's nominee to the position of assistant attorney general for the Criminal Division.

Mr. Wray has already had a remarkable career and will bring extraordinary experience to this important position. His qualifications speak for themselves.

For the past 2 years, Mr. Wray has served as the principal associate deputy attorney general at the Department of Justice. In this capacity, he has gained invaluable experience and, at the same time, has been a tremendous asset to my friend, another Georgian, Deputy Attorney General Larry Thompson.

Let me first share some of Mr. Wray's background. We will excuse him for attending Yale University for both his undergraduate studies and his legal education, but he saw the light and came back to Georgia.

After law school, he clerked for Judge J. Michael Luttig, on the Fourth Circuit Court of Appeals, and then entered private practice with the prestigious Atlanta law firm of King and Spalding.

My very good friend, and former Attorney General, and Fifth Circuit Judge Griffin Bell, who has been a partner at King and Spalding for many years, quickly identified Mr. Wray as a rising star on the firm's Special Matters Team, which was led by Judge Bell.

Mr. Wray comes before this Committee highly recommended by Judge Bell for his ability to handle complex litigation related to corporate investigations. Mr. Wray began his career of public service with the U.S. Attorney's Office in Atlanta. During his 4 years as an assistant U.S. attorney, he prosecuted cases ranging from public corruption to gun trafficking and immigration violations.

When Larry Thompson came to Washington as the deputy attorney general, he selected Mr. Wray as his top assistant. In this position, Mr. Wray has worked with all levels of DOJ to coordinate and oversee both policy and operations related to the FBI, the Criminal Division, and the U.S. Attorney's Offices.

He has specifically focused on counterterrorism initiatives since September 11, 2001, attending daily classified FBI and CIA briefings. Mr. Wray's experience and understanding of the inner workings of DOJ uniquely qualify him to take over the Criminal Division and continue antiterrorism efforts uninterrupted.

As assistant attorney general for the Criminal Division, Mr. Wray will have responsibility for the enforcement of over 900 Federal criminal statutes. He will coordinate with the 93 United States attorneys to prosecute violations of these laws, including many nationally significant cases, such as the prosecution of alleged terrorists.

In addition, he will advise the deputy attorney general, the attorney general, the White House and Congress about criminal law policy and will monitor law enforcement activities. At the age of 36, Mr. Wray has accomplished more in the legal profession than many

of us, as attorneys, do in a lifetime. His exceptional qualifications and youthful energy will invigorate the Criminal Division at the Department of Justice as it investigates and prosecutes some of the Nation's most important cases, including cases related to terrorism.

We are truly fortunate to have someone as qualified as Mr. Wray to serve as the assistant attorney general for the Criminal Division. Former Attorney General Griffin Bell, former Senator Sam Nunn, Attorney General John Ashcroft, and Deputy Attorney General Larry Thompson all unconditionally support this nominee.

Mr. Wray's decision to serve his country required that he move his wife and two young children to Washington from Atlanta and forego regularly attending Braves games, drinking sweet tea and enjoying all things Southern.

[Laughter.]

Senator CHAMBLISS. For his commitment to public service, I am very grateful. I welcome him here today. I urge the Committee to support his nomination, and I thank you, Mr. Chairman.

Senator GRAHAM. He has given up a lot.

Thank you.

Senator Miller?

**PRESENTATION OF CHRISTOPHER A. WRAY, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, BY HON. ZELL MILLER, A U.S. SENATOR FROM THE STATE OF GEORGIA**

Senator MILLER. Thank you, Mr. Chairman.

I am very honored and pleased to join with my colleague, Senator Chambliss, and appear before this Committee to add my presentation of Christopher Wray, who has, you have been told, been nominated to be assistant attorney general for the Criminal Division of the Justice Department.

Once again, President Bush has made what I think is an outstanding choice. This is a young man who is wise and mature beyond his 36 years. His remarkable resume reads like one that should belong to someone much, much older. This is a young man who has the law in his blood. His father, his uncle, his grandfather, and his grandmother were all lawyers. This is a young man whose peers speak of him in glowing terms, unbelievably hardworking, straight shooter, very even keeled are the phrases they use.

This is a young man who has earned the trust and confidence of 2 of the best lawyers the State of Georgia has ever produced.

The first is Griffin Bell, who was appointed to a Federal judgeship by President John Kennedy, and who was our Nation's former Attorney General under Jimmy Carter. As Senator Chambliss has told you, Griffin Bell has watched this young man for a long time. He first spotted him while he was still a student at Yale and recruited him to the prestigious law firm of King and Spalding.

At King and Spalding, Chris was immediately handed the plum assignment of working on Griffin Bell's Special Matters Government Investigations practice. It is an assignment that goes only to the best of the best in that firm.

Judge Bell said recently of Chris, "From day one he was born to be a good lawyer."

As you have been told, Chris also has another big fan, Larry Thompson. Two years ago I had the honor and the pleasure of coming before this Committee to present Larry Thompson for his nomination hearing as deputy attorney general. He has done an outstanding job for this Nation, as I knew he would. Larry Thompson also holds Chris Wray in very high regard. Larry was Chris' mentor early in his career, and they served together on that elite Special Matters practice at King and Spalding.

Larry is also the godfather of Chris' 6-year-old son, Trip, and his wife Helen and his daughter Caroline are also here with us today.

As an assistant U.S. attorney in the Northern District of Georgia, Chris was assigned to the hardest cases, and he helped send to prison drug traffickers, counterfeiters, church arsonists, kidnapers, armed bank robbers and gun traffickers.

One of Chris' final cases was a very high-profile public corruption case, in which the City of Atlanta had lost millions of dollars in a bribery scheme. It was a complicated case that was made more so by the fact that the opposing counsel was Chris' friend and mentor, Larry Thompson.

After a hard-fought 3-week trial, Chris won a guilty verdict, and Larry's client was sentenced to prison. At that point, Larry was probably wishing that he had not trained Chris quite so well. But several months later, when Larry became deputy attorney general, he did what any sensible person would do who had been beaten by one of the best. He brought Chris to Washington as his top assistant.

At the Justice Department, Chris has approached his duties with that same dedication, the same common sense, the same keen legal skills that made Griffin Bell and Larry Thompson take notice of them more than a decade ago. At a time when our Nation faces a threat from terrorism like any we have ever faced, we need the hardest worker, we need the brightest man as our top criminal prosecutor. And I submit to this distinguished Committee that is what we have in Chris Wray.

So it is my honor to present Christopher Wray to this Committee. I want to join Griffin Bell, and Larry Thompson, and Senator Sam Nunn, Senator Saxby Chambliss in giving him my strongest recommendation for confirmation as assistant attorney general for the Criminal Division.

Thank you, Mr. Chairman.

Senator GRAHAM. Thanks, Senator.

Thank you both. Very impressive young man.

Senator Murray?

**PRESENTATION OF LONNY SUKO, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF WASHINGTON, BY HON. PATTY MURRAY, A U.S. SENATOR FROM THE STATE OF WASHINGTON**

Senator MURRAY. Thank you very much, Mr. Chairman, Senator Edwards, members of the Committee, along with my colleague, Senator Cantwell and members of our House delegation who are both here, Congressman George Nethercutt and Congressman Doc Hastings, it is my pleasure to introduce Lonny Suko, a distinguished lawyer and U.S. magistrate judge from Washington State.

I want to welcome Judge Suko and his wife Marcia, who is with him today, to this hearing.

Mr. Chairman, I am honored to recommend that the Senate confirm Lonny Suko as a District Court judge for the Eastern District of Washington State. Judge Suko has strong bipartisan support, and with good reason. He has handled some of the most difficult cases in Eastern Washington in the past decade, and he has won the respect of everyone who has come before him. That is one of the reasons why Judge Suko enjoys such strong support from a diverse group of attorneys and community leaders in Washington State.

Both Senator Cantwell and I assisted the President in choosing him from a list of very qualified candidates. Lonny Suko has spent his life living and serving Eastern Washington. He is a graduate of my alma mater, Washington State University, and of the University of Idaho School of Law. He has had a distinguished career as a lawyer and a U.S. magistrate judge.

In private practice, Lonny Suko had a successful practice defending both plaintiffs and defendants in a variety of tort, contract, creditor/debtor and public sector cases. He has also distinguished himself as a U.S. magistrate judge, serving part time from 1971 to 1991 and full time since 1991.

As I mentioned, Judge Suko handled some of the most challenging cases in recent history in Eastern Washington. He heard the injury and death claims of more than 2 dozen plaintiffs who were victimized by a gunman at Fairchild Air Force Base in the early 1990's. He was involved in several other high-profile settlements. In all of those cases, Judge Suko won high praise for his judicial demeanor, his fairness and his respect for all parties.

Judge Suko clearly meets the standards of fairness, even-handedness, and adherence to the law that we expect of our Federal Judges. Outside of his many professional credentials, I have met with him and I have been impressed by both his professionalism and his decency.

Therefore, it is my pleasure to introduce a great lawyer and judge who I believe will make an exceptional Federal Judge. I urge this Committee to approve his nomination, and I hope we can confirm Judge Suko before the full Senate quickly. He served the people of our State well, and I am proud to support his confirmation.

Thank you very much.

Senator GRAHAM. Thank you, Senator Murray, thank you very much.

Senator Hutchison from Texas.

**PRESENTATION OF EARL LEROY YEAKEL III, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TEXAS; AND KAREN P. TANDY, NOMINEE TO BE ADMINISTRATOR OF THE DRUG ENFORCEMENT ADMINISTRATION, DEPARTMENT OF JUSTICE, BY HON. KAY BAILEY HUTCHISON, A U.S. SENATOR FROM THE STATE OF TEXAS**

Senator HUTCHISON. Thank you, Mr. Chairman.

I am here today to ask for confirmation of two outstanding Texans.

The first is Lee Yeakel, who has been nominated to serve as a U.S. District Judge of the Western District. If confirmed he would fill a vacancy in Austin. He has served as a Justice on Texas Third Court of Appeals in Austin since 1998. Prior to his judicial service, Judge Yeakel spent 29 years in private practice in Austin, most recently as a partner with the firm of Clark, Thomas and Winters from 1990 to 1998, where he concentrated on State and Federal commercial litigation and appellate work.

He earned his bachelor's degree from the University of Texas at Austin in 1966 and his law degree from the University of Texas in 1969. He has earned a master of law degree from the University of Virginia in 2001. Judge Yeakel has also been very involved in civic activities. His involvement has included services on the boards of the Austin Rotary Club, the West Austin Youth Association, the Austin Choral Union, and the Committee for Wild Basin Wilderness.

He meets the high standard to which we hold all Federal Judges and I hope that you will vote expeditiously to recommend him to the Senate.

He is accompanied today—and I would like to ask them to stand—by his wife, Anne Yeakel, with whom I have worked at the University of Texas Law School; Evan Yeakel, his son; Clare Yeakel, his daughter; and his granddaughter, Sarah Blanton, if she woke up.

And I have a second recommendation, Karen Tandy, from whom you will be hearing shortly, who has been nominated to be Administrator of the Drug Enforcement Agency. If confirmed she will be the first female administrator of the DEA. She is also the first member of her family to graduate from college, and the first lawyer in her family.

Ms. Tandy is currently the Associate Deputy Attorney General and Director of the Organized Crime Drug Enforcement Task Force at the Department of Justice. She is from Fort Worth and holds her undergraduate and law degrees from Texas Tech University. While there, she was the first female president of the student bar association.

Ms. Tandy clerked for Hon. Hal Woodward, the Chief Justice of the Northern District of Texas, after she graduated from law school. And she too has received numerous awards and special commendations during her career, including the Attorney General's Award for Distinguished Service, and the U.S. Attorney Director's Award for Superior Service.

Karen Tandy's experience and service make her an excellent choice to be Administrator of the Drug Enforcement Agency of the Department of Justice, and I hope that you will confirm here.

She is accompanied today by her husband, Steve Pomerantz, and her two teenage daughters, Lauren and Kimberly.

Senator GRAHAM. Welcome.

Senator HUTCHISON. I am very pleased to recommend these two outstanding Texans to you, and I hope that you will recommend them to the Senate. Thank you.

Senator GRAHAM. Thank you very much for your statement.

Senator Durbin.

Senator DURBIN. Mr. Chairman, I would like to yield to Senator Fitzgerald, as the nomination was made by him, but I certainly support it. I would like him to make the opening statement.

Senator GRAHAM. Absolutely. Senator Fitzgerald.

**PRESENTATION OF SAMUEL DER-YEGHIAYAN, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS, BY HON. PETER FITZGERALD, A U.S. SENATOR FROM THE STATE OF ILLINOIS**

Senator FITZGERALD. Thank you, Mr. Chairman, and thank you, Senator Durbin.

I am pleased to introduce to the Committee Hon. Judge Sam Der-Yeghiayan, and to strongly support his nomination to the bench for the Northern District of Illinois.

Since his admission to the Illinois Bar in 1978, Judge Der-Yeghiayan has distinguished himself among his peers. In his more than 20 years of experience in the Federal judicial system, Judge Der-Yeghiayan has personally litigated and adjudicated thousands of cases. At a time when vacancies in the court system have pressed the limits of the Federal Judiciary, it should be pointed out that since his appointment to the U.S. Immigration Court in Chicago, Judge Der-Yeghiayan carried one of the heaviest case loads in the entire immigration court system.

As you know, Mr. Chairman, Judge Der-Yeghiayan's area of expertise is in the field of immigration law. As an immigrant of Armenian descent who came to the United States at the age of 19, I am sure it is not accident that he is now one of the leading authorities in this complex field. I have also been advised that if and when Judge Der-Yeghiayan is formally confirmed by the Senate, he will be the first immigrant of Armenian descent ever nominated and confirmed for the Federal Judiciary.

Judge Der-Yeghiayan began his legal career as an honored law graduate under the Attorney General's Honors Program, and was appointed in 1978 as a trial attorney for the Immigration and Naturalization Service in Chicago. Four years later Judge Der-Yeghiayan was promoted to the position of District Counsel for the INS Chicago District with jurisdiction over the States of Illinois, Indiana and Wisconsin. From 1982 to 2000 he managed one of the largest INS legal proceedings programs in the Nation, and supervised a staff of over 20 Government attorneys, including Special Assistant United States Attorneys.

During his time with the INS Judge Der-Yeghiayan served as part of the Government team litigating cases in both the U.S. District Courts and the Seventh Circuit Court of Appeals. He also served on various national legal committees, including the Committee on National Security and Antiterrorism.

In 1988 Judge Der-Yeghiayan was detailed to the U.S. Embassy in Moscow, where he served as the U.S. Justice Department's sole representative on refugee and other matters.

Judge Der-Yeghiayan is the recipient of numerous awards and commendations from prestigious legal organizations, including the Justice Department, the Chicago Bar Association, and the Federal Bar Association. On March 6, 2003, Judge Der-Yeghiayan was honored by the American Immigration Law Foundation with the Immi-



grant Achievement Award for his outstanding contributions to America and the American legal system. In 1998 he received the District Counsel of the Year Award from the Commissioner of the INS and the Attorney General of the United States. Furthermore, the American Bar Association's Standing Committee on the Federal Judiciary unanimously endorsed Judge Der-Yeghiayan as qualified for appointment to the U.S. District Court.

Samuel Der-Yeghiayan earned his BA in 1975 from Evangel University in Springfield, Missouri, where he majored in political science. In 1978 he earned his JD degree from the Franklin Pierce Law Center in Concord, New Hampshire, where he served on the Law Review.

Judge Der-Yeghiayan is a fine man, a distinguished citizen of our State of Illinois, and will be a tremendous asset to the Federal Judiciary.

Mr. Chairman, if I could just ask Judge Der-Yeghiayan and his wife, Becky, who are here in the room with us, to please stand up. There they are in the back.

Senator GRAHAM. Welcome. Thank you for coming.

Senator FITZGERALD. They also have two adult children who are not with us, Tara and Jared. So thank you very much, Mr. Chairman, and members of the Committee for your time.

Senator GRAHAM. Thank you, Senator Fitzgerald.

Senator Durbin?

**PRESENTATION OF SAMUEL DERYEGHIAYAN, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS, BY HON. DICK DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS**

Senator DURBIN. Thank you very much, Mr. Chairman, and I will be brief. It is no reflection on Judge Der-Yeghiayan's qualifications. But Senator Fitzgerald and I have this bipartisan effort that has been extremely successful in filling every vacancy that has come our way, and this is further evidence of it.

When I had a chance to meet with Judge Der-Yeghiayan, I think what impressed me the most was he had received commendations from the INS, from the Department of Justice, and as Senator Fitzgerald just noted, within the last few months from an organization of immigration lawyers. I think anyone who can earn the trust of both Federal law enforcement as well as immigrant communities, understands the responsibilities of a judge, and that is why I think he is going to be an excellent appointment.

And I think the fact that he is an immigrant is a reminder to all of us, particularly as an immigrant from Middle Eastern background, is a reminder to all of us of the importance of immigration to America. It is the diversity of this Nation which makes it so strong, and Judge Der-Yeghiayan has demonstrated that he has come to our shores and given us a lot. I am sure he will give us more.

Thank you, Mr. Chairman.

Senator GRAHAM. Thanks, Senator. A very impressive group of nominees we have today.

At this time the Committee would like to recognize Congressmen Doc Hastings and George Nethercutt.

Senator DURBIN. Mr. Chairman, if I could interrupt for a moment? Could I have leave to enter into the record a statement by the ranking Democratic leader, Senator Leahy?

Senator GRAHAM. Without objection.

Senator DURBIN. Thank you.

Senator GRAHAM. Who is the most senior of you all?

Representative NETHERCUTT. You mean by age, chronologically or?

Representative HASTINGS. I am more mature.

Senator GRAHAM. Well, how about Doc Hastings? Congressman Hastings, thank you for coming.

**PRESENTATION OF LONNY R. SUKO, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF WASHINGTON, BY HON. DOC HASTINGS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON**

Representative HASTINGS. Senator Graham and I sometimes have a hard time saying that.

Senator GRAHAM. You are not the only one.

[Laughter.]

Representative HASTINGS. Thank you very much, and Senator Edwards, thank you very much for the courtesy you are showing to me and my colleague from Washington, George Nethercutt, on this issue.

We are pleased to be here to introduce to you, or second if that is the proper protocol, what Senator Murray did in introducing to you Lonny Suko as appointment to the Federal Judge.

He is a constituent of mine. Indeed his office, when he served as a Federal Magistrate, was right across the street from my district office in Yakima, and we had several conversations over the time on different issues. And I was always impressed by how he approached whatever issue we were talking about.

Senator Murray, I think, laid out very well his background, his judicial temperament. The one thing I want to dwell on just a bit here is his most previous role prior to getting this nomination, and that as a Federal Magistrate. As you know, sometimes the job of a magistrate is one that is under the radar, and that work is done pretty much under the radar. But there are two very high-profile cases that he provided over in which there was a settlement, and I think is worth noting today.

One of them involved the Gypsy Church of the Northwest against Spokane City County. It involved more than a million dollars and various activities. The reason I mention that is Spokane is George's hometown. I am about 150 miles from Spokane, but this case raised a very high profile because it went on for some time. While I am not an attorney, I remember that being settled. I have a cousin that is an attorney in Spokane that I think worked on that a little bit, and to have settled that I think was a tremendous accomplishment that probably demonstrated the temperament that Judge Suko brings to this job.

And the other one was one that Senator Murray mentioned regarding the mass shooting at Fairchild Air Force Base, and that involved a settlement of some \$17 million, a numerous number of people.

So I just bring this to your attention to demonstrate the temperament that I think Judge Suko had that impressed a bipartisan group of attorneys that George and I were involved with along with our two Senators to make recommendations to the White House.

I am pleased to say that this bipartisan group of attorneys that looked at these nominees, unanimously recommended Judge Suko for the Federal Bench. So I am pleased to be here to introduce him to you. Hopefully, the confirmation process will be very quick and unanimous like our recommendation was.

Again, thank you very much for the courtesy you have shown us here.

Senator GRAHAM. Thank you, Congressman Hastings.  
Congressman NETHERCUTT.

**PRESENTATION OF LONNY R. SUKO, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF WASHINGTON, BY HON. GEORGE R. NETHERCUTT, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON**

Representative NETHERCUTT. Thank you, Mr. Chairman and members of the Committee.

I am delighted to be here in support of Lonny Suko and his nomination by the President to be U.S. District Court Judge for the Eastern District of Washington, a jurisdiction that Congressman Hastings and I share. It represents about two-thirds or a half, thereabouts, of the geographical area of our State of Washington. So it is a very large district and it is a very diverse district.

I want to also comment on Senator Murray and Senator Cantwell, and thank them for their cooperation in this whole effort and their recommendation of Magistrate Suko to be a U.S. District Court Judge. I believe he has the judicial temperament, the intellectual capacity, the experience in private practice, and certainly the experience as a U.S. Magistrate to make him eminently qualified for the position of U.S. District Court Judge.

He is a loving father, a devoted husband, and is highly respected in his community. The bar association, without exception, finds him to be a gentleman and a high-quality individual. He blends kindness with decisiveness, and I think that is a great quality for a U.S. District Court Judge.

I thank you for holding the hearing. I thank you for welcoming him. I have a statement for the record. I would ask that it be included, and I thank Judge Suko, Honorable Magistrate Suko, for presenting himself for this new challenge.

My colleague reminds me, if we may introduce him and his wife. They are here today and we would ask them to stand.

Senator GRAHAM. Please stand. Thank you very much for coming. Welcome.

Representative NETHERCUTT. Thank you, Mr. Chairman.

[The prepared statement of Representative Nethercutt appears as a submission for the record.]

Senator GRAHAM. Thank you both. It is a pleasure to see you both. Thank you for coming over. Thank you very much.

At this time I think we will hear from Ms. Duncan, Panel II, if she will come forward. Judge Duncan, please have a seat. Make

yourself comfortable and welcome to the Committee. We are very proud to have you here. I have been told I am going to swear you in. Would you raise your right hand, please?

Do you solemnly swear the testimony you are about to give this Committee is the truth, the whole truth and nothing but the truth, so help you God?

Ms. DUNCAN. I do.

Senator GRAHAM. Thank you very much.

Ms. DUNCAN. Thank you.

Senator GRAHAM. Do you have an opening statement?

**STATEMENT OF ALLYSON K. DUNCAN, NOMINEE TO BE  
CIRCUIT JUDGE FOR THE FOURTH CIRCUIT**

Judge DUNCAN. No, I do not, Mr. Chairman, other than wishing to thank Senator Edwards and Senator Dole for their introductions, and for their support, and thank you also for the opportunity of this hearing.

[The biographical information of Judge Duncan follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full name (include any former names used.)**  
Allyson Kay Duncan
2. **Address: List current place of residence and office address(es).**  
Residence: 3908 City of Oaks Wynd, Raleigh, NC 27612  
Office: 3737 Glenwood Avenue, Suite 400, Raleigh, NC 27612
3. **Date and place of birth.**  
September 5, 1951  
Durham, North Carolina
4. **Marital Status (includes maiden name of wife, or husband's name).  
List spouse's occupation, employer's name and business address(es).**  
  
Honorable William Arthur Webb  
U. S. Federal Magistrate Judge  
Eastern District of North Carolina  
310 New Bern Avenue  
Raleigh, North Carolina 27601
5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**  
  
a. Duke University School of Law, 1972-1975; J.D.; May, 1975  
b. Hampton University, 1968-1972; B.A.; May, 1972
6. **Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.**  
  
1998 to Present - Kilpatrick Stockton, LLP, 3737 Glenwood Avenue, Suite 400, Raleigh, North Carolina 27612; Partner.  
  
1991 to 1998 - North Carolina Utilities Commission, 430 N. Salisbury Street, Raleigh, North Carolina 27603; Commissioner.

1990 - North Carolina Court of Appeals, 1 West Morgan Street, Raleigh, North Carolina 27601; Associate Judge.

1986 to 1990 - North Carolina Central University School of Law, 1801 Fayetteville Street, Durham, North Carolina 27707; Associate Professor.

1978 to 1986 - Equal Employment Opportunity Commission, 1801 L. Street, N.W., Washington, D.C. 20507; Appellate Attorney, Assistant to the Deputy General Counsel, Assistant to the Chairman, Acting Associate Legal Counsel, Acting Legal Counsel.

1977 to 1978 - District of Columbia Court of Appeals, 500 Indiana Avenue, N.W., Washington, D.C. 20001; Law Clerk to Judge Julia Cooper Mack.

1976 to 1977 - Lawyers Co-Operative Publishing Company, formerly of Rochester, New York; Associate Editor, 1976-1977 (Lawyers Co-Operative Publishing Company was absorbed by West Group approximately five years Ago. West Group is located at 110 Operman Drive, Eagan, Minnesota 55123.)

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

Not Applicable.

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

- a. In law school, I was an Earl Warren Scholar, and received an AmJur Book Award for International Law
- b. The North Carolina Central University School of Law Teacher of the Year Award
- c. Hampton University 20 Year Alumni Award
- d. Vepco Strong Minority Men and Women Award (shared with individuals like Arthur Ashe and Bernard Shaw)

- e. The Gwynneth Craig Award from the North Carolina Association of Women Attorneys for outstanding contributions to the legal profession
- f. Various other community and civic awards

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

- a. American Bar Association, Member, 2002 to Present
- b. North Carolina Bar Association, Member, August, 1997 to Present
- c. North Carolina Bar Association, President-Elect, June, 2002 - Present
- d. North Carolina Bar Association, Board of Governors, Member, 1993-1996
- e. North Carolina Bar Association, Race Relations Implementation Committee, Member, 1997 - 2000; Co-Chair, 1998
- f. North Carolina Bar Association, Committee on Women in the Profession, Member, 1999 - 2001; 1999 and 1998 Vice-Chair
- g. North Carolina Bar Association, Minorities in the Profession Committee, Member, 1991 and 1993, Chair
- h. North Carolina Bar Association, Appellate Rules Study Group, 1987 - 1991
- i. North Carolina Bar Association, Nominations Committee, Member, 1991 and 1992
- j. North Carolina Bar Association, Resolutions Committee, Member, 1993
- k. North Carolina Bar Association, Finance Committee, Chair, 2002
- l. North Carolina Bar Association, Memorials Committee, Chair, 1993
- m. North Carolina Bar Association, Continuing Legal Education Committee, Member, 1990 - 1991
- n. North Carolina Bar Association, Charter and Bylaws Committee, Member, 1993 - 1994; Chair of the Bylaws Committee 2000
- o. North Carolina Bar Association, Legal Services Liaison Committee, Member, 1997
- p. North Carolina Bar Association, Strategic Planning Committee, Member, 2001 - 2002
- q. North Carolina Bar Association, North Carolina Case Maker Committee, Member, 1993, 1994, Chair; 1997 - 1998, Co-Chair
- r. North Carolina Bar Association, Committee Chair, 1991-1994 and 1997-2002
- s. North Carolina Bar Association, Litigation Committee, Member, 1992
- t. North Carolina Bar Association, Administrative Law Committee, Member, 1993 - 1995
- u. North Carolina Bar Association, Executive Committee, Member, 1993

- v. North Carolina Bar Association, Business Law, Bankruptcy Law and Labor Law Curriculum Committee, Member, 2002
- w. North Carolina Association of Black Attorneys, Member, approximately 1992 - Present
- x. North Carolina Association of Women Attorneys, Governing Board, Member, 1991, 1993-1999, 2003
- y. Tenth Judicial District, Member, approximately 1997 to Present
- z. Wake County Bar Association, Member, 2002 to Present

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

The American Bar Association and the North Carolina Bar Association have Legislative lobbying activities.

All other organizations:

- a. The Carolina Ballet, Board of Directors
- b. The North Carolina Symphony, Board of Directors (past)
- c. The North Carolina Center for Public Policy Research, Board of Directors (past)
- d. The Wake Med Hospital Foundation, Board of Directors (past)
- e. Hampton Alumni Association
- f. Duke Alumni Association
- g. Duke Women's Health Advisory Project (past)
- h. North State Bank Board of Directors
- i. Raleigh Chapter of the Links, Inc.

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

- a. North Carolina, 1975 to present
- b. District of Columbia, 1976; I let my membership lapse after returning to North Carolina, but reactivated it several years ago
- c. Eastern District of North Carolina
- d. U. S. Supreme Court
- e. Fourth Circuit U. S. Court of Appeals
- f. Sixth Circuit U. S. Court of Appeals



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

I co-authored a text book, North Carolina Appellate Advocacy, Harrison Publishing Company, Asheville, NC, 1989 (there have been several supplements)

I wrote a law review article, "Fetal Protection and the Exclusion of Women from the Toxic Workplace," NCCU Law Journal, Vol. 18, No. 1, 1989

I wrote an article on FERC Order 888 and preemption issues, "Issues of Federalism and State Energy Policy," paper for State Regulatory Aspects of the Emerging Competition in Energy Markets, the thirteenth National Regulatory Conference, Marshall-Wythe School of Law, the College of William and Mary, May 8-9, 1995, Williamsburg, Virginia.

I have given numerous speeches to community organizations, the Commencement Address at Meredith College in the spring of 1991, and informative speeches, particularly on employment and energy issues which I am not able to produce.

The North Carolina Court of Appeals is the first level of appellate Jurisdiction where most appeals go as a matter of right. I have Synopsized ten opinions which reflect the range of issues that came before me during the year that I served. (See attached).

With respect to the decision on In re Adoption of P.E.P., the Supreme Court reversed the Court of Appeals panel on the basis of my dissent.

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

I am in excellent health. My last physical was May 1, 2002.

14. **Judicial Office:** State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

1990 - North Carolina Court of Appeals, Associate Judge, appointed by Governor James Martin. The North Carolina Court of Appeals is the first level of Appellate jurisdiction where most appeals go as matter of right.

1991 to 1998 - North Carolina Utilities Commission, Commissioner, appointed by Governor James Martin and confirmed in joint session by the Senate and the House of Representatives of the North Carolina General Assembly. In accordance with the Public Utilities Act of 1963, Chapter 62, Article 3, Section 62-30, the Commission shall have and exercise such general power and authority to supervise and control the public utilities of the State as may be necessary to carry out the laws providing for their regulation, and all such other powers and duties as may be necessary or incident to the proper discharge of its duties.

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

- (1) I have synopsized ten opinions which reflect the range of issues that came before me during the year I served as Associate Judge on the North Carolina Court of Appeals. (See attached)

With respect to the decision on In re Adoption of P.E.P., the Supreme Court reversed the Court of Appeals panel on the basis of my dissent.

- (2) Not applicable.  
 (3) Not applicable.

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

Same response as number 14 above, Judicial Office.

17. Legal Career:

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

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

I served as a law clerk to the Honorable Julia Cooper Mack of the District of Columbia Court of Appeals, from 1977-1978.

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

I have never practiced alone, although I did handle one court-appointed case after law school while I was looking for a job.

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

This listing is identical to that under number 6 above, Employment.

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

My current law practice focuses primarily on energy issues, as a result of my seven-year tenure on the North Carolina Utilities Commission. My initial focus after law school was in the area of employment law.

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

A typical former client is SCANA Corp., which I represented in securing the state approvals of its acquisition of Public Service Company of North Carolina, Inc.

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

I do not generally appear in court. My practice is before Administrative bodies, primarily the North Carolina Utilities Commission.

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

Not applicable.

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

Not applicable.

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

None.

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

Not applicable.

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

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

See attached discussion of some of the cases I briefed and argued in the federal courts of appeal on behalf of the Equal Employment Opportunity Commission.

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

There are several cases and matters I would consider significant, which span my legal career. While in the appellate division of the Equal Employment Opportunity Commission (EEOC), I argued cases in the Federal Courts of Appeal which helped define the limits of the "bona fide occupation" exemption to the Age Discrimination in Employment Act. The position I argued was later codified into law.

I also served on the negotiating team which handled the EEOC's lawsuit against General Motors in 1983, which resulted in a \$33 million settlement, the agencies largest non-litigated settlement to that point.

While teaching at North Carolina Central University School of Law, Professor Frances Solari and I co-authored the only text on state appellate advocacy to use in our appellate procedure courses.

I dissented from a panel decision on the Court of Appeals involving an adoption decision with significant procedural and other irregularities which I felt tainted the process to an extent which prohibited the birth parents from giving informed consent. The North Carolina Supreme Court reversed the majority opinion on the basis of the analysis of my dissent.

While serving on the North Carolina Utilities Commission, I presided over and participated in cases involving the implementation of the Telecommunications Act of 1996, the Natural Energy Policy Act of 1992, and the Safe Drinking Water Act, among others. Since leaving the Commission, I have handled regulatory matters involving rate making, mergers and acquisitions, and the certification of electric power plans and interstate natural gas pipelines.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

I am not involved in any such arrangements.

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

I would recuse myself from any case in which a conflict of interest exists.

I would consider a conflict of interest to exist wherever the circumstances described in 28 U.S.C. Section 455 exist.

I shall keep myself informed as to my financial interests and those of my spouse.

3. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.**

I have no plans, commitments or arrangements to pursue outside employment during my service with the court.

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

I have attached a copy of my financial disclosure report.

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

See attached net worth statement.

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

I have never held a position in a political campaign, nor ever played a role in one other than making a contribution or engaging in volunteer grass roots activity such as putting up a yard sign.





CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, comaker or guarantor		0	Are any assets pledged? (Add schedule)		NO
On leases or contracts		0	Are you defendant in any suits or legal actions?		NO
Legal Claims		0	Have you ever taken bankruptcy?		NO
Provision for Federal Income Tax		0			
Other special debt		0			

## III. GENERAL (PUBLIC)

1. **An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.**

In large part, because of the constraints in government work on types of outside activity, and the nature of my practice, I have primarily channeled my public interest work through non-profit organizations. The following are illustrative of that type of activity, but it is only a partial listing. As President-Elect of the North Carolina Bar Association, for example, I have spent the past year serving as an *ex officio* member of the Board of Directors of Legal Aid of North Carolina, which focuses on the state-wide delivery of legal services to the poor. Working to establish adequate funding of legal services is a priority of my upcoming presidency, as well as supporting the Bar Association's legislative agenda through which we are seeking the support of the General Assembly. Another stated priority of the current President, which I have adopted and with respect to which I have already devoted considerable time, is working through legislative and other channels to secure adequate funding for programs within the state's judicial system, such as our Guardian Ad Litem program, and Dispute Resolution Centers, which particularly benefit those with limited resources.

I have a strong interest in women's health issues. The Duke Women's Health Advisory Project held public seminars on women's health issues, staffed a local women's health center, and took Duke Hospital resources into the community. For example, we initiated an effort that involved the use of mobile breast cancer screening units that could be moved about the city. The Wake Med Advisory Board also sponsors a number of programs for low-income children, and the Links, Inc. is a national organization that is active in a number of low-income community programs, such as tutoring and mentoring efforts.

2. **The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?**

I have never belonged to such an organization.

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

No.

**If so, did it recommend your nomination?**

Not applicable.

**Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).**

I have had two interviews with members of the Office of White House Counsel.

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

No.

5. **Please discuss your views on the following criticism involving "judicial activism."**

**The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped-many of the prerogatives of other branches and levels of government.**

**Some of the characteristics of this "judicial activism" have been said to include:**

- a. **A tendency by the judiciary toward problem-solution rather than grievance-resolution;**
- b. **A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;**
- c. **A tendency by the judiciary to impose broad, affirmative duties upon governments and society;**
- d. **A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and**

- e. **A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.**

Article III of our Constitution allocates to the judiciary the power to decide "cases and controversies" arising under the Constitution and laws of the United States. Since *Marbury v. Madison*, the Article III judiciary has been viewed as having the power to interpret the Constitution as well as review legislation and to strike down that which violates the Constitution. The power and authority of the judiciary is properly limited to cases under the Constitution and laws which have been enacted by the political branches. Likewise, Courts are required to limit their adjudication to those cases which are "live" cases and controversies as opposed to merely rendering advisory opinions.

The Tenth Amendment imposes a different type of restraint on the judiciary. It reaffirms the principle that the national government is a government of limited and enumerated powers which reserves broader power to the States and People. Courts therefore are required to find a valid exercise of federal power in order to uphold a federal law or regulation.

The term "judicial activism" refers to the perception that judges have gone beyond deciding cases based on the Constitution, statutes, and binding legal precedent and are in effect legislating or imposing their policy choices. The term has been employed by both conservative and liberal judges as well as public and academics.

It is in the discharge of their responsibility to interpret the Constitution or statutes, that most of the criticism arises. The process of judging should focus on the particular grievance before the court and leave the broader resolution of general societal problems to the political branch. The Federal Rules of Civil Procedure provide a mechanism by which a party can bring into a lawsuit all of those persons for whom, and from whom, relief should properly be sought. The judiciary should focus on the parties to the litigation rather than using individual plaintiffs as vehicles for the imposition of far-reaching orders extending to broad classes of individuals.

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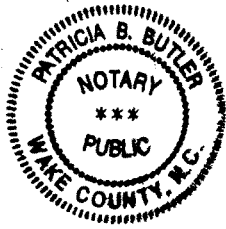
AFFIDAVIT

I, Allyson Kay Duncan, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

March 24, 2003  
(DATE)

Allyson Kay Duncan  
Allyson Kay Duncan

SUBSCRIBED AND SWORN TO before me this 24<sup>th</sup> day of March, 2003.



Patricia B. Butler  
Notary Public in and for the State of  
North Carolina

My Commission Expires: 3-10-2008

AD-10 Rev. 1/2001		<b>FINANCIAL DISCLOSURE REPORT</b> <b>FOR NOMINEES</b>		<i>Report Required by the Ethics                  in Government Act of 1978,                  (5 U.S.C. App., §§101-111)</i>	
1. Person Reporting (Last name, first, middle initial) Duncan, Allyson K.		2. Court or Organization U. S. Court of Appeals, 4th Cir.		3. Date of Report 5/1/03	
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) Circuit Judge (Nominee)		5. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination. Date 4/28/03 ___ Initial ___ Annual ___ Final		6. Reporting Period 1/1/2002 through 4/1/2003	
7. Chambers or Office Address Kilpatrick Stockton, LLP 3737 Glenwood Avenue, Suite 400 Raleigh, North Carolina 27612		8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations. Reviewing Officer _____ Date _____			
IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.					

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

POSITION	NAME OF ORGANIZATION/ENTITY
<input type="checkbox"/> NONE (No reportable positions.)	
1 Partner	Kilpatrick Stockton, LLP
2 Director	North State Bank
3 President - Elect	North Carolina Bar Association

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

DATE	PARTIES AND TERMS
<input checked="" type="checkbox"/> NONE (No reportable agreements.)	
1	
2	
3	

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

DATE	SOURCE AND TYPE	GROSS INCOME
<input type="checkbox"/> NONE (No reportable non-investment income.)		
1 2/28/02	royalties; Harrison Publishing Company; sale of book	\$ 1,024.99
2 2002	Kilpatrick Stockton LLP	\$ 323,583.00
3 2003	Kilpatrick Stockton LLP (through 3/31/03, net of hold back)	\$ 47,853.45
4		\$
5		\$

**FINANCIAL DISCLOSURE REPORT**

Name of Person Reporting <b>Duncan, Allyson K.</b>	Date of Report <b>5/1/03</b>
---	---------------------------------

**IV. REIMBURSEMENTS** – transportation, lodging, food, entertainment.  
*(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)*

	<u>SOURCE</u>	<u>DESCRIPTION</u>
<input type="checkbox"/>	NONE (No such reportable reimbursements.)	
1	Exempt	
2		
3		
4		
5		
6		
7		

**V. GIFTS.** *(Includes those to spouse and dependent children. See pp. 28-31 of Instructions.)*

	<u>SOURCE</u>	<u>DESCRIPTION</u>	<u>VALUE</u>
<input type="checkbox"/>	NONE (No such reportable gifts.)		
	Exempt		\$
2			\$
3			\$
4			\$
5			\$

**VI. LIABILITIES.** *(Includes those of spouse and dependent children. See pp. 32-33 of Instructions.)*

	<u>CREDITOR</u>	<u>DESCRIPTION</u>	<u>VALUE CODE*</u>
<input checked="" type="checkbox"/>	NONE (No reportable liabilities.)		
1			
2			
3			
4			
5			







FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Duncan, Allyson K.	5/1/03

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

Art. VII changes

tem # 3 Gabelli Mutual Fund was deleted, it was redeemed 8/23/99  
tem # 4 Berger 100 Mutual Fund was deleted, it was redeemed 8/2/99  
tem # 6 Duplicate Janus Mutual Fund was deleted  
tem #12 Name change, correct name is Paine Webber Cash Fund  
tem #19 Oakmark Mutual Fund was deleted, it was redeemed 1/4/00

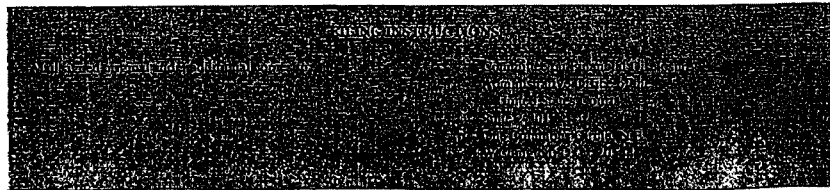
X. CERTIFICATION.

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 Allyson K. Duncan Date May 1, 2003

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.)



## 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.

AS OF JANUARY 1, 2003

ASSETS			LIABILITIES		
Cash on hand and in banks	50	000 00	Notes payable to banks-secured	18	000 00
U.S. Government securities-add schedule		0	Notes payable to banks-unsecured		0
Listed securities-add schedule	193	775 00	Notes payable to relatives		0
Unlisted securities--add schedule		0	Notes payable to others		0
Accounts and notes receivable:		0	Accounts and bills due		0
Due from relatives and friends		0	Unpaid income tax		0
Due from others		0	Other unpaid income and interest		0
Doubtful		0	Real estate mortgages payable-add schedule	380	000 00
Real estate owned-add schedule	386	000 00	Chattel mortgages and other liens payable	44	000 00
Real estate mortgages receivable		0	Other debts-itemize:		
Autos and other personal property	80	00			
Cash value-life insurance		0			
Other assets itemize:					
Household	50	000 00			
Art	10	000 00			
			<b>Total liabilities</b>	<b>442</b>	<b>000 00</b>
			<b>Net Worth</b>	<b>427</b>	<b>775 00</b>
<b>Total Assets</b>	<b>789</b>	<b>855 00</b>	<b>Total liabilities and net worth</b>	<b>869</b>	<b>775 00</b>

CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, comaker or guarantor		0	Are any assets pledged? (Add schedule)		NO
On leases or contracts		0	Are you defendant in any suits or legal actions?		NO
Legal Claims		0	Have you ever taken bankruptcy?		NO
Provision for Federal Income Tax		0			
Other special debt		0			

Senator GRAHAM. You are a very impressive person, and we are honored to have you here.

Without further ado, I will yield to Senator Edwards if he would like to start any question you might have.

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

And welcome, Judge. We are glad to have you here.

You clerked for Judge Julia Cooper Mack, who graces us with her presence here today. We are honored to have her here, and as you well know, she is one of the most respected jurists in the country, and also a first, by the way, herself.

Judge DUNCAN. Correct.

Senator EDWARDS. I wonder if you would say a word about what you learned working for her and how that will help you in your work on the Fourth Circuit?

Judge DUNCAN. My year in clerking with Judge Mack was one of the most enjoyable and informative of my life. I would be there still if she had allowed me to clerk in perpetuity, but she insisted that I move on.

I learned from her thoroughness, comprehensiveness and attention to detail, and patience. And I also learned to approach issues thoughtfully and with a respect for the level of detail that did not always appear on the surface. She taught me to analyze and she improved both my research skills and my writing skills. I owe a great deal of what I was able to become subsequently as an appellate attorney with the EEOC from my experience in clerking with her on the D.C. Court of Appeals, will always be very grateful, and am extremely gratified that she was able to come with me today.

Senator EDWARDS. Judge, during the time you were on the North Carolina Court of Appeals, you in your opinion showed a strong concern for the due process rights of everyone who appeared before you, whether it was a parent, a criminal defendant, a business person. I wonder if you would comment on whether this is a commitment you feel strongly about and one that you would take with you to your job on the Fourth Circuit?

Judge DUNCAN. If I am fortunate enough to be confirmed to the Fourth Circuit, I would bring my sincere commitment to adequately ensuring due process for everyone, that I attempted to apply when I served on the Court of Appeals. For obvious reasons, I believe that everyone is entitled to the due process of law, that it isn't just minorities but everyone who comes before the court is entitled to be treated with full respect for their rights. It is something I have always felt very strongly about, and it is a commitment I will carry forward.

Senator EDWARDS. In addition to your work as a lawyer and as a judge, you have also been very involved in civic responsibilities, and you have shown actually your commitment to the people of North Carolina in that regard, which we applaud you for. I wonder if you would just say a word about how you believe that activity helps around you and how it would help you in your service on the Fourth Circuit.

Judge DUNCAN. Serving with the North Carolina Bar Association in particular, first on the Board of Governors and now as President, has given me an opportunity to learn about the experiences of other members of the profession, and has given me an increased

respect for the range of activities that lawyers are engaged in. I have seen lawyers come together to provide legal services to the families of Fort Bragg in the absence of husbands and wives in the military. I have seen lawyers come together to raise money and provide support for the victims of natural disasters.

It has given me a keener perspective of the role that lawyers play, not just within their profession, but also in their community, and it has renewed my pride in being a lawyer and in attempting to serve the public good in that capacity.

Senator EDWARDS. Judge, you served North Carolina well, and we are very proud of you, as a person, as a lawyer, and as a judge. I know myself, having spent a lot of time talking to folks in North Carolina, including lawyers and judges who know you very well, that you are held in extremely high regard by everyone across the board, regardless of political party affiliation, and we will do everything in our power to see that you are confirmed.

Judge DUNCAN. Thank you very much.

Senator GRAHAM. Thank you, Judge. I just echo what Senator Edwards said. Both the Senators from North Carolina give you very high marks in your resume as deserving of such marks.

I just have one question. What do you think about the University of Michigan cases that were just rendered by the Supreme Court?

Judge DUNCAN. I have had an opportunity to skim them. I have not read them in depth. I believe that the two opinions provide additional guidance for the Courts of Appeals to apply to the fact patterns that come before them. I think they have set out a framework that will circumscribe our consideration at the Court of Appeals level, if I am fortunate enough to be confirmed.

Senator GRAHAM. Thank you very much.

Do you have anything else, Senator Edwards?

Senator EDWARDS. No.

Senator GRAHAM. Thank you very much for your testimony before the Committee, and a very impressive person you are.

By agreement, we will have questions open to all of the nominees for a week, that any member of the Committee can submit questions that they would like for the next week.

Thank you very much, Judge Duncan. Thank you for coming.

Judge DUNCAN. Thank you.

Senator GRAHAM. Our next panel would be Mr. Brack, Mr. Der-Yeghiayan, Louise Flanagan, Mr. Suko and Mr. Yeakel, please.

If you would raise your right hand, please. Do you solemnly swear that the testimony you are about to give before this Committee is the truth, the whole truth and nothing but the truth, so help you God?

All: I do.

Senator GRAHAM. Thank you. You may be seated. And we will just start, if you have an opening statement, now would be the time to present it, and we will start with Judge Brack and work to the right.

**STATEMENT OF ROBERT C. BRACK, NOMINEE TO BE U.S.  
JUDGE FOR THE DISTRICT OF NEW MEXICO**

Judge BRACK. Mr. Chairman, thank you for the opportunity to appear this afternoon. I know we are on a short schedule.

I wanted to thank certainly the President for the nomination the support of my Senators, who are great servants of the State of New Mexico, and have served the Nation and our State well.

And I have my three daughters here today as well. Senator Domenici introduced my wife earlier, but I appreciate my family supporting me in this effort, and wanted to recognize them as well.<sup>2</sup>

[The biographical information of Judge Brack follows:]

## I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Name:** Full name (include any former names used).  
**ROBERT CHARLES BRACK**
2. **Address:** List current place of residence and office address(es).  
**Residence: Clovis, NM**  
**Work: Curry County Courthouse, 700 N. Main, Suite 14, Clovis, New Mexico 88101**
3. **Date and Place of Birth:**  
**May 2, 1953 Lynwood, California, United States**
4. **Marital Status:** (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).  
  
**I married the former Sheila Kay Massey on May 24, 1975. She is employed with Colonial Real Estate, 4201 N. Prince Street, Clovis, NM 88101, as a realtor.**
5. **Education:** List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.  
  
**1976 - 1978 University of New Mexico School of Law;  
Juris Doctor Degree, conferred May, 1978.**  
  
**1975 - 1976 Tulane University School of Law, New Orleans, LA.**  
  
**1972 - 1975 Eastern New Mexico University, Portales, New Mexico 88130.  
Bachelor of Arts Degree, conferred May, 1975.**  
  
**1/72 - 5/72 Northern Illinois University, DeKalb, Illinois.**  
  
**8/71 - 12/71 Texas Tech University, Lubbock, Texas.**
6. **Employment Record:** List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.  
  
**Employment:**  
  
**1997 - present State of New Mexico as District Court Judge,  
Clovis, New Mexico.**



1980 - 1997 Robert Brack, P. A. - General, Civil Trial Practice  
906 Colonial Parkway, Clovis, New Mexico 88101

1978 - 1980 Teddy L. Hartley, Attorney at Law; Staff Attorney  
906 Colonial Parkway, Clovis, New Mexico 88101

1976 - 1978 Patrick Chowning, Attorney at Law; Law Clerk  
3636 Menaul NE, Albuquerque, New Mexico

Summer 1976 Santa Fe Carloading, Albuquerque, New Mexico; dockworker

Summer 1975 Harry Dixon Housepainting, New Orleans, Louisiana; painter

Non-Employment Affiliations:

2001 - present Officer & Director; Communities for Christ Crusade; Clovis,  
New Mexico, 501(C)(3).

1993 - 1994 Sangre de Cristo Cattle Co., partner  
a New Mexico general partnership

1990 - present Trustee of Robert Brack, P.A. Profit Sharing Trust

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

NO

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

1974 Eastern New Mexico University  
Pre-Law Award - Tuition Waiver

1975 Graduated from ENMU with Honors

1976 Invited to write for Tulane Law Review. Invitations extended to top 10% of class at end of first year. I did not write for the Review as I transferred to the University of New Mexico Law School for my second and third years.

2001 Clovis Chamber of Commerce "Heart Award" given for distinguished public service.

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

2002 - present	New Mexico State Bar Association Committee on Professionalism Monitoring and Evaluation sub-committee Communications sub-committee
1998 - 2001	New Mexico Chief Judges Council
1997 - present	New Mexico District Court Judges Association
1978 - present	New Mexico State Bar Association
1984 - present	Arizona Bar Association
1979 - present	Texas Bar Association
1979 - mid 90's	American Bar Association

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

Lobbying:

1995 - 1999	New Mexico Amigos - Ambassador Group; New Mexico businessmen and women - self-funded. The Amigos sponsor a legislator's breakfast annually, at the beginning of the New Mexico legislative session. I have never attended one of these breakfasts, nor did I ever participate in any other lobbying efforts conducted by the Amigos.
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Others:

1990 - 1994	Founding Member, Archdiocese of Santa Fe, Catholic Foundation; Albuquerque, New Mexico.
2001 - present	Chairman, Communities for Christ Crusade, lay-lead, inter-denominational group; Partnership with local churches; Clovis, New Mexico.
1980 - present	Colonial Park Country Club, Clovis, New Mexico.
1989 - 1996	Clovis Chamber of Commerce, Clovis, New Mexico; membership in name of Robert Brack, P.A.

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

special admission to practice.

1989 Supreme Court of the United States  
 1984 Arizona State Courts  
 1980 U.S. Court of Appeals for 10<sup>th</sup> Circuit  
 1979 Texas State Courts  
 1979 U.S. - District of New Mexico, Bankruptcy Courts.  
 1978 New Mexico State Courts

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

I haven't been published. I speak occasionally to local civic and religious groups to promote the business of the court and local charitable activities. There are no copies of written speeches because it is my practice to speak from brief outlines that I discard after the event. I'm not aware of any press coverage of any such speeches, nor were they written or videotaped. A short speech given by me at my swearing-in ceremony as a state district court judge in February, 1997 was videotaped, but a recent search for a copy (for purposes unrelated to my nomination) was unsuccessful. A list of public speaking opportunities with approximate dates and subject matter follows. None of my speeches involved constitutional law or legal policy.

<u>Group Addressed</u>	<u>Approx. Date</u>	<u>Subject Matter</u>
Camp Sierra Blanca Commencement Exercise (Branch of Boy's School)	May, 1999 or 2000	Character
NM State Bar Convention Prayer Breakfast	June, 2000	Personal Testimony
Local businessmen and women Cannon Air Force Base, Clovis, NM	July, 2001	Jehoshaphat, 2 Chron. 20, as related to the need for revival in our nation; promoting Oct, 2001 crusade.
Local businessmen and women Portales, NM (Eastern NM University)	July, 2001	Same as above.

Clovis, NM Thursday Noon Rotary	July, 2001	Same as above.
Various churches in Clovis & Portales, NM area	June, July, August September, 2001	Same as above.
Clovis, NM Citywide Memorial Service	September 12, 2001	Prayer
Clovis High School Student Council Award Dinner	Spring, 2002	Character
National Day of Prayer, Portales, NM	May 1, 2002	Personal Prayer Experience
Sacred Heart Catholic Church Adult Study Group (Clovis, NM)	Fall, 2002	Evening with Judge Brack
First Church of the Nazarene (Spoke alongside our city mayor, school superintendent and Wing Commander of Cannon Air Force Base), Clovis, NM	October, 2002	Friends
Knights of Columbus Clergy Appreciation Dinner Clovis, NM	November 24, 2002	Commendations, challenges, considering it all joy
Plains Regional Medical Center Award Banquet	Winter, 2002	Heroes
St. Helen's Catholic Church, Portales, NM	January, 2002 - March, 2003 (approx. 3 times)	Gave the sermon from prescribed readings for the particular Sunday.
Kingswood Methodist Church Clovis, NM	April 8, 2003	Eulogist at funeral for friend
Men's Bible Study, Clovis, NM	April 20, 2003	The Purpose Driven Life
Clovis High School Golf Awards Banquet	May 15, 2003	Character

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

**Excellent. Date of last physical was March 25, 2003.**

14. **Judicial Office:** State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

1997 - present      **State of New Mexico District Judge  
(appointed initially, then elected in 1998)**

**State trial court - general jurisdiction**

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

**As a state district court judge, I strive to rule from the bench as often as I possibly can. As necessary, though, the drafting of letter decisions takes the place of more formal "opinions" in my court.**

- (1) A synopsis of ten (10) significant cases are listed below:

- A. **State vs. Bernardo Rodriguez**, Curry County, New Mexico. District Court Cause No. D-0905-CR-199700179.

After being on the bench only a short time, I presided over this week-long murder trial. Mr. Rodriguez was accused of killing a rival gang member. At the end of the prosecution's case, concerned about the extent of the proof, I very nearly granted a directed verdict, but determined that there was a theory, if believed, upon which the jury could convict. I let the matter go to the jury which, after extended deliberation, acquitted Mr. Rodriguez.

- B. **State vs. Arnell Van Duyne**, Curry County, New Mexico. District Court Cause No. D-0905-JR-0200100115.

This 15 year old defendant was accused of brutally raping, then beating to death with a baseball bat, the woman who had adopted him after the parental rights of his natural mother had been terminated. Pursuant to a guilty plea agreement, I sentenced Mr. Van Duyne to the maximum

allowed under the agreement.

- C. Paul Young vs. Children, Youth & Families Dept., Curry County, New Mexico. District Court Cause No. D-0905-CV-0200200245.  
In a companion case to State vs. Arnell Van Duyne, above, the widower of the woman beaten to death, sued the New Mexico Children, Youth and Families Department for failing to disclose, in the adoption process, knowledge of Mr. Van Duyne's dangerous, explosive tendencies gained from psychological examinations done of the young man. On motion of the State, I dismissed the complaint, finding no safe harbor for the plaintiff in our tort claims act. The matter is on appeal.
- D. State vs. Lloyd Sperry, Curry County, New Mexico. District Court Cause Nos. D-0905-CR-0200100115 and D-0905-CR-0200100200.  
Mr. Sperry, an elementary school teacher, was charged with twenty-two (22) counts of criminal sexual contact of a minor involving young female students ages 9-12. Given a range of sentences in an Alford plea agreement, I sentenced Mr. Sperry to the maximum in one of the highest profile cases in our district in some time.
- E. Charles R. Ranch LLC vs. Eduardo Montoya, et al., San Miguel County, New Mexico. District Court Cause No. CV-98-150.  
Sitting by designation in this out-of-district case, I presided over a fascinating land grant case involving title to real property hundreds of years old dating to Spanish royalty. After significant motions practice over several years, the parties finally settled the case in February, 2003.
- F. Campos de Suenos, Ltd. vs. County of Bernalillo, et al., Bernalillo County, New Mexico. District Court Cause No. D-202-CV-9705106.  
Sitting by designation in this out-of-district case, I presided over a breach of contract case between local developers and the county government. Extensive motions practice resulted in my dismissing all but one of the numerous counts. On appeal, my decision not to dismiss the remaining count was reversed. Case reported at 130 N.M. 563, 28 P.3d 1104, 2001 NM App. LEXIS 36 (CA, 2001), cert denied 130 N.M. 484, 27 P.3d 476, 2001 NM LEXIS 203 (2001).
- G. State vs. Allen Hicks, Jr., Curry County, New Mexico. District Court Cause Nos. D-0905-CR-97-65 and D-0905-CR-97-214.  
Within days of my taking the bench, this defendant, who had multiple prior convictions, sought to be released on his own recognizance on charges including aggravated robbery with a firearm. I denied his request. One week later, he asked that I reconsider, citing a jail-house

conversion that made him more trustworthy. I congratulated him on his new life, but let my previous ruling stand. He said "F\_\_ you" and went back to jail.

H. In the Matter of Jerry Martinez, a child, Curry County, New Mexico. District Court Cause No. D-0905-JR-97-236.

This juvenile was caught in the act of breaking into a dry cleaners with his father. His father, who had several priors, was showing his son some tricks of the trade. I developed a wonderful relationship with the son over the course of several hearings and he quickly became one of my favorites. When he finally was sent to the Boy's School, Jerry and I corresponded regularly and whenever he was in Clovis, he would come by to see me. This exceptionally bright, handsome, quick-witted young man was murdered on July 11, 1999.

I. Christian Children's Home vs. John E. Vestal, Roosevelt County, New Mexico. 125 N.M. 426, 962 P.2d 1261, 1998 N.M. App. LEXIS 81 )(CA, 1998).

Mr. Vestal, convicted of criminal sexual penetration of a 13 year old girl, asserted his parental rights to the child conceived as a result of the criminal act. Under a state statute that dispenses with the requirement of notice to, or consent from, "a biological father of an adoptee conceived as a result of rape or incest," I denied Mr. Vestal's petition for custody and allowed the adoption of the child to go forward. The Court of Appeals affirmed my decision.

J. State of New Mexico vs. Richard Swopes, Curry County, New Mexico. District Court Cause No. D-0905-CR-02-03.

In one of my most recent high-profile cases, the defendant was charged with nineteen (19) counts of sexual misconduct with children. The matter was resolved by plea and I am awaiting a diagnostic evaluation before sentencing Mr. Swopes to a period of not less than thirteen (13) years and not more than forty-one (41) years.

- (2) In my six years as a state judge, I have been appealed approximately 40 times. I have been reversed 5 times. Copies of the unpublished or memorandum opinions are attached.
- (3) As a state district judge, my involvement with constitutional issues is limited, for the most part, to habeas and search and seizure matters. I don't believe that any of my decisions or corresponding appellate decisions could be said to have involved "significant" constitutional issues.

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

**NONE**

17. **Legal Career:**

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

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

**NO**

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

**I practiced law as a solo practitioner from 1980-1997, with the exception of periods during which I had one associate, at 906 Colonial Parkway, Clovis, New Mexico 88101.**

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

**Ted L. Hartley, Attorney at Law, Associate Attorney, 1978-1979;  
906 Colonial Parkway, Clovis, New Mexico 88101.**

**Robert Brack, P.A. (professional association), 1980-1997;  
906 Colonial Parkway, Clovis, New Mexico 88101.**

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

**1978 - 1997, General civil trial practice with business emphasis.**

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

**A representative sample of my former clients would include multiple financial institutions (Western Bank of Clovis; First National Bank of Clovis), a convenience store chain of 350 stores (Allsup's Convenience**



Stores, Clovis, New Mexico); our local community college (Clovis Community College, Clovis, New Mexico), a regional telephone cooperative (Eastern New Mexico Rural Telephone Cooperative), several car dealerships (including at one time the Chrysler, Plymouth, Dodge, Nissan, Jeep, Eagle, Mitsubishi, Chevrolet, GM & Ford franchises); oil and gas distributors (Gary Cook Oil Company) and regional highway/paving contractors (K. Barnett & Sons, Clovis, New Mexico.)

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

**I appeared in state courts frequently.**

- (2) What percentage of these appearances was in:
- (A) federal courts; 5%
  - (B) state courts of record; 95%
  - (C) other courts.
- (3) What percentage of your litigation was:
- (A) civil; 98%
  - (B) criminal; 2%
- (4) State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

**I tried approximately 100 cases to verdict, usually as sole counsel, always as lead counsel.**

- (2) What percentage of these trials was:
- (A) jury; 20%
  - (B) non-jury; 80%

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

- (a) the date of representation;
  - (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
  - (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.
- (1) **Burns vs. State of New Mexico** - D-0101-CV-89-1314, represented the named plaintiff and approximately 9,000 additional federal retirees against the state Taxation and Revenue Department for illegal, unconstitutional taxation of federal retirement benefits. Federal Supremacy Clause, 11<sup>th</sup> Amendment issues confronted/overcome. At the time (1990), New Mexico did not allow an opt-out-type class action so we were required to deal, individually, with all 9,000 plaintiffs. We prevailed on summary judgment in the State District Court, Santa Fe County, and the State chose not to appeal resulting in tax refunds to our clients in excess of \$20 million. I was lead counsel in briefing and arguing the case. District Judge Steve Herrera, now deceased, presided. James F. Hart (908 Colonial Parkway, Clovis, New Mexico 88101, 505-762-7748) and Lisa Cronin, my associate at the time (3744 N. Sandrock Pl, Tucson, AZ 85750, (520) 546-0233), acted as co-counsel. Mr. Frank Katz (1300 Canyon Rd., Santa Fe, NM 87501-6162, (505) 982-4342) represented the State of New Mexico.
  - (2) **Kenny Thomas vs. NCAA** - CV-95-09054, represented, as lead counsel, a freshman, star basketball player at the University of New Mexico ruled ineligible by the NCAA. Tried case in Bernalillo County District Court, Albuquerque, New Mexico, before the Honorable W. Daniel Schneider, now a federal magistrate, in October/November 1995 on a preliminary injunction. Prevailed after 3 days of trial in what was reported at the time as the first court loss ever suffered by the National Collegiate Athletic Association. My co-counsel, was Pete V. Domenici, Jr. (6100 Seagull St., NE, #205, Albuquerque, New Mexico 87109, (505) 883-6250). Mr. Paul Bardacke (P.O. Box 35670, Albuquerque, NM 87176-5670, (505) 888-4300), represented the NCAA.
  - (3) **Strebeck vs. Chrysler Insurance** - I represented, as lead counsel, my lifelong friend and client, Sid Strebeck, against the defendant insurance company for non-payment of a fire claim resulting from the destruction of one of his auto dealerships. The case was tried, to the court, the Honorable Justice Stanley Frost, retired, sitting by designation, over 9 days in January, 1997. We prevailed. Opposing counsel was Mr. Ed Chapin, representing his firm from San Diego, California, 3405 Kenyon, #402, San Diego, California 92110, (619) 718-7540. I was not able to defend the appeal as I took the bench just weeks after the trial. The appeal is reported at 127 N.M. 603, 985 P.2d 1163 (1999). My brother, Brian Brack, (505) 243-3500, assisted at trial and defended the appeal.

- (4) Gilman vs. McCrary - I represented the plaintiff in a Hatfield vs. McCoy-type boundary dispute that found its way to our Supreme Court on at least two occasions. Reported at 97 N.M. 376, 640 P.2d 482 (1982). I was sole counsel. Richard Rowley (305 Pile, Clovis, NM 88101, (505) 763-4457) represented the defendant. District Judge Reuben Nieves, now deceased, presided. The issues were interesting, but paled in comparison to the personalities involved. Allegations of gun play and murder remain unresolved to this day.
- (5) White vs. Huttenbauer - United States District Court, New Mexico. Cause No. CV-79-197. Fresh out of law school (1979-1980), I represented, as lead counsel, our client, Mr. Ken White, a New Mexico cattleman, against Mr. Sam Huttenbauer, who had defaulted on a land sales agreement. We prevailed in the district court and later at the 10<sup>th</sup> Circuit. Mr. Harry Patton (I believe Mr. Patton lives in the Clovis, NM area, but my attempts to locate an address or telephone number were unsuccessful) represented Mr. Huttenbauer. The case was tried before the Honorable Santiago E. Campos.
- (6) Jacklin vs. Dudley - I represented a troubled young mother in an extended custody battle concerning her children, against her own parents. My client's parents convinced her to give them guardianship of her 2 small girls "just until you get on your feet". Immediately upon securing the guardianship, her parents cut my client off completely from any contact with her children. After several years of litigation, my client was restored to custody of her girls. The case was tried in Curry County, New Mexico District Court to the Honorable Fred T. Hensley. The case is reported at 101 N.M. 34, 677 P.2d 1070 (1984). Mr. Hal Greig (P.O. Box 1080, Clovis, NM 88101, (505) 763-4428) represented the Jacklins.
- (7) Richardson vs. Ford Motor Co. - (1984) I represented a young farmer who was horrifically burned in a motor vehicle accident. My client's Ford pickup truck t-boned a lady's vehicle which had run a stop sign. The lady died in the accident, but my client's injuries would have been limited to a broken arm had it not been for the burns he received when the fuel vapors, escaping from an in-cab fuel tank, ignited. After extensive discovery but pre-trial, Ford settled the case. The case was filed in Curry County, New Mexico district court. Ford was represented by the law firm of Snell and Wilmer, Phoenix, Arizona. I don't recall the name of counsel from that firm.
- (8) State vs. Oscar Gilman - (1980) Roosevelt County, New Mexico District Court case, the Honorable Reuben Nieves, now deceased, presiding. In my only criminal jury trial case, I defended Mr. Gilman accused of aggravated assault with a deadly weapon on Mr. McCrary (see # 4, Gilman v. McCrary). Mr. Gilman had assured me, before trial, and the jury at trial, that he was not guilty

in that he had picked up a stick not a shotgun as Mr. McCrary, who was legally blind, believed. A surprise, rebuttal witness, a passing motorist, was allowed to testify, over my objection, that he had in fact seen Mr. Gilman holding a shotgun at the time of the incident. Leslie Williams (P.O. Box 674, Clovis, NM 88101, (505) 769-0687) was the prosecuting attorney.

Embarrassed before the jury, I argued that Mr. Gilman may have lied to them about the shotgun, but that the state had still failed on the proof in that no evidence was presented that the gun had been pointed at Mr. McCrary or that he had been placed in fear. The jury acquitted Mr. Gilman, who has since disappeared and has never been seen or heard from again.

- (9) Young vs. Rural Electric Cooperative - (Early 80's) I represented the surviving widow of Mr. Charles Young, who was killed when he attempted to rescue a farm laborer who had lifted an irrigation pipe which contacted a transmission line that was hung below statutory minimums. The case was settled after extended discovery. The case was filed in Quay County, New Mexico district court and assigned to the Honorable Stanley Frost, District Judge, now deceased. The Honorable Alan Torgerson, now a U.S. Magistrate (P.O. Box 25687, Albuquerque, NM 87125-0687, (505) 842-1950), represented the Coop.
- (10) Spiteri vs. Foulkes - Curry County, NM Cause No. 81-CV-28245. I represented a minor child and his parents seeking recovery for profound injuries sustained by the child when he was run over by a passing motorist. The plaintiffs prevailed in what was described, at the time, as the largest civil jury verdict ever rendered in our district. The Honorable Reuben Nieves, now deceased, presided. Dan B. Buzzard, now deceased, represented the defendant.
19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

In addition to those matters described in response to Question 19, some of which involved litigation that did not ultimately go to trial, other significant legal activities pursued during my practice would include:

- A. representing a chain of 350 convenience stores where I was involved in land acquisitions, lease negotiations, contract work with vendors, and development of employee policies;
- B. representing a large, progressive telephone cooperative at a very exciting time in the industry characterized by transition from land-based telephone systems

to cell and wireless technology, and a move into the Internet service provider business;

- C. representing a local community college which transitioned from a branch of a 4-year college institution to being an independently-chartered community college. Following the transition, the college has experienced exponential growth and is looked upon as a tremendous asset to our community;
- D. representing a NCAA division-I basketball coach in negotiating the buy-out of the remainder of his contract when he was unexpectedly and unceremoniously fired by the University of New Mexico after posting several back-to-back 20-win seasons.
- E. New Mexico Bank and Trust (formerly First National Bank of Clovis (NM). I was hired the day my clients purchased this very-troubled financial institution in 1982 and represented the bank until I took the bench. In my 15 years of representation, as my good friend and former owner/president of FNB was fond of saying, I never lost a case involving the bank. Dan Hardisty, former President, now lives in Ruidoso, New Mexico and can be reached at (915) 497-2445 or (505) 378-8376.

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

Having served in the New Mexico judiciary for over 5 years, I have accrued and vested retirement benefits that can be taken as a lump sum after my leaving the bench or in monthly payments beginning at age 62. Also, I recently liquidated a small portion of my pension plan.

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

Historically, I have resolved questions of potential conflicts of interest by making a full disclosure of any prior relationship, knowledge or involvement with a party, counsel or issue, on the record, followed by an indication of my belief whether I can, in spite of the potential conflict, continue impartially. As a federal judge, I will follow, in all

circumstances, the Code of Conduct for U.S. Judges and the requirements of 28 USC §455 and all other recusal statutes.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain:

**NO**

4. List sources and amounts of all income received during the calendar year preceding your nomination and, for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

**A copy of my financial disclosure report is attached.**

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

**Please see attached net worth statement.**

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

**NO**

### III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

**During my trial practice, I was regularly appointed to represent indigent respondents in abuse and neglect cases, which I considered pro bono work. I also regularly provided legal assistance, on a pro bono, non-compensated basis, to my church, local charities, and other disadvantaged clients.**

2. The American Bar Associations Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates – through either formal membership

requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

NO

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

In September, 2002, Nelson Franse, an Albuquerque attorney and lifelong friend, called to advise me that two positions were soon to be available on the U.S. District Court and to encourage me to consider putting my name in the hat. After much thought, I made some preliminary calls to friends and potential supporters, including Pat Rogers, an Albuquerque attorney, New Mexico State Land Commissioner Pat Lyons, and Pete Domenici, Jr., an Albuquerque attorney and former co-counsel.

In January, 2003, I wrote to Senator Pete V. Domenici indicating my desire to be considered for one of the positions available. I met with Pat Rogers, U.S. District Chief Judge Parker, and Albuquerque attorney, Bill Keleher, to discuss the possibility of my nomination. On January 31, 2003, I met with Senator Domenici in his Washington D.C. office for an interview. On February 1, I met with Senator Jeff Bingaman for breakfast in Las Cruces, NM to discuss his support of my nomination.

On February 12, 2003, I was interviewed by a Deputy Counsel to the President and a representative from the Department of Justice at the White House. The interview lasted approximately 45 minutes. On March 5, 2003, I was told that the President intended to send my name to the Senate pending FBI checks and other due diligence. Thereafter, I was interviewed by agents from the FBI and representatives from the Office of Legal Policy at the Department of Justice.

On April 28, 2003, my name was sent to the Senate by the President.

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

NO

5. Please discuss your views on the following criticism involving "judicial activism."  
The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target

of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this “judicial activism” have been said to include:

1. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
2. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
3. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
4. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
5. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

**In our system of separation of powers, the power to legislate is left exclusively to the legislative branch. The judicial branch exists to say what the law is, not what it should be. The courts exist to decide cases and controversies, not to sit as super legislatures. When the judiciary crosses the line from interpreting policy to making policy, our constitutional scheme is perverted and endangered.**

**The doctrine of stare decisis demands, particularly of the lower courts, that decisions of the superior courts be followed in order to promote stability and prevent chaos.**

**If federal judges are to remain faithful to their oath to uphold the Constitution and decide according to law and if the public trust vested in an independent judiciary is to be upheld, judges must restrain themselves in the use of the extraordinary power granted them in their positions.**



Senator GRAHAM. Thank you, sir.  
Judge Der-Yeghiayan.

**STATEMENT OF SAMUEL DER-YEGHIAYAN, NOMINEE TO BE  
DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS**

Judge DER-YEGHIAYAN. Mr. Chairman, thank you for this opportunity to appear before this Committee. I thank the President for his nomination. I thank Senator Fitzgerald for recommending me, and Senator Durbin for supporting me for this position.

I am grateful that my wife is here today with me. She was earlier introduced. My son, Jared and my daughter Tara could not be here, but I like also to recognize my parents, Jack and Lydia, who have been an important part of my life.

And I am grateful to this Committee, and I will answer any questions. Thank you.<sup>3</sup>

[The biographical information of Judge Der-Yeghiayan follows:]

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

1. **Name:** Full name (include any former names used).  
**Answer:** Samuel Der-Yeghiayan
2. **Position:** State the position for which you have been nominated.  
**Answer:** United States District Judge, Northern District of Illinois.
3. **Address:** List current office address and telephone number. If state of residence differs from your place of employment, please list the state where you currently reside.  
**Answer:** 55 E. Monroe Street, Suite 1900, Chicago, IL 60603,  
(312) 353-7313.
4. **Birthplace:** State date and place of birth.  
**Answer:** February 16, 1952. Aleppo, Syria
5. **Marital Status:** (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Please also indicate the number of dependent children.  
**Answer:**  
Spouse: Becky Der-Yeghiayan (nee Wilson)  
Occupation: Administrative Assistant to the Superintendent  
Libertyville School District 70  
1381 W. Lake Street  
Libertyville, IL 60048  
Dependent Children: None
6. **Education:** List in reverse chronological order, listing most recent first, each college, law school, and any other institutions of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

**Answer:**

**Certificate**, The National Judicial College, Reno, Nevada (February 2001).

**Juris Doctor**, Franklin Pierce Law Center, Concord, New Hampshire (1975-1978).  
*J.D. Degree* May 1978.

**Bachelor of Arts**, Evangel University, Springfield, Missouri (1971-1975).  
*B.A. Degree* June 1975.

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

**Answer:**

**IMMIGRATION JUDGE** – United States Department of Justice, Executive Office for Immigration Review (EOIR), Immigration Court, 55 East Monroe Street, Suite 1900, Chicago, Illinois 60603 (2000 – present).

**DISTRICT COUNSEL** - United States Department of Justice, Immigration and Naturalization Service (INS), 55 East Monroe Street, Suite 1700, Chicago, Illinois 60603 (1982-2000).

- **SPECIAL ASSIGNMENT** - American Embassy, Moscow, U.S.S.R. (September-October 1988).

**ACTING DISTRICT DIRECTOR** - United States Department of Justice, Immigration and Naturalization Service (INS), 219 S. Dearborn Street, Chicago, Illinois 60604 (May 1986 - January 1987).

**TRIAL ATTORNEY** - United States Department of Justice, Immigration and Naturalization Service (INS), 219 S. Dearborn Street, Chicago, Illinois 60604 (1978-1982).

**ACTING APPELLATE TRIAL ATTORNEY** - United States Department of Justice, Immigration and Naturalization Service (INS), 5107 Leesburg Pike, Falls Church, Virginia 22041 (January/February 1981; May 1982).

**TEACHING ASSISTANT** - Federal Courts course (Professor Peter W. Brown), Franklin Pierce Law Center, Concord, New Hampshire 03301 (Spring Semester 1978).

**LAW CLERK** - United States District Court, District of New Hampshire, for the Honorable Hugh H. Bownes, U.S. District Court Judge (presently U.S. Court of Appeals Judge, First Circuit), 55 Pleasant Street, Concord, New Hampshire 03301 (May - August 1977).

**RESEARCH AND TEACHING ASSISTANT** - Public International Law and Private International Law courses (Professor Stephen K. Glickman), Franklin Pierce Law Center, Concord, New Hampshire 03301 (1977-1978).

**LEGAL INTERN** - Myers and Brown, Attorneys at Law, 4 Park Street, Concord, New Hampshire 03301 (1977-1978).

**LEGAL INTERN** - R. Peter Shapiro, Judiciary Committee, New Hampshire House of Representatives, 41 Centre Street, Concord, New Hampshire 03301 (1976-1977).

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

**Answer:** None.

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

**Answer:**

**IMMIGRANT ACHIEVEMENT AWARD** - Received the American Immigration Law Foundation's First Annual Chicago Immigrant Achievement Award honoring immigrants who have made noteworthy contributions to America (2003).

**DISTRICT COUNSEL OF THE YEAR AWARD** - Received the 1998 INS Commissioner's District Counsel of the Year Award.

**OUTSTANDING PERFORMANCE RATINGS** - Awarded Outstanding Performance Rating certificates from the Attorney General of the United States in appreciation and recognition of outstanding service as a Department of Justice Attorney for twenty consecutive years (1981-2000).

**ATHLETIC HALL OF FAME** - Inducted into the Athletic Hall of Fame of Evangel University (1991).

**SUPERIOR ACCOMPLISHMENT AWARD** - Received Superior Accomplishment Awards as a Department of Justice Attorney in recognition of meritorious service performed on behalf of the government (1990;1997).

**NATIONAL ADVOCATES SOCIETY AWARD OF MERIT** - Received the 1990 Award of Merit for outstanding efforts in fairly applying the immigration laws of the United States (1990).

**FRANK J. MCGARR AWARD** - Received the Frank J. McGarr Award of the Federal Bar Association as the outstanding government attorney in Chicago (1986).

**CERTIFICATES OF APPRECIATION** - Chicago Bar Association, Young Lawyers Section (1984-1985; 1987-1988; 1993-94); American Immigration Lawyers Association (1991).

**SPECIAL ACHIEVEMENT AWARD** - Received Special Achievement Award, United States Department of Justice, Immigration and Naturalization Service (1982).

**HONOR LAW GRADUATE** - Selected as an Honor Law Graduate by the United States Department of Justice under the Attorney General's Honor Law Graduate Program (1978).

**LAW REVIEW** - Served on the Law Review Editorial Board, *IDEA -The Journal of Law and Technology*, Franklin Pierce Law Center, Concord, New Hampshire (1976-1978).

**WHO'S WHO IN AMERICAN LAW** - Listed in *Who's Who in American Law* (1979 & 1983).

**ATHLETIC SCHOLARSHIP**, Evangel University (1971-1975).

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

**Answer:**

- Illinois State Bar Association (ISBA), Member (1978-1989), Assembly Member (1980 - 1983).
- American Bar Association (ABA), Student Member (1975-1978), Member (1978-1989).

- INS Resource Allocations Committee, 1998-2000.
  - INS Special Interest and Terrorist Cases Committee, 1997-2000.
  - INS Legal Proceedings Evaluation Guide Committee, 1995-2000.
  - INS General Counsel's Management Initiatives Committee, 1994-2000.
  - INS Enforcement Counsel National Steering Committee, 1990.
  - INS Legal Advisory Committee on Criminal Aliens, 1990-2000.
  - INS Employer Sanctions Legal Advisory Committee, 1987-1997.
  - INS Commissioner's Committee on Cost Effectiveness in Government, 1988.
  - INS Attorney Recruitment Committee, 1981-2000.
  - INS Legal Executive Council, 1981-1985.
  - INS General Counsel's Awards Committee, 1981-1985.
  - INS General Counsel's Legal Case Tracking Committee, 1983-1985.
  - Chairman, Citizenship Day and Constitution Week Naturalization Ceremony - Citizenship Council of Metropolitan Chicago, Illinois, 1983-2000.
11. **Bar and Court Admission:** List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

**Answer:**

- Supreme Court of the United States (1984).
- United States Court of Appeals, Seventh Circuit (1979).
- United States District Court, Northern District of Illinois (1978).
- United States District Court, Eastern District of Wisconsin (1979).
- Supreme Court of Illinois (1978).
- Admitted to practice in Illinois (1978).

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

**Answer:**

*Phi Alpha Delta Law Society, Franklin Pierce Law Center, Page Chapter (1977-1978).*

Illinois Police Association (IPA) (1979 - present).

To my knowledge, the above organizations did not engage and do not engage in discriminatory practices.

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

**Answer:**

**Publications:**

Author, "Immigration Reform and Control Act of 1986 - INS Enforcement Policies and Procedures." Employment Regulations in Illinois, California Business Law Institute (1987-1995).

Author, "Employer Sanctions - INS Enforcement Policies and Procedures." 27th Annual Immigration and Naturalization Institute. Practising Law Institute (1994).

Co-Author, Chapter on "Immigration and Naturalization Service" - Chicago Lawyer's Court Handbook, Chicago Bar Association Young Lawyer's Section (1987, 1989, 1992, 1997).

**Speaker and Lecturer**

- Midwest Immigrant and Human Rights Center, Training for Pro Bono Attorneys Representing Aliens in Asylum Proceedings - Speaker on representation before the Immigration Court, January 8, 2003, John Marshall Law School, Chicago, Illinois.\*
- United States Department of Justice, Office of Immigration Litigation 6<sup>th</sup> Annual Immigration Litigation Conference, "Immigration and National Security Enforcement and Litigation After September 11, 2001" - Chair, Federal Courts Panel: A View From the District Court, May 9, 2002, Scottsdale, Arizona.\*
- United States Attorney's Law Enforcement Conference – Speaker on Immigration Practitioner Fraud and the Immigration and Nationality Act, April 20, 1999.\*\*
- American Immigration Lawyers Annual Midwest Conference - Panelist on Removal Proceedings, March 12, 1999, Chicago, Illinois.\*
- Cook County State's Attorney Training Seminar – Speaker on Domestic Violence and the Immigration and Nationality Act, December 15, 1998, Chicago, Illinois.\*\*
- Congressional Seminar – Speaker on Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), April 3, 1997, Chicago, Illinois.
- American Immigration Lawyers Association, Midwest Regional Conference – Panelist on Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), March 21, 1997, Chicago, Illinois.\*
- Institute of Business Law - Featured Speaker on Employment Regulations in Illinois, July 13, 1995, Chicago, Illinois.\* See Publication.
- Practising Law Institute, 27th Annual Immigration and Naturalization Institute - Faculty on Enforcement and Litigation Issues in Employer Sanctions, November 18, 1994, Chicago, Illinois.\* See Publication.
- Institute of Business Law - Featured Speaker on Employment Regulations in Illinois, July 4, 1994, Chicago, Illinois.
- Chicago Bar Association – Panelist on "A Day in Immigration Court" seminar, May 3, 1994, Chicago, Illinois.\*



- American Immigration Lawyers Association, Seminar - Faculty on Relief from Deportation, Recent Developments: 212(c), Conditional Residence, Waivers/Removal, February 18, 1994, Chicago, Illinois.\*\*
- Institute of Business Law - Featured Speaker on Employment Regulations in Illinois, July 15, 1993, Chicago, Illinois.\* See Publication.
- American Immigration Lawyers Association, Midwest Regional Conference, Faculty on Conditional Residents, Waivers and Removal, February 12, 1993, Chicago, Illinois.\*\*

**NOTE:** The Lectures and Panel participation were made orally from hand-written notes or typed outlines. I have provided a copy of the conference agenda\* and a copy of the typed outline\*\*, as applicable.

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

**Answer:** None.

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

**Answer:** The general state of my health is excellent. My last physical examination occurred on January 11, 2003.

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

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

**Answer:**

- 1) Matter of T-\*, Case No. \* (Oral Decision rendered January 6, 2003).

The respondent, a native and citizen of an African country, was placed in removal proceedings before the Immigration Court. He was found to be deportable but applied for various forms of relief including asylum, withholding of removal, and protection under the Torture Convention. The respondent submitted numerous documents and testified in

support of his applications. The respondent provided evidence that he was a well known member of a pro-democracy group opposed to the dictatorial regime in his country and because of his activities in support of democracy he was persecuted. I found the respondent's testimony to be credible. In addition, I found that the respondent's claim of asylum was corroborated by documentary evidence and U.S. State Department Country Reports on Human Rights Practices in the Respondent's country. I found that the respondent had established his burden of proof on his request for asylum on account of his political opinion and granted his request for asylum as a matter of discretion.

2) Matter of B-H\*, Case No. \* (August 28, 2002 & November 21, 2002).

The respondent, a native and citizen of Libya, applied for asylum in the United States. The INS denied his application and placed him in removal proceedings. On August 28, 2002, after an evidentiary hearing, I found that the respondent had assisted in the persecution of others, denied his request for asylum, and entered an order deporting him to Libya. During the pendency of his appeal, the respondent was detained in the custody of the INS and held with no bond. At a bond redetermination hearing before me on November 21, 2002, I found that the respondent was a danger to the community having cooperated with a terrorism-sponsoring country in the persecution of others. Therefore, I denied his request for a change in custody status and ordered that he be held without bond pending a determination on his appeal.

3) Matter of Nevarez-Arellano, Case No. A37-002-300 (August 16, 2002).

The respondent, a native and citizen of Mexico, was convicted in 1993 in the U.S. District Court, Northern District of Illinois, for the offense of Conspiracy to Distribute Heroin as provided in Title 21 U.S.C. 846. Based upon his conviction, I found that he was deportable as an aggravated felon. He then applied for a Section 212(c) waiver. Even though Section 212(c) of the Immigration and Nationality Act was repealed by Congress in 1996, the U.S. Supreme Court in I.N.S. v. St. Cyr, 121 S.Ct. 2271 (2001), held that "212(c) relief remains available for aliens whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible to apply for 212(c) relief at the time of their plea under the law then in effect." After an evidentiary hearing, including the presentation of extensive testimony, I found that the respondent had failed to demonstrate that he warranted a favorable exercise of discretion. Specifically, I found that the respondent's criminal history, including his conviction for a serious crime of drug trafficking and two violations of probation, his lack of rehabilitation, his usage of drugs during his probation, his admission of hitting the mother of his children, the existence of two orders of protection, and his less than forthright testimony, far outweighed the respondent's substantial family ties and long residence in the United States. I denied the respondent's application for a 212(c) waiver and ordered him deported to Mexico.

4) Matter of Flores, Case No. A77-772-102 (Oral Decision rendered August 15, 2002).

The respondent, a native and citizen of Mexico, fled her native country in 1989 to escape extreme poverty which had resulted in the death of her first daughter. At a deportation hearing, she applied for Cancellation of Removal under Section 240A(b) of the Immigration and

Nationality Act (Act). To be eligible for Cancellation of Removal under this section, the respondent must establish 10 years of continuous residence in the United States, good moral character during such period, and exceptional and extremely unusual hardship to qualifying immediate family members who are U.S. citizens or lawful permanent residents if the respondent were to be deported. In addition, the respondent must establish that she merits a favorable exercise of discretion. The respondent demonstrated that she satisfied the physical presence and good moral character requirements. In support of the claim of hardship to her two United States citizen children if she were to be deported to Mexico, she presented evidence that both children suffer from chronic medical ailments and that, through her employee insurance coverage, she is able to provide them with appropriate medical care. Based upon the particularly compelling facts present in this case, I found that if the respondent were to be deported to Mexico, her two United States citizen children would suffer hardship that is substantially beyond that which would be ordinarily expected to result from an alien's deportation. I found that the respondent established statutory eligibility for Cancellation of Removal and granted the requested relief as a matter of discretion.

5) Matter of Silva, Case No. A77-771-828 (Oral Decision rendered July 25, 2002).

The respondent, a native and citizen of Mexico, entered the United States in 1989. During an Immigration Court proceeding she was found to be subject to deportation but applied for Cancellation of Removal under Section 240A(b) of the Immigration and Nationality Act (Act). To be eligible for Cancellation of Removal under this section the respondent must establish 10 years of continuous residence in the United States, good moral character during such period, and exceptional and extremely unusual hardship to qualifying immediate family members who are U.S. citizens or lawful permanent residents if the respondent were to be deported. In addition, the respondent must establish that she merits a favorable exercise of discretion. The respondent demonstrated that she satisfied the physical presence and good moral character requirements. The respondent also presented documentary and testimonial evidence that her two United States citizen children, ages 10 and 13, were good students who were featured in the local newspapers; that both children were involved actively in their church and served as altar boy and girl; that both children spoke fluent English and were active in their community; and that her 13-year-old daughter was found to have a learning disorder and received special education. The respondent demonstrated that she was a taxpayer with steady employment; that she had purchased a home; that she had paid taxes; that she was a law abiding individual with no criminal record; and that she had significant ties to the United States. I found that the respondent established statutory eligibility for Cancellation of Removal and granted the application as a matter of discretion.

6) Matter of Padilla, Case No. A41-123-489 (May 6, 2002).

The respondent, a native and citizen of Mexico, entered the United States as an immigrant. He was subsequently convicted for several offenses including criminal sexual abuse of a minor, obstruction of justice, driving on a revoked license, and aggravated driving under the influence of alcohol. At a deportation hearing, the respondent moved to terminate the proceedings arguing that he was not deportable. The respondent also applied for a waiver of deportation and, in the alternative, for voluntary departure. Notwithstanding the respondent's extensive

family ties in the United States, I found that the nature and seriousness of the respondent's crimes, coupled with his total disregard for the laws of the United States, compelled this Court to deny his motions and applications. I entered an order that the respondent's Lawful Permanent Residence be terminated and the respondent be deported to Mexico.

7) Matter of O-C-C\*, Case No. \* (March 25, 2002).

The respondent, a native and citizen of Colombia, was convicted of two drug possession offenses. I found that he was deportable from the United States as an aggravated felon. The respondent then applied for various forms of relief from deportation, including a Section 212(c) waiver, cancellation of removal, withholding of removal, and protection under the Convention Against Torture. The respondent contended that he could apply simultaneously for a Section 212(c) waiver as well as for Cancellation of Removal. I found that the respondent was statutorily ineligible to apply simultaneously for both forms of relief. The respondent then applied for Withholding of Removal and protection under the Convention Against Torture. I found that the respondent's drug convictions were particularly serious, thus rendering him statutorily ineligible for Withholding of Removal. I also found that even if the respondent's drug convictions were not considered to be particularly serious, he had failed to satisfy his burden of proof on the merits of his application for Withholding of Removal. In addition, I found that the respondent failed to meet his burden of proof that he would be tortured if deported to Colombia. Therefore, I denied all forms of relief and entered an order deporting the respondent to Colombia. The BIA affirmed my decision on August 1, 2002.

8) Matter of F-M\*, Case No. \* (Oral Decision rendered March 19, 2002).

The respondent, a native and citizen of Iraq, applied for asylum in the United States. The respondent, a Christian, was affiliated with the Assyrian Democratic Movement in Iraq. He presented evidence that he had participated in a play mocking the leadership of the Kurdistan Democratic Party and its friendly relations with the government of Saddam Hussein. The respondent was jailed and tortured because of his actions. I found that the respondent was persecuted in Iraq based upon his political opinion and granted his request for asylum in the United States.

9) Matter of S-B\*, Case No. \* (January 23, 2002 & September 26, 2002).

The respondent, a citizen of Bosnia, was convicted of domestic battery and aggravated driving under the influence of alcohol. The respondent argued that he was not deportable for having been convicted of two crimes involving moral turpitude. I found that the respondent's conviction for driving under the influence of alcohol while his driver's license was suspended constituted a crime involving moral turpitude. In addition, I found that the respondent's conviction for domestic battery was a crime involving moral turpitude as well. Consequently, I found that the respondent was deportable for having been convicted of two crimes involving moral turpitude. The respondent then applied for asylum and Withholding of Removal. I found that the respondent's conviction for domestic battery committed against his wife was a particularly serious crime thus rendering the respondent statutorily ineligible for asylum and Withholding of Removal. I ordered the respondent's deportation to Bosnia. On appeal, the

BIA agreed with my finding of deportability but found that the respondent's conviction for domestic battery did not constitute a particularly serious crime. The BIA then remanded the case for consideration of the respondent's application for asylum. After a hearing on the merits of the respondent's asylum claim, I entered another decision on September 26, 2002, finding that the respondent failed to satisfy his burden of proof for asylum and also denied the application as a matter of discretion. In addition, I noted that Congress, in the context of immigration law, had provided various forms of relief to the victims of domestic violence. I further opined that if the victims of domestic violence have been provided extraordinary immigration benefits not available to other aliens, logically it would follow that an alien convicted of domestic battery should be found to have committed a particularly serious crime rendering him ineligible for certain immigration benefits such as asylum in the United States. I once again ordered the respondent's deportation to Bosnia. My decision was affirmed by the BIA in a per curiam order on January 29, 2003.

10) Matter of L\*-, Case No. \* (June 20, 2001).

The respondent, a citizen of Viet Nam, was convicted of two burglary offenses and was sentenced to 9 years imprisonment. He moved for the termination of proceedings arguing that his crimes were not aggravated felonies. I denied the respondent's motion to terminate finding that his crimes constituted aggravated felonies under the immigration laws and precedent decisions of the Seventh Circuit Court of Appeals. The respondent then applied for Withholding of Removal and protection under the Convention Against Torture. I found that the respondent's crime was particularly serious thus barring him from Withholding of Removal. I also found that the respondent had failed to show that he would be tortured if removed to Viet Nam.

\* **NOTE:** In order to preserve the confidentiality of the asylum process, the name of the Respondent and the case number have been redacted.

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

**Answer:**

In Matter of Tohir, A27-916-146 (BIA October 31, 2002), and Matter of Ashraf, A76-772-130 (BIA November 1, 2002), the respondents had failed to appear for their hearings and were ordered removed *in absentia*. Their motions to reopen were denied. The Board of Immigration Appeals (BIA) reopened the matters and remanded them to the Immigration Court for a hearing.

In Matter of Oprzadek, A78-291-326 (BIA October 11, 2002), while the respondent's appeal was pending, he moved that his case be remanded because a visa petition filed on his behalf had been approved. The BIA remanded the matter so that he could apply for relief before the Immigration Court.

In Matter of S-B-, (January 23, 2002 & September 26, 2002), the respondent, a citizen of Bosnia, was convicted of domestic battery and aggravated driving under the influence of alcohol. The respondent argued that he was not deportable for having been convicted of two crimes involving moral turpitude. I found that the respondent was convicted of two crimes involving moral turpitude. The respondent then applied for asylum and withholding of removal. I found that the respondent's conviction for domestic battery committed against his wife was a particularly serious crime rendering the respondent statutorily ineligible for asylum and withholding of removal. I ordered the respondent's deportation to Bosnia. On July 18, 2002, in an unreported decision, the Board of Immigration Appeals (BIA) agreed with my conclusion that the respondent was deportable for having been convicted of two crimes involving moral turpitude. The BIA, however, found that the respondent's conviction for domestic battery was not a particularly serious crime rendering him ineligible for asylum. The BIA then remanded the matter to consider the respondent's application for asylum. After an evidentiary hearing on September 26, 2002, I entered another decision finding that the respondent failed to satisfy his burden of proof for asylum and also denied the application for asylum as a matter of discretion. In addition, I noted that Congress, in the context of immigration law, had provided various forms of relief to the victims of domestic violence. I further opined that if the victims of domestic violence have been provided extraordinary immigration benefits not available to other aliens, it would follow that an alien convicted of domestic battery should be found to have committed a particularly serious crime rendering him ineligible for certain immigration benefits such as asylum in the United States. I once again ordered the respondent's deportation to Bosnia. My decision was affirmed by the BIA in a per curiam order on January 29, 2003.

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

**Answer:**

Immigration Courts do not rule on state constitutional issues and have no jurisdiction to entertain federal constitutional challenges to immigration laws. However, in every proceeding before the Immigration Court, every respondent is accorded due process protections as mandated by the Fifth Amendment.

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

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

**Answer:** In 2000, I was appointed by Attorney General Janet Reno as an Immigration Judge.

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

**Answer:** No.

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

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

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

**Answer:** No

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

**Answer:** No

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

**Answer:** United States Department of Justice, Immigration and Naturalization Service (INS), 55 East Monroe Street, Suite 1700, Chicago, Illinois 60603, Trial Attorney, 1978-1982; District Counsel, 1982-2000.

United States Department of Justice, Executive Office of Immigration Review (EOIR), 55 East Monroe Street, Suite 1900, Chicago, Illinois, Immigration Judge, 2000-present.

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

**Answer:**

**IMMIGRATION JUDGE** – United States Department of Justice, Executive Office for Immigration Review (EOIR), Immigration Court, 55 East Monroe Street, Suite 1900, Chicago, Illinois 60603 (2000 – present).

As an Immigration Judge, presides over formal court proceedings. Conducts trials involving both criminal and non-criminal aliens in removal, deportation, exclusion, rescission, asylum, and bond proceedings. Renders oral and written decisions and rules on complex litigation issues relating to constitutional, criminal, labor, and administrative law under the Immigration and Nationality Act and the Code of Federal Regulations.

**DISTRICT COUNSEL** - United States Department of Justice, Immigration and Naturalization Service (INS), 55 East Monroe Street, Suite 1700, Chicago, Illinois 60603 (1982-2000).

As chief counsel for the INS in the states of Illinois, Indiana, and Wisconsin, directed all legal activities of the agency. Supervised a staff of 17 trial attorneys and two Special Assistant United States Attorney representing the United States in federal, state and administrative courts on issues relating to constitutional, criminal, labor and administrative law arising from the enforcement of the Immigration and Nationality Act.

**SPECIAL ASSIGNMENT** - American Embassy, Moscow, U.S.S.R.

Represented the United States on all issues relating to the processing of refugees from the Soviet Union. Served as legal advisor to the Consul General on all matters relating to the Immigration and Naturalization Service (September-October 1988).

**ACTING DISTRICT DIRECTOR** - United States Department of Justice, Immigration and Naturalization Service (INS), 219 S. Dearborn Street, Chicago, Illinois 60604 (May 1986 - January 1987).

As chief operating officer for the Chicago District, managed and supervised all activities of the agency in the states of Illinois, Indiana, and Wisconsin.

**ACTING APPELLATE TRIAL ATTORNEY** - United States Department of Justice, Immigration and Naturalization Service (INS), 5107 Leesburg Pike, Falls Church, Virginia 22041 (January/February 1981; May 1982).

Represented the government before the Board of Immigration Appeals on all appeals from decisions of the Immigration Courts.

**TRIAL ATTORNEY** - United States Department of Justice, Immigration and Naturalization Service (INS), 219 S. Dearborn Street, Chicago, Illinois 60604 (1978-1982).



Represented the government in deportation, exclusion, rescission, and other related hearings before immigration judges.

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

**Answer:** The only client I have represented is the United States of America.

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

**Answer:** As a Trial Attorney, I appeared in Immigration Court daily between 1978 and 1982. In addition, I occasionally appeared with the U.S. Attorney in U.S. District Court on immigration-related litigation. I also represented the United States in U.S. District Court in Lexington, Kentucky in a class action during the Haitian refugee crisis. Between 1982-2000, I appeared in court on occasion because I was supervising and directing the courtroom activities of a staff of approximately 20 Trial Attorneys and two Special Assistant U.S. Attorneys in my capacity as District Counsel.

- (2) Indicate the percentage of these appearances in

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

**Answer:**

80% in Immigration Court  
15% in U.S. District Court  
5% in U.S. Court of Appeals

- (3) Indicate the percentage of these appearances in:

- (A) civil proceedings;  
(B) criminal proceedings.

**Answer:**

98% civil  
2% criminal

In the criminal trials, I served in an advisory capacity to the United States Attorney. However, in immigration litigation, approximately 50% of the civil cases involved criminal aliens and issues relating to criminal law and procedure.

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

**Answer:** As a Trial Attorney with the INS, I have represented the government in Immigration Court as sole counsel in over a thousand cases resulting in final orders. I have represented the government as sole counsel in a class action lawsuit in U.S. District Court. I have served as associate counsel with the U.S. Attorney's Office in U.S. District Court in approximately 10 cases. In my capacity as District Counsel for INS, I supervised over 800 cases argued by Special Assistant U.S. Attorneys in U.S. District Court. In addition, I served as a member of the government's litigation team in over 50 cases in the Seventh Circuit Court of Appeals.

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

**Answer:** There are no jury trials in Immigration Court litigation. However, I have a solid understanding of the jury trial process.

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

**Answer:** Not applicable.

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

**Answer:** As a Department of Justice attorney, I was restricted to only representing the United States in legal matters, and therefore, was not authorized to provide *pro bono* representation to others. However, during my tenure as District Counsel for the INS (1982-2000), I have actively engaged in the training of Congressional staff, States Attorneys, Bar Associations, and law enforcement agents. In my capacity as an Immigration Judge, I have served as a speaker at a seminar sponsored by the Midwest Immigrant and Human Rights Center on January 8, 2003, and provided training to *pro bono* attorneys from throughout Chicago and the Midwest representing aliens in Immigration Court proceedings relating to political asylum applications.

I have also served as a volunteer in my church and community as follows:

- Sunday School Teacher, Senior High class, North Shore Assembly of God, Skokie, Illinois (1979-1987).
- Baseball and Basketball Coach, Vernon Hills Park District, Vernon Hills, Illinois (1992-93).
- Soccer Coach, Deerfield Park District, Deerfield, Illinois (1986-1987).
- Soccer Coach, Concord Park District, Concord, New Hampshire (1976-1977).

In addition, I volunteered and provided ongoing legal education at the following events:

- Judge, John Marshall Law School, Appellate Advocacy and Advanced Research and Writing Course (Spring 1979).
- Judge, Northwestern University Law School, Moot Court Trials (Spring 1985).
- Constitutional Rights Foundation, Speaker on Citizenship in the United States District Court for Eighth Grade Students, October 18, 1989.
- American Business Women's Association, Speaker on Citizenship, February 13, 1990, Waukegan, Illinois.
- Chairman, Citizenship Day and Constitution Week Ceremonies, Citizenship Council of Metropolitan Chicago (1982-1998)

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

- (a) the citations, if the cases were reported, and the docket number and date if unreported;
- (b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;
- (c) the party or parties whom you represented; and
- (d) describe in detail the nature of your participation in the litigation and the final disposition of the case.

Answer:

- 1) In Obaei v. Landon, District Director, INS, No. 79 C 5130 (N.D. Ill. 1979), a group of Iranian students filed a class action seeking an injunction against an INS policy regulating the extension of student status for Iranian nationals. The temporary restraining order would have crippled the government's ability to monitor and control the admission of students during the height of the Iranian hostage crisis. I personally argued the government's position opposing the temporary restraining order. On December 7, 1979, the Honorable Frank J. McGarr denied the plaintiffs' request. The plaintiffs were represented by the law firm of Fennerty & Moscovitch.

Principal Opposing Counsel: Ruth Moscovitch, Esq.  
Commonwealth Edison  
440 South LaSalle Street, Suite 3300  
Chicago, Illinois 60605  
(312) 394-7545

- 2) In Matter of Parodi, 17 I&N Dec. 608 (BIA 1980), the respondent was twice convicted of passing counterfeit currency. He obtained a judicial recommendation against deportation (JRAD) for his second conviction and argued in Immigration Court that the JRAD on the second conviction should preclude his deportation on both convictions. I argued that since the convictions were independent of each other, a deportation charge was appropriate on the first conviction. Both the Immigration Court and the Board of Immigration Appeals (BIA) agreed with my position. The BIA designated its opinion as a precedent decision. In addition, I personally argued against a motion which the respondent filed in U.S. District Court requesting the issuance of a nunc pro tunc JRAD on the first conviction. The Honorable Prentice Marshall denied the motion on January 18, 1980 (No. 78 C 168). The respondent was represented by Virgil Mungy.

Principal Opposing Counsel: Virgil Mungy, Esq.  
5453 West Diversey Avenue  
Chicago, Illinois 60639  
(773) 804-1022

- 3) In Bathelmy, et al. v. William French Smith, Attorney General of the U.S., et al., Civil No. 81-167 (E.D. Ky. 1981), a group of Haitian detainees applied for a temporary restraining order to enjoin the U.S. government from conducting exclusion and deportation hearings against them. At the time, I was detailed to Lexington, Kentucky to establish an INS legal office and to oversee litigation in expulsion proceedings. The injunction sought in this class action would have jeopardized the government's ability to conduct expulsion proceedings against these individuals and would have set a

national precedent impairing the government's ability to enforce the immigration laws of the U.S. during the height of the Haitian Boatlift Crisis. On August 24, 1981, I successfully argued in U.S. District Court that the due process rights of the plaintiffs were protected and that there was no legal basis for the granting of the injunction. On August 25, 1981, the Honorable Scott Reed denied the plaintiffs' motion for a temporary restraining order. The respondents were represented by attorneys Herbert D. Sledd, Robert E. Reeves, and John R. Leathers of Lexington, Kentucky. In addition, the plaintiffs' pleadings listed the following 19 attorneys as being of counsel: Margaret Kannesohn (Lexington, Ky.); Sylvia Lovely (Lexington, Ky.); Donna Proctor (Lexington, Ky.); the Law Firm of Brown, Bucalos & Gardner (Lexington, Ky.); the Law Firm of Allison, Soreff & Garber (Louisville, Ky.); James Lowry (Lexington, Ky.); James Berry (Lexington, Ky.); Willie E. Peele (Frankfort, Ky.); Paul Reilender (Lexington, Ky.); Phil Hunter (Lexington, Ky.); Theodore Berry (Lexington, Ky.); Agyenium Boateng (Lexington, Ky.); Gwen Banachowski (Louisville, Ky.); William Shelton (Lexington, Ky.); Bing L. Bush (Lexington, Ky.); Anthea M. Boarman (Lexington, Ky.); the Law Firm of Goldman & Davis (Lexington, Ky.); Ernesto Scorsone (Lexington, Ky.).

Principal Opposing Counsel: Herbert D. Sledd, Esq.  
250 West Main Street  
Lexington, Ky. 40507  
(859) 233-2012

- 4) In Matter of Frentescu, 18 I&N Dec. 244 (BIA 1982), the respondent was convicted of burglary and the government sought his removal from the U.S. as a result of that conviction. I argued that the crime of burglary was a crime involving moral turpitude and the Immigration Court agreed with my argument. On appeal, the Board of Immigration Appeals ruled that the respondent's burglary offense was not a "particularly serious crime" which would render him ineligible for relief. The significance of this decision was that it was a case of first impression and it has been cited extensively in other decisions. The respondent was represented by attorney Juan M. Soliz of the Legal Assistance Foundation of Chicago.

Principal Opposing Counsel: Juan M. Soliz,  
(last known address) 1661 South Blue Island Avenue  
Chicago, Illinois 60608  
(telephone number unknown)

- 5) In Harris v. Moyer, a multiple party, multiple issue case, I represented the INS and the District Director of the Chicago District of the INS in a matter involving personnel practices. A Merit Systems Protection Board (MSPB) hearing official issued an adverse ruling against the INS. On appeal to the full MSPB, I served as a legal advisor and assisted in the preparation of the government's appeal which resulted in the reversal of the hearing official's initial finding. (MSPB Docket No. CH 315H8410125). The U.S. Court of Appeals for the Federal Circuit upheld the MSPB decision. Harris v. MSPB, Appeal No. 85-2167 (Dec. 23, 1985). This was an important case for the INS since it involved issues relating to the termination of probationary employees.

I also represented the INS District Director who was being investigated by the Special Counsel for MSPB for alleged prohibited personnel practices. On March 21, 1985, the Special Counsel declined prosecution and terminated the investigation (OSC File 10-4-00717).

In addition, I provided legal and technical advice to the Assistant U.S. Attorney in defending an action brought in the U.S. District Court in Chicago for alleged Constitutional violations in the termination process. Harris v. Moyer, No. 85 C 02228 (N.D. Ill. 1986). The Judge who presided over this matter was the Honorable James B. Moran and the case was eventually settled.

Co-counsel: Linda Wawzenski  
Assistant U. S. Attorney  
219 S. Dearborn Street  
Chicago, Ill. 60604  
(312) 353-1994.

Principal Opposing Counsel: Douglas P. Roller, Esq.  
321 South Plymouth Court, Suite 950  
Chicago, Illinois 60604  
(312) 337-6368

- 6) In U.S. Department of Justice v. Ready-Man, Inc., Case No. CHI-88-274A-0460 (INS Chicago 1988), I personally directed the litigation and negotiated the settlement of the largest employer sanctions case since the passage of the Immigration Reform and Control Act of 1986 (IRCA). The case involved 1520 violations of the newly enacted employer sanctions laws. The importance of this case was that it produced a settlement which resulted in both a significant fine and a model for cooperation between the INS and the business community whereby the employer modified its personnel practices to comply with the law. This settlement was used as a model for nationwide settlements of employer sanctions cases by the INS.

Principal Opposing Counsel: Joseph Hasman, Esq.  
Peterson and Ross  
200 East Randolph, Suite 7300  
Chicago, Illinois 60601  
(312) 946-4322

- 7) In U.S. Department of Justice v. Esposito, A27-895-148 (INS Chicago 1989), the respondent was a major organized crime figure from Italy. He had 12 outstanding warrants in Italy for murder. When extradition proceedings against Esposito had to be terminated after 18 months due to a technicality, the INS took Esposito into custody. Deportation proceedings were instituted against Esposito based upon his use of fraudulent documents to procure his entry into the United States. I successfully supervised the

litigation relating to Esposito's deportation. The Immigration Court, the Board of Immigration Appeals, and the Court of Appeals for the 7<sup>th</sup> Circuit ruled in favor of the government ordering Esposito's deportation. (Esposito v. INS, 936 F.2d 911 (7<sup>th</sup> Cir. 1991)(*reh'g. en banc denied* August 8, 1991).

Co-counsel: Craig Oswald, Esq.  
Deputy Chief Assistant U.S. Attorney  
219 South Dearborn Street  
(312) 353-5300

Principal Opposing Counsel: Philip Parenti, Esq.  
600 South Dearborn Street, Suite 214  
Chicago, Illinois 60605  
(312) 372-8882

- 8) In Pilch v. INS, 129 F.3d 169 (7<sup>th</sup> Cir. 1997, Rehearing denied January 16, 1998), the respondent was denied suspension of deportation relief by the Immigration Court and the Board of Immigration Appeals. He filed a petition for review before the 7<sup>th</sup> Circuit Court of Appeals. I served as part of the litigation team which successfully argued that the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) precluded judicial review of discretionary decisions. As Chief Counsel for the Chicago District of the INS, I participated in the development of litigation strategy and provided litigation assistance to David McConnell, the Department of Justice attorney assigned to argue the matter before the Court of Appeals. The 7<sup>th</sup> Circuit panel consisted of the Honorable Judges Cummings, Flaum and Kanne. This was an important decision on a case of first impression subsequent to the passage of the IIRIRA.

Co-counsel: David McConnell, Esq.  
Deputy Chief, Civil Division  
U.S. Department of Justice  
Office of Immigration Litigation  
1331 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530  
(202) 616-4881

Principal Opposing Counsel: Royal Berg, Esq.  
33 N. LaSalle Street, Suite 2300  
Chicago, Illinois 60602  
(312) 855-1118

- 9) In Turkhan v. Perryman, 188 F.3d 814 (7<sup>th</sup> Cir. 1999), the respondent filed a writ of habeas corpus seeking review of a final order of deportation by the Board of Immigration Appeals. The United States District Court denied the writ and the alien appealed to the 7<sup>th</sup> Circuit. The Court of Appeals held that the District Court had jurisdiction to review the petition under the general habeas statute. The Appellate Court agreed with the government and further ruled that the retroactive application of a statute precluding judicial review of final orders against criminal aliens did not violate the alien's due

process and equal protection rights. I served on the litigation team with Papu Sandhu of the Department of Justice. As Chief Counsel for the Chicago District of the INS, I participated in the development of litigation strategy and provided litigation assistance to the Department of Justice attorney assigned to argue the matter before the Court of Appeals. The 7<sup>th</sup> Circuit panel consisted of the Honorable Judges Posner, Kanne and Evans.

Co-counsel: Papu Sandhu, Esq.  
Civil Division, U.S. Department of Justice  
Office of Immigration Litigation  
1331 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530  
(202) 616-9357

Principal Opposing Counsel: Royal Berg, Esq.  
33 N. LaSalle Street, Suite 2300  
Chicago, Illinois 60602  
(312) 855-1118

- 10) In Malek v. INS, 198 F. 3<sup>rd</sup> 1016 (7<sup>th</sup> Cir. 2000), the respondent was convicted of two counts of wire fraud and one count of misuse of a social security number. The respondent was found deportable and filed for asylum and withholding of deportation. The Immigration Court and the Board of Immigration Appeals found that the respondent was not credible and denied his applications for relief. I served on the litigation team which successfully argued that the 7<sup>th</sup> Circuit Court of Appeals should not disturb the credibility determinations of the Immigration Court and the Board of Immigration Appeals. As Chief Counsel for the Chicago District of the INS, I participated in the development of litigation strategy and provided litigation assistance to Nora Ascoli Schwarz, the Department of Justice attorney assigned to argue the matter before the Court of Appeals. The 7<sup>th</sup> Circuit upheld the Board of Immigration Appeals' determination that the alien's testimony was not credible and that the Board's decision was supported by substantial evidence. The 7<sup>th</sup> Circuit Panel consisted of the Honorable Judges Coffey, Easterbrook and Rovner.

Co-counsel: Nora Ascoli Schwarz, Esq.  
Civil Division, U.S. Department of Justice  
Office of Immigration Litigation  
1331 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530  
(202) 616-4888

Principal Opposing Counsel: Robert DeKelaita, Esq.  
6600 North Lincoln Avenue, Suite 310  
Lincolnwood, Illinois 60712  
(847) 677-9501



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

**Answer**: No.

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

**Answer**: No.

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

**Answer**: I have no financial conflict of interest nor do I anticipate any potential financial conflict of interest. However, if a potential conflict of interest arises, I will abide by all canons and rules of ethics in order to avoid any appearance of a conflict of interest.

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

**Answer**: No.

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

**Answer**: See the attached copy of my Financial Disclosure Report.

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

**Answer:** See the attached copy of my financial net worth statement.

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

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

**Answer:** Not applicable.

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

**Answer:** I completed all requisite forms. I was first interviewed by Senator Peter Fitzgerald's staff. Subsequently, I was interviewed by Senator Fitzgerald. I was also interviewed by the Justice Department's Office of Legal Policy and the White House Counsel's Office. In addition, I was interviewed by the FBI as part of its background investigation in the nomination process.

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

**Answer:** No.

Senator GRAHAM. Thank you very much.  
Judge FLANAGAN.

**STATEMENT OF LOUISE W. FLANAGAN, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF NORTH CAROLINA**

Judge FLANAGAN. Good afternoon, Mr. Chairman. I thank you for the opportunity of the hearing today. I would like to thank the President for the honor of this nomination. And I thank Senator Edwards and Senator Dole for their supportive remarks. I am very appreciative.

And I also appreciate the support of my family, who has already been introduced.

Thank you.

[The biographical information of Judge Flanagan follows:]

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

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

Louise Wood Flanagan, nee Louise Braxton Wood

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

U.S. District Judge, Eastern District of North Carolina

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

Courthouse Annex  
215 South Evans St., Room 103  
Greenville, NC 27858  
Tel. No. (252) 830-1334

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

Date of birth: 6/26/62  
Place of birth: Richmond, VA

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

Married to Michael Perkins Flanagan (6/23/90)  
Attorney, Ward and Smith, P.A. (Director)  
120 West Fire Tower Rd.  
Post Office Box 8088  
Greenville, NC 27835  
We have two dependent children

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

University of Virginia School of Law, 8/84 - 1/88 (J.D. degree received 1/88)  
Wake Forest University, 8/80 - 5/84 (B.A. degree received 5/84)  
Wake Forest University London Program, Spring 1983  
College of William & Mary, Summer 1981

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

U.S. District Court for the Eastern District of North Carolina  
 215 South Evans St., Room 103  
 Greenville, NC 27858  
 Job: U.S. Magistrate Judge, 1995 - present (part-time)

Ward and Smith, P.A.  
 120 West Fire Tower Rd.  
 Post Office Box 8088  
 Greenville, NC 27835  
 Job: Partner, 1/94 - 7/99  
 Associate, 8/90 - 12/93

Sonnenschein, Nath & Rosenthal  
 East Tower, Suite 600  
 1301 K St., N.W.  
 Washington, DC 20005  
 Job: Associate, 8/89 - 6/90

U.S. District Court for the Eastern District of North Carolina  
 215 South Evans St.  
 Greenville, NC 27858  
 Job: Law Clerk to the Hon. Malcolm J. Howard, U.S. District Judge, 3/88 - 7/89

Center for National Security Law  
 University of Virginia School of Law  
 580 Massie Rd.  
 Charlottesville, VA 22903  
 Job: Research Assist to Prof. John Norton Moore, Fall 1985 - Spring 1987

National Endowment for the Arts  
 Office of General Counsel  
 1100 Pennsylvania Ave., NW  
 Washington, DC 20506  
 Job: Summer Intern, 5/87 - 8/87

Colonial Williamsburg Foundation  
 P.O. Box 1776  
 Williamsburg, VA 23187  
 Job: Seasonal Sales Clerk (Craft House), 12/86

Lovell, White Durrant  
 Atlantic House  
 Holburn Viaduct  
 London EC1A 2FC England  
 Job: Legal Assistant, 8/86 - 11/86

Royal Academy of the Arts  
 Burlington House  
 Piccadilly  
 London W1J 0BD England  
 Job: Trust Office Intern, 5/86 - 8/86

Kilpatrick Stockton, LLP (formerly Petree Stockton Robinson)  
 1001 West Fourth St.  
 Winston-Salem, NC 27101  
 Job: Summer Associate, 5/85 - 8/85

Levy's Clothing Store  
 Barrack's Road Shopping Center  
 Charlottesville, VA  
 Job: Sales Clerk, 6/84 - 8/84

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

N/A

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

Member, Eastern North Carolina Inn of Court  
 Permanent Member, Fourth Circuit Judicial Conference

Fellowships or similar include law school sponsored fellowships to work at National Endowment for the Arts, Office of General Counsel, as summer intern, 5/87 - 8/87, and Royal Academy of the Arts, as trust office intern, 5/86 - 8/86. Carswell Scholar stipend awarded by Wake Forest University to work in Parliament, House of Lords, as research

assistant to Lord Irving, 6/83 - 8/83.

Received B.A. degree magna cum laude from Wake Forest University  
 Phi Beta Kappa  
 Guy T. Carswell Memorial Scholar  
 Cooke-Scales Memorial Scholar  
 Member, Omicron Delta Kappa and Mortar Board, Leadership/Scholarship Societies  
 Pi Sigma Alpha, Politics Honor Society  
 Invited to participate in Politics Honors Program  
 1982 Student Marshal

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

Member, North Carolina Bar Association  
 Member, Dispute Resolution Council (elected to term 7/02 - 6/05)  
 Member, Eastern North Carolina Inn of Court  
 Permanent Member, Fourth Circuit Judicial Conference  
 Former Member, Eastern District of North Carolina Local Rules Committee  
 Former Member, Court Historical Committee  
 Former Member, American Bar Association

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

United States Supreme Court, admitted 2001  
 United States Court of Appeals for the Fourth Circuit, admitted 1993  
 United States District Court for the Eastern District of North Carolina, admitted 1989  
 United States District Court for the Middle District of North Carolina, admitted 1993  
 United States District Court for the Western District of North Carolina, admitted 1991  
 Supreme Court of North Carolina, admitted 1988  
 District of Columbia Courts, admitted 1989

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

Member, Baywood Racquet Club  
 Former Member, League Tennis Team  
 Member, St. Timothy's Episcopal Church  
 Former Member, St. Paul's Episcopal Church  
 Former Member, Alter Guild Committee  
 Former Member, St. Peter's Episcopal Church  
 Member, Lector Book Club  
 Former Member, Handbook Committee  
 Member, Greenville Museum of Art  
 Former Board Member/General Counsel  
 Member, ECU Art Enthusiasts  
 1995 Greenville WalkAmerica Chairperson, March of Dimes  
 Former member, Phi Delta Phi Legal Fraternity  
 Member, National Society of Colonial Dames of America for the State of North Carolina  
 (Lenoir-Pitt Committee)  
 Former Member, Historical Activities Committee

The National Society of Colonial Dames of America for the State of North Carolina is an organization whose membership is limited to women dedicated to historic preservation, and the promotion of patriotism and love of country. I have no other membership in any organization which formerly discriminated or currently discriminates on the basis of race, sex, or religion, either through formal membership requirements or the practical implementation of membership policies.

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

During the past ten years, my speech work has involved commentary upon only technical subject matter. A presentation April 1996 to the North Carolina Association of Magistrates Spring Conference in New Bern, North Carolina, upon request of Joan Brannon, Assistant Director of the Institute of Government, has been preserved. I attach a copy of Brannon's letter of request and my April 1996 speech materials. I am unable to locate any other speech materials.

In 1999, while still engaged in private practice, I authored an in-house manual entitled "Creditors' Rights Handbook," with private distribution of approximately 12 copies to employees of Ward and Smith, P.A., affiliated with its Creditors' Rights department. The text is a practical tool for attorneys and staff, including technical and administrative



treatment of collection matters. Ownership resides with the law firm. The manual is its proprietary material, and includes many examples of work product obtained from client files, and privileged attorney-client communications. For these reasons, I have not attached any copy.

I edited the Ward and Smith, P.A. firm newsletter for a period of years during the mid to late 1990's. I did not separately author articles in this capacity but, rather, coordinated the regional publication with circulation limited to current and prospective firm clients, which addressed legal issues considered to be of interest to the readership. At or around the time I ceased private practice, I also was editing all similar outside publications of the firm, including section specific legal bulletins. Copies are attached.

From Fall 1985 - Spring 1987, I provided research assistance to Prof. John Norton Moore, through affiliation with the Center for National Security Law at the University of Virginia School of Law. I assisted without separate attribution in preparation of various publications, including The Legal Structure of Defense Organizations prepared for the President's Blue Ribbon Commission on Defense Management. I am unable to locate any copy of any publication by Prof. Moore, in which I assisted him.

I wrote various publications in 1986 of the Royal Academy of the Arts, London, through its Trust Office, including two full proposals for corporate arts sponsorship of prospective exhibitions and three proposals disseminated and successfully concluded during my tenure, for contributions to education workshops. I also coordinated the Academy's application to the Business Sponsorship Incentive Award (administered by Her Majesty's Government, Office of Arts and Libraries). I assisted with the production of certain catalogues, including with respect to the major 1986 exhibition. I am unable to locate published materials which I prepared or edited during this assignment. However, with respect to that aspect of work related to the 1986 exhibition at the Academy, reference is made for background and informational purposes, to New Directions in British Architecture, Norman Foster, Richard Rogers, James Stirling, by Deyan Sudjic, Thames and Hudson Publishers, 1986, a comprehensive text published on the occasion of that exhibition.

I authored numerous newspaper articles and opinion pieces while attending Wake Forest University, Winston-Salem, NC from 1980 - 1984, and serving as reporter for the campus newspaper, Old Gold & Black and, later, as its editorial page editor. Copies are attached.

Major speeches given during college included a speech at Senior Colloquium honors in 1984, addressing moral relativism in the context of the rebuilding of a defense against communism. A copy is attached. I also made a speech addressing the Board of Visitors generally. I am unable to locate any copy. The award to me of the Carswell Memorial Scholarship also required me to make an annual "defense" of my performance by speech or paper to my sponsor and others associated with the academic honor. Any speech

prepared of or relating to my annual "defense" has not been maintained, though I note this academic scholarship was renewed by Wake Forest University each year.

As a culmination of my 1983 summer research project endorsed by the Carswell Scholar program including by stipend award, I presented a paper to Parliament, House of Lords Library, through the offices of Lord Irving of Dartford, DL, entitled "Membership of the U.K. in the European Communities: The Role of the House of Lords." A copy of the paper is attached, together with confirmation from Lord Irving. Also during college, I assisted in editing writings of certain members of the politics department, without separate attribution. I am unable to locate any department writings from this period in which I may have had a hand in editing or providing research assistance.

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

I have never testified before Congress.

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

Excellent. My last regular physical examination occurred in 8/02.

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

- (a) a short summary and citations for the ten (10) most significant opinions you have written;
- (b) a short summary and citations for all rulings of yours that were reversed or significantly criticized on appeal, together with a short summary of and citations for the opinions of the reviewing court; and
- (c) a short summary of and citations for all significant opinions on federal or state constitutional issues, together with the citation for appellate court rulings on such opinions.

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

Responding to (a) above, requesting a short summary and citations for the ten (10) most significant opinions I have written, with direction concerning provision of copies of unreported decisions, magistrate judges' opinions are not promoted regularly for publication in my district. I supplement my list of the following cases, with provision of

copies of any unpublished opinions noted, including opinion not available on Westlaw:

1. Domestic Fabrics Corp. v. Sears, Roebuck, & Co., 212 F. Supp. 2d 489 (E.D.N.C. 2002). I undertook the case for hearing and submission to the court of recommendation for disposition as to the disputed terms and claims of the patent at issue. Such proceeding, commonly called a "Markman hearing," is conducted in accordance with decision rendered in Markman v. Westview Instruments, Inc., wherein the Supreme Court unanimously affirmed the Federal Circuit's en banc ruling that claim interpretation is exclusively within the province of the court. 517 U.S. 370, 391, 116 S.Ct. 1384, 1396 (1996), aff'g 52 F.3d 967, 979 (Fed. Cir. 1995). My recommendation was adopted in full. The case remains pending as to the issue of infringement.
2. U.S.A. v. Corbett H. Davis, III, 7:95-M-120. Decision was rendered in judgment December 15, 1995, after a two day trial on eight counts alleging violation of migratory bird laws, contained in Chapter 7 of Title 16, which resulted in finding of guilt on four of the counts and, later, imposition of a term of imprisonment. The was the first prison sentence imposed in North Carolina for violating waterfowl hunting regulations.
3. Wilson Land Corp. v. Smith Barney, Inc., 48 Fed. R. Serv. 3d 1298 (E.D.N.C. 2000); see also Wilson Land Corp. v. Smith Barney, Inc., 2000 WL 1745241 (E.D.N.C. 2001). I cite these opinions, and would note several others not disseminated, also made a part of the court's file bearing Case No. 5:97-519-BR, for treatment of complicated pretrial discovery issues in a multi-million dollar suit premised upon alleged ERISA violations. The significance of the matter does not, however, fully reveal itself upon inspection of my writings, where after numerous decisions on motions in discovery, I presided at the parties' request over a class action mediation proceeding which involved distinct attorney teams composed of approximately 15 to 20 attorney members total, several subclasses of plaintiffs with numerous individual representatives in attendance, and two divergent corporate defendants, also as shown on the record. Individual pre-mediation sessions were undertaken, culminating in a general mediation session which extended approximately four days. The mediation successfully concluded all matters at issue, where trial had been anticipated to extend as long as five weeks.
4. Miller v. U.S.A., 150 F.Supp. 871 (E.D.N.C. 2001). This opinion addressed deprivation of petitioner's Sixth Amendment right to assistance of counsel. Published decision includes my memorandum and recommendation together with the district judge's order adopting my recommendation.
5. Bond v. United States, U.S. District Court for the Eastern District of North Carolina Case Nos. 4:99-CR-16-H & 4:00-CV-31-H. The case came before me

also on referral pursuant to 28 U.S.C. § 2255. This is another detailed treatment of an ineffective assistance of counsel claim, where concluding recommendation also was adopted by order of the district judge. Copies are attached.

6. Scott v. Glickman, 199 F.R.D. 174 (E.D.N.C. 2001). This opinion considered and decided issues arising in discovery concerning the effect of inadvertent disclosure of privileged documents.
7. Rackley v. Apfel, 1999 WL 1939979 (E.D.N.C. 1999). This was an action pursuant to § 205(g) of the Social Security Act, 42 U.S.C. § 405(g), for judicial review of the denial of application to the Social Security Administration for a period of disability and disability insurance benefits. I cite to the case as an example of a significant area of civil law upon which I issued this and many other memoranda and recommendation pronouncing on review upon the sufficiency of the Administrative Law Judge's decision. This and every other memorandum and recommendation in this area, to the best of my knowledge, was adopted fully upon presentation to the responsible district judge.
8. Napier v. Wells Fargo Home Mortgages, Inc., U.S. District Court for the Eastern District of North Carolina Case No. 5:01-CV-181-H. This case is a proposed class action suit, wherein numerous discovery issues have been presented, including request for nationwide discovery. I denied that request to extend the scope of discovery beyond past and present employees of defendant in one geographic region in an order entered June 27, 2002. The district judge upheld my rulings in discovery in their entirety by order filed September 25, 2002, wherein he also granted request for certification of interlocutory appeal. On October 24, 2002, the Fourth Circuit denied the petition for permission in Case No. 02-262. The lawsuit remains pending. Copies are attached.
9. U.S.A. v. Paul Scinto, U.S. District Court for the Eastern District of North Carolina Case No. 4:01-CR-59-H. I cite to the case as an example of a significant area of criminal law upon which I issued this and several other memoranda and recommendation pronouncing upon suppression issues. This and every other memorandum and recommendation in this area, to the best of my knowledge, was adopted fully upon presentation to the responsible district judge.
10. Bryant-Durham Electric Co., Inc. v. Blake Construction Co., Inc., U.S. District Court for the Eastern District of North Carolina Case No. 5:98-CV-186. The case is significant because of its scale and complexity, in terms both of the evidentiary materials and the legal issues presented, where issues in construction of a prison medical facility in North Carolina arose between contractors and made their way into federal court on breach of contract theories presented in claims and counterclaims seeking millions of dollars. It was assigned to me upon the parties'

request for court-hosted settlement conference and I determined to utilize a private construction law expert as the magistrate judge's co-mediator, upon consent of the parties. This technique had not been utilized before in the district, to the best of my knowledge. Upon my presentation, the process was endorsed by the parties, and, while the case did not conclude during the lengthy mediation process over which I presided together with the court's co-mediator, ultimately it did settle. The case is a significant one in my estimation because it engaged court sponsored alternative dispute resolution procedures in this district not previously undertaken. This may prove of continued viability in effective, efficient resolution of similar types of technical, document intensive cases, which can absorb a significant amount of court resources upon any trial.

Responding to (b) above, requesting a short summary and citations for all rulings that were reversed or significantly criticized on appeal, together with a short summary of and citations for the opinions of the reviewing court, I provide the following:

I have issued approximately 40 substantive memoranda and recommendations in dispositive matters to the district judges in civil and criminal cases. Upon examination of the records, I note that all recommendations have been adopted fully with the exception of Memorandum and Recommendation in U.S.A. v. Dwight L. Hill, et al., U.S. District Court for the Eastern District of North Carolina Case No. 5:98-CV-767-BO. The case involved consideration of two motions for partial summary judgment by defendants variously seeking dismissal in a civil action involving alleged false statements in connection with the Farm Service Agency's Disaster Assistance Program where the government sued under the False Claims Act, 31 U.S.C. § 3729(a)(1), (2), and (3), and for common law fraud, unjust enrichment, and payment under mistake of fact. I recommended to the district judge that both motions be dismissed in full. The court through the Hon. Terrence W. Boyle, U.S. District Judge, declined to adopt that part of my treatment of claims under 31 U.S.C. § 3729, wherein I had recommended denial of motion also as it related to (a)(3) and conspiracy, on grounds that where there was no other proffered evidence of intent to defraud, certain assignment of powers of attorney raised no inference of the required intent. In all other respects, the court's brief order adopted my recommendation. Neither of the opinions was published. Copies are attached.

To the best of my knowledge, no appeal has ever been taken of any order that I have entered as to non-dispositive pleadings issues, or in discovery in either a criminal or civil matter, with the exception of Napier v. Wells Fargo Home Mortgages, Inc., U.S. District Court for the Eastern District of North Carolina Case No. 5:01-CV-181-H, noted above, in which I was affirmed by the district judge.

As to preliminary felony matters, in the seven plus years in which I have made custodial determinations numbering now in the many hundreds, I can recall only one case with certainty where order deciding a motion for detention was overturned on appeal. I am

reviewing records to ascertain this information.

Responding to (c) above, requesting a short summary of and citations for all significant opinions on federal or state constitutional issues, together with the citation for appellate court rulings on such opinions, I provide the following:

I have not been presented with many issues requiring me to expressly determine federal or state constitutional issues. Reference is made to cases cited at para. nos. 4 and 5 above, wherein I addressed alleged deprivation of the Sixth Amendment right to assistance of counsel.

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

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

I have not held public office nor have I been a candidate for office.

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

No, I have not.

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

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

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

I served as law clerk to the Hon. Malcolm J. Howard, United States District Judge, from March 1988 - July 1989 (first law clerk). In this capacity, I researched and drafted legal opinions in excess of 100 civil and criminal cases.

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

No, I have never practiced alone. My career affiliations have been with the federal

government or with a firm of practitioners.

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

I worked as an associate at the international law firm of Sonnenschein, Nath & Rosenthal, in its Washington, DC office, immediately upon completion of my federal clerkship in 1989. The term of employment concluded in June 1990, upon my marriage and relocation to North Carolina. The firm's current address is East Tower, Suite 600, 1301 K St., NW, Washington, DC 20005.

I was a partner with the law firm of Ward and Smith, P.A. from January 1995 until I resigned in July 1999, to work as magistrate judge exclusively. The firm has offices in New Bern, Wilmington, Raleigh, and Greenville, NC. I was resident in the Greenville office. I worked as an associate in the firm from August 1990 until becoming partner in 1995. The firm's address is 120 West Fire Tower Rd., PO Box 8088, Greenville, NC, 27835.

I serve the United States District Court for the Eastern District of North Carolina as magistrate judge. I have held the position, designated as part-time with substantial duties, since 1995. My work address is Courthouse Annex, Room 103, 215 South Evans St., Greenville, NC 27858. Initially, upon appointment in 1995, criminal duties entailed the bulk of my responsibilities, with some civil responsibilities added during the first term, limited to social security appeals. During the relevant period, I concluded through memoranda and recommendations a significant percentage of the district's work in the area of social security appeals. For several years, I also regularly presided over the misdemeanor docket at Fort Bragg, Fayetteville NC. In 1999, I resigned from private practice to work exclusively as magistrate judge, at a level approximating that of a full-time magistrate judge. As described in my response to 18(b) below, the scope of my duties materially expanded at or about the time of my reappointment in 1999, to include extensive civil and pre-trial felony work. I also preside over misdemeanor cases presented in Greenville NC.

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

As an associate from 1989 until 1990 in the Washington, DC offices of Sonnenschein, Nath & Rosenthal, I worked mainly in the firm's general litigation section while performing some work for its environmental group. The firm served as general counsel to Sears and related corporate entities, including Allstate Insurance Company and Coldwell Banker. I was assistant counsel in litigation in numerous insurance defense cases and employer-employee disputes arising in or around the southeastern United States. I also

assisted in the litigation of several major lawsuits under state and federal environmental laws. I relocated to North Carolina in summer 1990, upon my marriage, and commenced employment with Ward and Smith, P.A., in the firm's creditors' rights practice group, based in its Greenville NC office.

Beginning in 1990, my practice evolved into a statewide one. My work around North Carolina involved assisting clients, including financial institutions, insurers, corporations, small business operators, and individuals, in matters involving the creditor-debtor relationship. In addition to routine collection actions, I handled loan restructuring and workouts, and conducted complex commercial litigation in state, federal, and bankruptcy courts.

My practice also involved forfeiture defense work, defense of lender liability claims, and limited debtor defense work. I pursued pre-judgment collateral recovery efforts on behalf of clients, undertook other remedial actions, and oversaw judgment enforcement actions. I handled all manner of court room proceedings, from ancillary hearings to dispositive motions hearings, to trial work, and appellate work. The majority of my cases were able to be disposed of on motions, though some proceeded and were tried to conclusion and others resolved after conduct of settlement negotiations. The appellate work was substantial, separate and apart from overseeing the progress of an average of one hundred cases at the trial level at any given time.

In addition to these work activities, and my involvement as editor of firm publications for a number of years, I also assumed a role in training and development of staff and young attorneys, regularly preparing and conducting training programs. My work for the firm also included participating in a supervisory capacity in the firm's summer law clerk program.

Upon my appointment as magistrate judge in 1995, I continued in my private practice as permitted while performing the duties of magistrate judge on a part-time basis. These duties were limited mainly to preliminary criminal matters and social security appeals.

In May 1999, I succeeded to a second term as magistrate judge and thereafter resigned my partnership effective July 1999. I did so in order to pursue exclusively judicial work on behalf of the district. My work approximated that of a full-time magistrate judge, materially expanding to include substantial criminal assignments and civil duties.

I have presided over many, varied criminal matters. These include felony criminal matters ranging from initial appearances, detention hearings and bail reviews, grand jury sessions, fee applications, and issuance of warrants and related process, decision on non-dispositive motions (usually discovery disputes), and issuance of memoranda and recommendation to the district judges on dispositive motions, sometimes after evidentiary hearing. I also have presided over many misdemeanor cases to conclusion.



Civil work regularly includes attendance to case scheduling matters, decisions on pleadings issues raised by motion, resolution of disputes in discovery, recommendation upon dispositive legal motions referred by the district judges, which may require evidentiary hearing, preparation of proposed orders for the district court upon request, conduct of pretrial conferences, and otherwise assisting in preparation of civil matters for trial. While litigants historically do not consent in this district to magistrate judge jurisdiction, I have carried on my docket several civil consent cases, including jury trial matters. I also have overseen disposition of numerous social security appeals during my court service, by memorandum and recommendation. I have acted as special master in complex civil litigation for the court. Routinely, I am designated by the district judges to preside over civil cases at court-hosted settlement conference. This conference work comes by direct appointment, and frequently also upon request of the litigants.

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

In private practice in Washington, D.C., where the firm served as general counsel to Sears and related corporate entities, clients tended to be large corporations, like Sears, Allstate Insurance Company, and Coldwell Banker. I provided representation in litigation in numerous insurance defense cases and employer-employee disputes arising in or around the southeastern United States and also assisted in the litigation of several major lawsuits under state and federal environmental laws.

In summer 1990, I commenced employment with Ward and Smith, P.A., in the firm's creditors' rights practice group, based in its Greenville, NC office. I incorporate in response to this question my response to 18(b)(1) above, wherein I discussed in particular the creditors' rights practice area in which I specialized.

Typical former clients whom I served included an array of financial institutions clients, with counsel having been provided regularly by me to First-Citizens Bank & Trust Company (for whom Ward and Smith, P.A. served as general counsel), Heritage Bank, Fidelity Bank, Southern Bank and Trust Company, and Wachovia Bank, N.A.

I represented title insurance companies, including Chicago Title Insurance Company, life insurance companies, with representation provided frequently to TIAA-CREF, and regional and local corporate clients, partnerships, and proprietorships. Former clients, among others, were Lowe's, Ferguson Plumbing, New Bern Building Supply Co., Inc., Craven Electric Supply Co. Inc., Askew's Home Builders, Inc., and Greenville Winnelson Co.

I also counseled individuals to whom obligations were owed, and in some instances, individuals against whom creditors were proceeding or threatening to proceed.

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

In private practice, I appeared in court frequently, sometimes 2 to 3 times a week.

- (2) Indicate the percentage of these appearances in

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

I estimate that the percentage of my appearances in federal courts over the course of 10 years in private practice to be 10%, and that 90% of my appearances were in state courts of record.

- (3) Indicate the percentage of these appearances in:

- (A) civil proceedings;  
 (B) criminal proceedings.

I did not practice criminal law in the private sector. My private practice was wholly a civil one, therefore 100% of my appearances were in civil proceedings.

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

In my private practice, I estimate that I litigated 300 or more cases to conclusion in state and federal courts over the 10 year period in which I practiced in North Carolina, including disposition on motion, usually upon hearing and after conduct of discovery procedures on summary judgment. Some cases proceeded to be tried; however, the vast majority of cases I litigated in private practice, usually as sole or lead counsel from approximately 1994 forward, were concluded favorably at the motions stage. Other cases not tried to conclusion typically were resolved through loan workouts and other negotiations, often after concluding confessions of judgment or consent judgments. In the entirety of my private practice, I estimate that I acted as sole counsel in 75% of all cases, chief counsel in 10%, and assistant counsel in 15% of these cases.

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

No case was decided by jury.

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

I have not appeared before the Supreme Court.

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

Over the course of my private practice in North Carolina, commencing in 1990, I regularly provided counsel without charge to persons in the community with credit issues. Time spent would be dependent upon circumstances presented, and ranged from counseling over the telephone, to a personal conference, to an attempt to solicit assistance from others in providing additional advice and counsel. It also was informal practice group policy during a substantial part of my legal career to have directed to me inquiries received from debtors, seeking counsel as to specific debtor-creditor relationships, and where assistance could not directly be provided, I would refer these persons to lawyers in the community who represent debtor clients, as my practice largely was creditor-based. I estimate I addressed between 50 and 75 individual debtors' concerns.

In 1995 I marshaled the resources of the law firm towards significant contribution to the March of Dimes, a non-profit organization committed to saving babies with research to prevent premature birth, birth defects, and genetic diseases, through a fund-raising campaign in Greenville NC. The firm endorsed upon my request my chairmanship of the 1995 WalkAmerica campaign, then one of the largest charity events for this organization in eastern North Carolina. It assisted in and promoted my direct efforts and substantial contribution of time in planning, promotion, and solicitation of corporate and individual donations, and supported these activities with technical and financial support of many of its members. Approximately \$25,000.00 was raised upon conclusion of the campaign.

I represented without charge a local arts organization engaged in community outreach and in the promotion of education in the arts between 1995 and 1999. My service necessitated work in numerous legal areas.

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

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

- unreported;
- (b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;
  - (c) the party or parties whom you represented; and
  - (d) describe in detail the nature of your participation in the litigation and the final disposition of the case.
1. USA v. Two Tracts of Real Property, 998 F.2d 204 (4th Cir. 1993) (Judges Ervin, Murnaghan, and Restani). I defended in 1993 certain real property in a federal forfeiture action, including appeal by the U.S. Attorney for the Eastern District to the U.S. Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed the decision of the Hon. James C. Fox, U.S. District Court Judge, and ruled the property was not subject to federal forfeiture. I successfully argued before the Fourth Circuit for a narrower interpretation of 21 U.S.C. § 881(a)(7). The statute provides an exception to the government's right to arrest property that facilitates certain crimes and this protects property that is used without the "knowledge or consent" of the owner of that property. The property in this instance fell within that exception to the statute. At the time the criminal activity occurred, the drug trafficker's father owned the real property and he did not consent to criminal usage. This often discussed opinion of the Fourth Circuit has served to clarify exception to federal forfeiture. I was lead counsel and made the arguments before the Fourth Circuit on behalf of the title insurer. Co-counsel was Michael P. Flanagan, Ward and Smith, P.A., 120 West Fire Tower Rd., P.O. Box 8088, Greenville, NC 27858 (tel. no. (252) 215-4017). Opposing counsel was Norman Acker, Assistant U.S. Attorney, Terry Sanford Federal Building, Suite 800, 310 New Bern Ave., Raleigh, N.C. 27801 (tel. no. (919) 856-4530).
  2. First-Citizens Bank & Trust Company v. 4325 Park Road Associates, Ltd., Lat W. Purser, III, Thomas E. Norman, and E. Judson McAdams, 133 N.C. App. 153, 515 S.E.2d 51 (1999). I represented the creditor, First-Citizens Bank & Trust Company (for whom the law firm served as general counsel), in a collection suit instituted in Mecklenburg County Superior Court against the maker and guarantors of a promissory note to plaintiff's predecessor, Mutual Savings & Loan Association. Issues arose concerning interpretation of the contract of guaranty and language written on the face of the note, on which there was due and owing in excess of \$500,000.00, and attorneys' fees. The trial court adopted the creditor's interpretation, and affirmed adherence to the written language of the contract, over vigorous attempt in opposition to promote a result subjecting the debtors to far less liability. The case has served to clarify under North Carolina law that where the promissory note limits the maximum liability of each guarantor to a sum certain, that amount includes the guarantors' liability for attorney's fees incurred by the holder in the action on the note. Defendants appealed to the North Carolina Court of Appeals, which affirmed after hearing. Petition for discretionary review to

the North Carolina Supreme Court later was denied, as reported at 350 N.C. 829, 539 S.E.2d 284 (1999). I was lead counsel. Co-counsel was Michael P. Flanagan, Ward and Smith, P.A., 120 West Fire Tower Rd., P.O. Box 8088, Greenville NC 27858 (tel. no. (252) 215-4017). Opposing counsel was James H. Wade of the Mecklenburg County bar. I do not believe that Mr. Wade is engaged now in the practice of law as attempt to locate through the North Carolina Legal Directory has not been successful.

3. Peron Lee Griffin, et al. v. Ford Consumer Finance Co., et al., 812 F.Supp. 614 (W.D. 1993). Mortgagors filed a class action suit in Mecklenburg County Superior Court against lenders alleging violations of the Truth in Lending Act, 15 U.S.C. §§ 1601, *et seq.*, certain Federal Reserve Board regulations, and a host of common law and state statutory claims of or relating to an alleged fraud scheme involving other defendants, including several purported mortgage assistance entities, that caused plaintiffs to engage in title exchanges with "loan backers" with which they were connected by the mortgage assistance entities. My client, First-Citizens Bank & Trust Company, was among another group of defendants, composed of several lending institutions, who paid money in exchange for security interests in plaintiffs' homes to the "loan backers," without knowledge of the alleged underlying fraud scheme. The case came before the District Court for the Western District of North Carolina on the docket of the Hon. Robert D. Potter, U.S. District Judge, upon another lending institution's removal of the case, and on plaintiffs' subsequent motion to remand. The court remanded the case to state court upon a considered treatment of 28 U.S.C. § 1441, including the "separate and independent claim" language of § 1441(c), in the context of a suit involving categories of defendants alleged to have contributed to one injury from the face of the complaint. I endorsed the remand of this case back to state court. Ultimately, I achieved a voluntary dismissal by plaintiffs of any claims against the client. I was lead counsel for my client. Co-counsel was Michael P. Flanagan, Ward and Smith, P.A., 120 West Fire Tower Rd., P.O. Box 8088, Greenville, NC 27858 (tel. no. (252) 215-4017). Kenneth L. Schorr and Robert E. Hempson of Legal Services of the Southern Piedmont, 1431 Elizabeth Ave., Charlotte, NC 28204 represented plaintiffs (tel. no. (704)786-4145). Other defendants in the action were represented by Robert B. McNeill, Horack Talley Pharr & Lowndes, 2600 One Wachovia Center, 301 South College St., Charlotte, NC 28202-6038 (tel. no. (704)377-2500) and Hugo A. Pearce, III, Burris, MacMillan, Pearce and Burris, Suite 100, 6857 Fairview Rd., Charlotte NC 28210 (tel. no. (704) 365-2600).
4. First-Citizens Bank & Trust Company v. McLamb, et al., 112 N.C. App. 645, 439 S.E.2d 166 (1993). This case originated in Johnston County Superior Court, before Judge Robert L. Farmer. I defended a motion to dismiss, prosecuted a motion for partial summary judgment, and obtained a money judgment on behalf of First-Citizens Bank & Trust Company, which I subsequently executed upon. I

also defended appeal by the guarantors of the trial court's judgment. The guarantors pressed that there had been a material alteration of the contract, to which they had not agreed, and, therefore, they should be discharged from their obligation under established case law. I note the case because aspects of the law of guarantors, and impact thereon of surety considerations, were not particularly clear under North Carolina law. The court upheld a literal reading of the terms of the guaranty, dispensed with defendants' argument drawing distinctions between contracts of guaranty and ones of surety, and upheld under the Uniform Commercial Code ("U.C.C."), with reference to a provision which had not then received much consideration under North Carolina law, the right of the creditor to enforce the terms of the guaranty agreement under which the defendants had waived any defense of discharge. I was lead counsel. Co-counsel was Michael P. Flanagan, Ward and Smith, P.A., 120 West Fire Tower Rd., P.O. Box 8088, Greenville, NC 27858 (tel. no. (252) 215-4017). Opposing counsel was Joseph N. Callaway, Battle Winslow, Scott & Wiley, 2343 Professional Dr., P.O. Box 7100, Rocky Mount, NC 27804 (tel. no. (252) 937-2200).

5. Wachovia Bank of North Carolina, N.A. v. Doug Eggleston and Car Craft, Inc., Wayne County Superior Court Case No. 91-CVS-181. On behalf of the creditor plaintiff I brought suit against Car Craft, Inc., an eastern North Carolina car dealership, together with its owner, who were engaged in a check-kiting scheme. Checks variously were deposited between the Wachovia account and one maintained in the name of another dealership with a West Virginia bank over a period of time. Between January 2, 1991 and January 6, 1991, six checks made payable to Car Craft, Inc. and drawn on the West Virginia dealership's account totaling in excess of \$2,600,000.00, were dishonored by the Bank of White Sulphur Springs in West Virginia. The uncollectible checks immediately were charged back to the Car Craft, Inc. account with Wachovia, resulting in a negative balance or overdraft of \$2,209,602.42. While aggressive efforts were undertaken to minimize losses by establishing immediate claims to assets, a multi-count suit commenced premised upon U.C.C. violations, violation of the state's Unfair and Deceptive Trade Practices Act and certain common law claims. This concluded upon motion for partial summary judgment, where I argued for that judgment entered August 13, 1991, by Judge James R. Strickland of the Wayne County Superior Court, in the amount of \$1,842,174.00. Upon judgment becoming final, further attempts were undertaken to locate and levy additional property in satisfaction of the judgment. These efforts persisted through additional discovery and included efforts to levy obligations of third parties owed to the judgment debtors. It was also a very sad case on a personal note, in that the bank executive who deemed himself responsible for the account on behalf of our client committed suicide within hours of ascertaining the loss. I acted as co-counsel with Michael P.

Flanagan, Ward and Smith, P.A., 120 West Fire Tower Rd., P.O. Box 8088, Greenville, NC 27858 (tel. no. (252) 215-4017). Opposing counsel was Glenn A. Barfield, 231 E. Walnut St., P.O. Drawer 7, Goldsboro, NC 27533 (tel. no. (252) 735-6420).

6. First-Citizens Bank & Trust Company v. Universal Underwriters Insurance Co., 113 N.C. App. 792, 440 S.E.2d 304 (1994). On behalf of First-Citizens Bank & Trust Co., I successfully appealed the ruling of Superior Court Judge G.K. Butterfield on summary judgment in favor of the defendant insurance carrier to the North Carolina Court of Appeals. The significance of this case was not in the law, as the area of law concerning interpretation of an assignment of the right to payment after loss under an insurance policy already was well-established. Rather, it was remarkable to me that in this circumstance a policy that did not prohibit assignment of payment by its express terms could ever be construed in favor of the assertion by the drafter of the policy that the assignment was invalid under the policy terms (and that the creditor would be permitted to seek relief in this instance only from the defunct auto dealer that entered into the assignment at issue). Appeal to the North Carolina Court of Appeals was immediate, and decision by Judge Sidney S. Eagles on briefs, concurred in by Judges Arnold and Wells, resulted in reversal and remand for entry of an order granting summary judgment on the issue of liability to my client. The case is recognized for that proposition that an assignment of the mere right to payment after loss in no way broadens the scope of coverage of insurable risks. I was sole counsel. Opposing counsel was Stuart L. Stroud, Wallace, Morris & Barwick, 131 S. Queen St., P.O. Box 3169, Kinston, NC 28502 (tel. no. (252) 523-2000).
7. United States of America v. Wanchese Shiplift, Inc., James H. Hudson, and Pauline I. Hudson, U.S. District Court for the Eastern District of North Carolina Case No. 92-27-CIV-2-D. In this case I represented individual guarantors sued by the U.S. on behalf of the Small Business Administration ("S.B.A.") for the remaining balance of a loan made in 1981 to the corporate defendant for the purpose of building and maintaining a shiplift facility on land leased from the North Carolina Seafood Industrial Park, located in the Wanchese Seafood Industrial Park, in the principal amount of \$500,000.00. In excess of that amount was owing, well over the guarantors' liability cap of \$165,000.00. Default judgment was entered against the corporate defendant for the full amount and the government proceeded to attempt to collect on the Hudsons' guaranty. I mounted an aggressive defense that the guaranty was unenforceable largely on grounds that the collateral which secured the obligation had been wasted by the creditor. I met the government's summary judgment motion with one on our clients' behalf raising

these issues. The guarantor contract provided in relevant part that the Hudsons maintained rights against the S.B.A. for any deterioration, waste, or loss caused by the willful act or willful failure to act of the S.B.A.. In a case deemed one of first impression in the circuit, the court found discharge possible if the Hudsons could prove intentional diminution of value of the collateral by the S.B.A. in an attempt to cause them economic injury. There was substantial evidence to show on this point, that the S.B.A. intentionally determined to "lose" the collateral to the North Carolina Seafood Industrial Park by failing to respond to its 1990 demand that it cure default by the corporate debtor under a lease agreement assumed by the S.B.A.. This caused it to lose its lien rights, to the ultimate detriment of the Hudsons, by rendering it unable to consummate a proffered transaction for the sale of these assets. The evidence was met by a showing on the part of the government that there had been no intent in these actions to harm. Our case hinged upon that issue of intent, ordinarily a difficult one to succeed upon in a motion for summary judgment. The court, through decision rendered by the Hon. F.T. Dupree, U.S. District Judge, entered March 1, 1993, denied the government's motion and the one for summary judgment made on behalf of the Hudsons, with explicit finding, however, that evidentiary showing by defendants on the issue raised concerning the S.B.A.'s alleged willful conduct, while "not so one-sided as to warrant the entry of summary judgment in favor of defendants," was sufficient for the question to be submitted to the fact finder. Settlement agreement eventually was reached. I effectively functioned as sole counsel throughout the litigation. Opposing counsel was Norman Acker, Assistant U.S. Attorney, Terry Sanford Federal Building, Suite 800, 310 New Bern Ave., Raleigh, N.C. 27801 (tel. no. (919) 856-4530).

8. Smith, et al. v. Underwood, et al., 113 N.C. App. 35, 437 S.E.2d 512 (1993). I served as co-counsel for the defendant in this complex trust litigation matter. An action was brought against the defendant by numerous trust beneficiaries seeking his removal. The Pitt County Clerk of Court denied the petition. Superior Court Judge D.B. Herring, Jr., also denied the petition, and awarded fees to both parties. I was involved with the cross-appeals which followed to the North Carolina Court of Appeals. The mainly favorable ruling by the lower court was reversed in decision by Judge Johnson of the Court of Appeals, concurred in by Judge Cozort, and dissented from by Judge John. The Court of Appeals found that the trial court had abused its discretion by failing to remove the trustee. I assisted also in appeal to the North Carolina Supreme Court, which subsequently reversed the North Carolina Court of Appeals and reinstated judgment of the Superior Court in favor of the trustee. The court's per curiam decision, adopting the reasoning of the dissent for the Court of Appeals, is reported at 336 N.C. 306, 442 S.E. 2d 322 (1994). In appeal matters, I served as co-counsel with lead counsel A. Charles



Ellis, Ward and Smith, P.A., 120 West Fire Tower Rd., P.O. Box 8088, Greenville, NC 27858 (tel. no. (252) 215-4000). Opposing counsel included John Walter Bryant, Bass, Bryant, and Fanney, 9<sup>th</sup> floor, 16 W. Martin St., P.O. Drawer 909, Raleigh, NC 27602 (tel. no. (919) 832-9661).

9. First-Citizens Bank & Trust Company v. Sherif E. Esmat, Mecklenburg County Superior Court File No. 93-CVS-9398. This was a foreclosure deficiency suit brought under Chapter 45 of the North Carolina General Statutes, providing for recovery of any deficiency upon foreclosure by the secured creditor in certain circumstances. This case arose from the succession by First-Citizens Bank & Trust Company to the interests of Mutual Savings & Loan Association, a savings and loan operation of sizeable scale which had operated in and around Charlotte, North Carolina, and was purchased by the client in the early 1990's. As a part of my work activities, I handled numerous deficiency actions arising out of Mutual's loan operations, including this case, significant in part because it was one of the few to have gone to trial. There was no dispute as to the underlying obligation; rather, dispute centered upon the reasonableness of the creditor's bid for the collateral in the amount of \$122,500.00 where there was a total indebtedness due and owing in the amount of \$209,824.41, leaving a deficiency upon application of the foreclosure proceeds in excess of \$90,000.00. The case was significant also because of practical difficulties, where the defendant resided out-of-the-country for significant periods, access to documentation was cumbersome, and efficient administration of the case hindered somewhat by a change in counsel, a failed mediation attempt, and procedural delays. While these are difficult cases legally to prevail upon, when contested on the basis of the reasonableness of bid pursuant to N.C.Gen.Stat. § 45-21.36, I determined in consultation with the client that, all things considered, it was an important one to try. The case proceeded to trial over a two day period, before Superior Court Judge Marvin K. Gray, and concluded successfully with sizeable judgment entered October 9, 1996, in favor of the bank together with award of attorneys' fees. I acted as sole counsel in the case. Opposing counsel was Michael F. Schultze, Cranford, Schultze and Tomchin, P.A., 2813 Coltsgate Rd., Suite 200, Charlotte, NC 28211 (tel. no. (704) 442-1010).
10. Ernest C. Richardson, III, Trustee in Bankruptcy for Martin Schwarz v. TIAA/CREF, 123 B.R. 540 (E.D.N.C. 1991). I assisted in appeal of an unfavorable ruling in the U.S. Bankruptcy Court for the Eastern District of North Carolina on behalf of the client, TIAA-CREF, through preparation of the appellate brief and oversight of the appeal process. This case was among my first work assignments in private practice in North Carolina. In the brief submitted to the

court, in the matter pending before the Hon. W. Earl Britt, U.S. District Judge, I argued on behalf of the client that the bankruptcy court erroneously concluded that the debtor-professor's interest in supplemental retirement annuities established by his employer should not be excepted from property of his estate. The district court declined to endorse our position on appeal predicated upon differing analysis as to restrictions under the Bankruptcy Code, 11 U.S.C. § 541, and the Internal Revenue Code, 26 U.S.C. § 403, together with state statute governing exemption of rights accrued to participants under the North Carolina retirement system for teachers and state employees, and considerations of public policy. In significant part, the court rested its decision upon a public policy determination, that the debtor's ability to surrender the annuities for cash value before payments began meant that, as a matter of public policy, the annuities could not be excepted from property of the estate though the contract establishing the annuities contained antialienation and assignment provisions enforceable under both federal tax law and state law. Co-counsel was Michael P. Flanagan, Ward and Smith, P.A., 120 West Fire Tower Rd., P.O. Box 8088, Greenville, NC 27858 (tel. no. (252) 215-4017). Opposing counsel was Ernest C. Richardson, III, 503 Pollock St., New Bern, NC 28563. Tel. no. (252) 633-2470.

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

No, I have not.

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

The only civil or administrative proceeding implicated by this question in which I was named a party is the case Seymour Smith v. T.G. Shane, Billy Vandiford, Sandra Gaskins, and Louise Flanagan, Case No. 4:96-CV-68, filed May 13, 1996 in the U.S. District Court for the Eastern District of North Carolina. The case was a wrongful attempted transfer by Seymour Smith of a collections suit I instituted in 1994 against Smith, a Pitt County, NC resident, in Pitt County Superior Court, Case No. 94-CVS-481, on behalf of a creditor

client. It was dismissed and dismissal later affirmed by the U.S. Court of Appeals for the Fourth Circuit.

I had obtained a money judgment on behalf of a bank, and when it became final under state law, certain personal and real property owned by Smith became subject to seizure and sale in satisfaction of the judgment, pursuant to the North Carolina General Statutes governing enforcement of judgments. In post-judgment proceedings, I levied against assets owned by judgment debtor Smith. Execution papers were issued in the regular course through the office of the Pitt County Clerk of Court (Sandra Gaskins), and served through the office of the Pitt County Sheriff (Billy Vandiford), by the assigned deputy (T.G. Shane). At some point, Smith attempted to "remove" the state action. In the attempted removal process, he inserted my name, that of the sheriff, his deputy, and the clerk of court into the case caption as the defendants and inserted himself now as the plaintiff to the action. The district court remanded the matter back to state court in order entered July 10, 1996. On July 30, 1996, notice of appeal by Smith was filed. In a per curiam decision rendered March 10, 1997, in Case No. 96-2091, the Fourth Circuit affirmed the lower court's decision. The state judgment enforcement proceedings in the underlying state action, Case No. 94-CVS-481, were successfully concluded against Smith on behalf of the judgment creditor.

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

I shall recuse myself immediately from any case in which a conflict of interest exists. Review of the parties and counsel on a case-by-case basis, with deference to 28 U.S.C. § 455, should serve to promote the necessity of avoiding the appearance of any conflict in judicial matters coming before me. I also shall keep myself informed about my financial interests and those of my husband and our children. The only arrangement that I believe likely to present conflict is my marriage to a local attorney. In accordance with the foregoing, I shall not participate in any matter brought before the courts by the law firm of Ward and Smith, P.A., with whom my husband is associated, and I would expect the clerk of court automatically to accomplish transfer of any such case from my docket.

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

No, I do not.

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

See attached Financial Disclosure Report.

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

The statement and several schedules are attached.

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

No, not that I am aware of.

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

N/A

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

I was contacted directly by a member of the Office of Counsel to the President who inquired whether I would be willing to be considered for a district judgeship. I responded affirmatively. I traveled to the White House in November 2002, at which time I met with two members of the Office of Counsel together with a member of the Office of Legal Policy. In December 2002, I was interviewed by a member of the Office of Legal Policy. Also in December, I was interviewed by an FBI field agent. I was nominated by the President on January 29, 2003.

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

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No, there has been no inquiry of me by anyone along lines described in this question.

Senator GRAHAM. Judge Suko.

**STATEMENT OF LONNY R. SUKO, NOMINEE TO BE DISTRICT  
JUDGE FOR THE EASTERN DISTRICT OF WASHINGTON**

Judge SUKO. Mr. Chairman, I do not have an opening statement. But I would also like to join in thanking the President, the Office of the White House, Senators Murray and Cantwell of the State of Washington, and the two Congressmen who stood up earlier to speak on my behalf. Without the joint efforts and the bipartisanship that was shown, I wouldn't have gotten this far, and I am very grateful to be here.<sup>5</sup>

[The biographical information of Judge Suko follows:]

## I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)  
Lonny Ray Suko. No other names used.
2. Address: List current place of residence and office address(es).  
  
Residence: Yakima, WA  
Office: 25 S. Third Street, Yakima, WA, 98901.
3. Date and place of birth.  
10-12-43 at Spokane, WA.
4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).  
  
Married to Marcia Anne Suko whose maiden name is Marcia Anne Michaelson. My wife is self-employed part-time as a Guardian Ad Litem and home study investigator in divorce cases where child custody and visitation issues are being litigated in state court.
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.  
  
College of Law at the University of Idaho, Moscow, Idaho; 9/65 through 6/68; Juris Doctor received 6/68.  
  
Washington State University, Pullman, Washington, 9/61 through 6/65; Bachelor of Arts (With Distinction), received 6/65.
6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were

connected as an officer, director, partner, proprietor, or employee since graduation from college.

U. S. Courts for the Eastern District of Washington, 25 S. Third Street, Yakima, WA, 98901, full-time U.S. Magistrate Judge, 8/1/95-present.

Lyon Law Offices, 222 North Third Street, Yakima, WA, 98901, associate/partner/shareholder, 9/69-7/95.

U.S. Courts for the Eastern District of Washington at Yakima, 25 S. Third Street, Yakima WA, 98901, part-time U.S. Magistrate Judge, 2/71-9/91.

U.S. Courts for the Eastern District of Washington at Spokane, 920 W. Riverside, Spokane, WA, 99210, law clerk to Federal District Judge, 9/68-8/69.

Washington State Department of Labor and Industries, Office of the Attorney General, General Administration Building, 7273 Linderson Way SW, Olympia, WA, 98504, summer intern, 6/67-8/67.

Whitman Mission National Historic Site, 328 Whitman Mission Road, Walla Walla, WA, 99362, park ranger, 6/66-9/66.

Washington State Association of County Commissioners, 206 Tenth Avenue S.E., Olympia, WA, 98501, summer intern, 6/65-9/65.

Washington Education Foundation (non-profit organization dedicated to scholarships for underprivileged children), trustee, approx. 9/01-present. (non-compensated)

Washington State University Foundation (non-profit corporation which raises funds for educational purposes at Washington State University), approx. 9/96 through 9/01. (non-compensated)

First Presbyterian Church Foundation (non-profit), co-trustee, approx. 9/01-present. (non-compensated)

Mabel Swan Manor (non-profit), member of board of directors, approx. 1974-1976.



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

N/A. Have not served in U.S. Military.

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

Honor Society Memberships: Phi Beta Kappa; Phi Kappa Phi; Phi Eta Sigma (freshman academics); Pi Sigma Alpha (Political Science); and Phi Alpha Delta (law).

Scholarships: Metta Cordes scholarship to assist freshman year of attendance at Washington State University; Alumni Educational Opportunity Awards received from Washington State University for each of undergraduate years thereafter through June 1965.

Law School Honors: Moot Court winner picked as finalist who argued before Idaho Supreme Court; Am Jur award for having highest grades in trusts; elected as member of Honor Court (student group assigned to decide any violations of law school honor code).

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

National Council of U.S. Magistrate Judges (also known as Federal Magistrate Judges Association) 1995-present.

Magistrate Judges Executive Board, 9<sup>th</sup> Circuit Court of Appeals; 2000-present.

Washington State Bar Association, 1968-present.

Yakima County Bar Association, served as secretary 1970-1971 as well as on Law Library Board of Trustees from approximately 1986 until 1994.

Federal Bar Association, Eastern District of Washington;  
1970's-present.

Washington Council of School Attorneys, (approximately 1974-  
1994) elected member of Board of Directors for 3 year term  
in approximately mid 1980's; presenter at selected school  
law seminars in 1970's and 1980's.

American Bar Association; 1968-present.

John Gavin Inns of Court, founding board member in 1991.

\*Washington State Trial Lawyer's Association.

\*Association of Trial Lawyers of America.

(\*Membership discontinued approximately mid 1995.)

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

None of the organizations to which I belong have as their  
primary purpose the lobbying of public bodies. However, I  
believe Washington State University has a lobbyist at the  
state level who presumably has occasion from time to time to  
represent the interests of those university affiliated  
groups hereafter listed. The organizations to which I  
belong are as follows:

Washington Education Foundation (non-profit) board member,  
2001-present;

Washington State University Foundation (non-profit  
organization which raises scholarships for underprivileged),  
board member, 1996-2002;

Washington State University Alumni Association (non-profit),  
life member;

Advisory Board to College of Liberal Arts at Washington  
State University, 2001-present;

Yakima First Presbyterian Church (1972 - ); member of Board of Session (governing body), approx. 1973-1976;

Yakima First Presbyterian Church Foundation, trustee, 2001-present;

Yakima Country Club (social membership only);

Yakima Kiwanis;

Yakima YMCA.

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

Washington State Bar Association, admitted 10/22/68;  
U.S. District Court, Eastern District of Washington, admitted 9/26/69;  
U.S. District Court, Western District of Washington, admitted 8/25/78;  
U.S. Court of Appeals, 9<sup>th</sup> Circuit, admitted 10/13/78;

No lapses of membership.

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

I have not published any titles, books, articles, reports, or other material for general sale or distribution to the public. However, an article prepared by me which summarizes the conclusions of a presentation made to the Chief District Judges of the 9<sup>th</sup> Circuit Court of Appeals in August 2001, is available as part of the Magistrate Judges' Executive

Board Conference Newsletter for Winter, 2001, and can be accessed at the 9<sup>th</sup> Circuit Internet site. Four (4) copies of the article are enclosed.

I have also prepared seminar publications for limited use by participants on approximately 8-10 occasions over the years. Insofar as known, those materials are no longer in existence and cannot be retrieved. The title to two of the seminar presentations include: School Personnel Management law, Part IV: The Superintendent as an Employee, including the Superintendent's Contract, Benefits, Evaluation, Nonrenewal, and Separation Agreements - Washington State School Law Seminar held at University of Washington School of Law in July, 1987, and Fourteenth Amendment Due Process Rights - School Law Academy held at Yakima, Washington, in April, 1992.

I have not delivered any speeches in written or videotaped format and am unaware of any available press reports covering presentations which I may have made at seminars or elsewhere.

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

My last physical examination was September 18, 2002, supplemented by an eye exam and hearing exam on March 12, 2003. I am in excellent health.

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

U.S. Magistrate Judge for the Eastern District of Washington, full-time, 8/1/95 - current, appointed; authorized to exercise all duties permitted to be performed by U.S. Magistrate Judges.

U.S. Magistrate Judge for the Eastern District of Washington, part-time, 2/71 - 9/91, appointed; authorized to perform all duties permitted to be performed by U.S. Magistrate Judges.

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

(1) Citations for the ten most significant opinions you have written:

*Snelling v. Riveland*, 983 F. Supp. 930 (E.D.Wash, Sept. 10, 1997), *aff'd* 165 F.3d 917 (9<sup>th</sup> Cir. 1998). Inmate sued prison officials for rejection of letters and magazines under prison regulation rejecting sexually explicit materials mailed to inmates, and claimed First Amendment violations. Prison defendants brought motion for summary judgment. This court held that there was rational connection between prohibition and legitimate penological concerns of safety and rehabilitation and regulation was permissible. Motion for summary judgment granted, inmate's First Amendment claim dismissed with prejudice.

*Graves v. Burlington Northern R.R.*, 971 F. Supp. 1360 (E.D.Wash., July 8, 1997). Railroad employee who was injured as result of collision with uninsured motorist brought Federal Employers' Liability Act (FELA) action against railroad, alleging that railroad caused his damages by negligently failing to obtain uninsured and underinsured motorist insurance coverage for its company vehicles. Railroad moved for summary judgment. I concluded that railroad had no duty to provide uninsured or underinsured motorist insurance, and absent such duty, there was no negligence, and railroad was not liable under FELA.

*Allen v. Wood*, 970 F. Supp. 824 (E.D.Wash, June 9, 1997). Inmate brought civil rights action against prison officials, alleging that their rejection of some of his mail violated his constitutional rights. On officials' motion for summary judgment, I found that: (1) rejection of sexually explicit materials did not violate inmate's First Amendment rights;

(2) rejection of such materials was not cruel and unusual punishment in violation of the Eighth Amendment; (3) rejection did not violate due process; and (4) rejection did not violate equal protection.

*Molesky v. Walter*, 931 F. Supp. 1506 (E.D.Wash., June 7, 1996), *aff'd* 129 F.3d 126 (9<sup>th</sup> Cir. 1997). Inmate brought §§ 1983 action against prison officials alleging he was compelled to undergo a psychological evaluation in violation of his constitutional rights. Prison officials moved for summary judgment. My rulings: (1) undergoing psychological examination did not involve a restraint which exceeded inmate's sentence in such an unexpected fashion as to give rise to due process violations; (2) because evaluation was not an atypical or significant hardship, it could not amount to cruel or unusual punishment; (3) assuming inmate had constitutional right to privacy, prison officials justifiably curtailed exercise of inmate's rights by requiring him to undergo mental health evaluation which promoted legitimate penological objectives; (4) requiring inmate to undergo psychological evaluation did not violate his equal protection rights; (5) compelling inmate to submit to mental health evaluation did not violate his right against self-incrimination; and (6) inmate was not entitled to assistance of counsel during evaluation.

*Schenck v. Edwards*, 921 F. Supp. 679 (E.D.Wash., Feb. 1, 1996), *aff'd* 133 F.3d 929 (9<sup>th</sup> Cir.). Inmate brought §§ 1983 civil rights suit against state penitentiary officials in connection with discipline imposed for possession of another prisoner's draft legal pleadings and alleged that search of cell was illegal. Defendants moved for summary judgment and to strike. Holding: (1) disciplining inmate for mailing draft legal pleadings to another inmate did not violate the First Amendment; (2) suspended sentence imposed by prison disciplinary board did not result in loss of protected liberty interest required for due process violation; and (3) search of cell and inspecting legal documents outside inmate's presence was constitutional and could not be basis of civil rights claim. Summary judgment granted.

*Michaels v. U.S.*, 2001 WL 758633 (E.D.Wash., May 10, 2001). In an action for wrongful levy, pursuant to 26 U.S.C. §§ 7426(a)(1), I found that plaintiff could claim no interest

in the real property at issue as the attempted transfers of interests were void.

*Crofton v. Roe*, No. CY-95-3142-LRS (E.D.Wash. Dec. 17, 1996), *aff'd* 170 F.3d 957 (9<sup>th</sup> Cir. 1999). State prisoner brought action challenging prison regulation that prohibited receipt by a prisoner of any book, magazine, or other publication, unless prisoner ordered publication from publisher and paid for it out of prisoner's own prison account. The decision of the court enjoined enforcement of regulation, but denied prisoner's claim for damages and held that defendant prison officials would be entitled to qualified immunity. State appealed, and prisoner cross-appealed. The Court of Appeals, Schroeder, Circuit Judge, affirmed the district court and held that: (1) blanket prohibition on gift publications violated First Amendment; (2) temporary delay in delivery of publications did not violate First Amendment; (3) prisoner was not entitled to continuance; and (4) prisoner failed to make showing of contempt.

*Roeber v. Dowty Aerospace Yakima*, No. CY 99-3032-LRS (E.D.Wash. Sept. 15, 2000), *aff'd* 21 Fed.Appx. 649 (9<sup>th</sup> Cir. 2001). [opinion attached] Employee brought action against former employer alleging violations of the Americans with Disabilities Act (ADA) and the Washington Law Against Discrimination. Summary judgment was granted in favor of employer, and employee appealed. The Court of Appeals affirmed the district court and held that employee was not "disabled" within meaning of the ADA or the Washington Law Against Discrimination.

*Cootes v. United States*, No. CY-00-3040-LRS (E.D.Wash. June 21, 2001). [opinion attached] Enrolled member of the Confederated Tribes and Bands of the Yakama Nation, argued that Defendants (Army Corp of Engineers) did not have authority, under 36 C.F.R. § 327, to prohibit or restrict Plaintiff's right to fish and erect a camp at Cottonwood Cove because of established treaty fishing right. Relying on the canons of judicial restraint, this court denied Plaintiff's Motion for Summary Judgment, recognizing that genuine issues of material fact remained.

*Florum v. Barnhart*, No. CY-01-3026-LRS (E.D.Wash. Apr. 15, 2002). [opinion attached] Claimant appealed Commissioner of Social Security's decision denying her benefits because she had the residual functional capacity to return to her previous work as a cashier. Decision of the Administrative Law Judge ("ALJ") upheld, finding that the decision was based upon proper legal standards and supported by substantial evidence in the record. Plaintiff was found properly capable of performing her past relevant work and therefore the ALJ was not required to call a vocational expert.

(2) A short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings:

*Holm v. Washington State Penitentiary*, CY-97-3064-LRS (E.D.Wash. March 8, 1999), *affirmed and partially vacated at* 19 Fed.Appx. 704 (9<sup>th</sup> Cir. 2001) (unpublished decision). Former employee of state penitentiary sued the penitentiary under the Americans With Disabilities Act (ADA). Summary judgment granted to the penitentiary. Employee appealed. The Court of Appeals affirmed holding that (1) damages claims were barred by the Eleventh Amendment, and (2) injunctive relief could be sought only against individual defendants. However, the Court vacated that part of the district court's judgment dismissing with prejudice plaintiff's hostile work environment claims, because these claims were not before the court.

*Sorenson v. Comm'r of Social Security Admin.*, No. CY-98-3054 (E.D.Wash. May 12, 1999), *dismissed at* 4 Fed.Appx 335 (9<sup>th</sup> Cir. 2001) (unpublished decision). Claimant sought review of decision of Commissioner of Social Security denying application for supplemental security income (SSI) benefits. This court granted summary judgment, affirming Commissioner's decision. Claimant appealed. The Court of Appeals dismissed the case because the parties had filed written consent to the magistrate judge's jurisdiction only after the entry of judgment. The Court in effect concluded that the trial court had no jurisdiction at the time the original judgment was entered and that this defect could not be remedied by the later acts of both parties.



*Lawson v. Panasuk*, No. CY-96-3159-LRS (E.D.Wash. July 18, 2000), *vacated at* 19 F.3d 1332 (9<sup>th</sup> Cir. 1999) (unpublished decision). Thelbert Lawson, a Washington state prisoner, sued prison officials pursuant to 42 U.S.C. §§ 1983 alleging that prison officials were deliberately indifferent to his serious medical needs when they denied him an eye examination and prescription. Summary Judgment granted for the prison officials. On appeal, the Ninth Circuit Court of Appeals vacated and remanded the case to the district court because the prisoner had been given inadequate *Rand* notice. See *Rand v. Rowland*, 154 F.3d 952, 962 app. "A" (9th Cir.1998) (en banc); *Klinge v. Eikenberry*, 849 F.2d 409, 411 (9th Cir. 1988).

(3) Citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions:

While some of the foregoing citations involved issues touching on federal constitutional matters, none of them were precedent setting nor did they change the substantive law applicable to the facts at issue.

Unreported Opinions: (copies provided herewith)

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

None.

17. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:
1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

I served as law clerk to the Hon. Charles L. Powell, Chief Judge, U.S. District Court for the Eastern District of Washington, at Spokane, WA, during the period September, 1968 through August, 1969;

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

I have never practiced alone.

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

9/68-7/95 -- practiced with Lyon Law Firm (P.O. Box 1689, Yakima, WA, 98907-1689) located at 222 N. 3<sup>rd</sup> St., Yakima, WA, 98901, first as an associate and then later as a partner (1972) and senior shareholder (beginning in approximately 1991). Beginning in approximately 2/71, I was appointed part-time U.S. Magistrate Judge and held that position while practicing full-time with the firm until September of 1991 when the position was discontinued.

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

From 1969 until 1995 (spent as a practicing attorney in the Lyon Law Firm at Yakima, WA), my practice evolved from the typical duties assigned an associate (personal injury, partnership, corporations, commercial transactions, guardianship, real estate, divorce, minor criminal defense and general litigation law) to a concentration in the areas of civil litigation (both plaintiff and defense personal injury, wrongful death, property damage, breach of contract, and related claims), school, public employment, and agricultural law. Most of the changes referenced by this paragraph had occurred by the mid 1980's.

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

My practice included the broad representation of individuals in tort and contract matters and gradually evolved until approximately 40 percent of my time was spent with the problems of education predominantly in grades K-12 (public contracting, collective bargaining, labor relations, employee discipline, defense of tort claims and related issues). The remainder of my practice continued to focus upon general litigation as well as ongoing legal advice in all aspects of the law. Additionally, near the end of my time as a private practitioner, I was increasingly called upon to serve as a mediator and Special Master. I also had occasion to appear before the U.S. Department of Agriculture in litigation which challenged the Far West Spearmint Marketing Order.

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

I was in court 1-2 times a month on civil matters in the capacity of private counsel. While there were times when the frequency varied, no particular patterns were noted other than those created by the type of legal work being performed. These appearances were, of course, in addition to the numerous appearances which I made in court every week as a part-time U.S. Magistrate Judge through the time period ending in September 1991.

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

(a) 15%  
 (b) 70%  
 (c) 15%

3. What percentage of your litigation was:  
 (a) civil; 100%  
 (b) criminal.

(a) Virtually all of the appearances referenced above were in civil proceedings since my duties as a part-time Magistrate Judge through 1991 precluded my representation of defendants involved in criminal cases in state or federal court.

(b) As noted above, I was in court portions of several days per week on criminal cases as a part-time Magistrate Judge while I was in private practice during the period 1971-1991.

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

Having been on the Bench full-time for the last eight (8) years, I have assumed that the answer to this question should be limited to cases tried by me as a lawyer rather than a judge. Accordingly, while I have no way of confirming the accuracy of my answer, I estimate that I probably tried to verdict or judgment in courts of record (as a practicing lawyer) approximately 30-40 cases. In actuality, we were preparing for trial most of the time with the end result that the cases usually settled. Because of my general role within the firm, the vast majority of these would have been spent as chief counsel and in most instances, sole counsel, although I did have others assist from time to time. In addition, I tried many cases which were heard before private arbitrators (not included in numbers shown above).

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

I estimate that approximately 20-25% of these trials would have been decided by a jury. This estimate relates solely to the time spent in private practice and predates my going on the Bench as a full-time U.S. Magistrate Judge approximately eight (8) years ago.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date

if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Because I have been sitting on the Bench for almost eight (8) years as a full-time Magistrate Judge, I do not have access to the files and case decisions which were concluded at the trial court level without further appeal (most of my practice). Additionally, my former firm ordinarily destroys litigation files which are more than five or six years old unless required to be maintained for other purposes. Of necessity, all of the litigated matters reported in response to this question come solely from those cases which resulted in published or unpublished opinions at the Washington Supreme or Appellate Court levels.

#1 (Medical Negligence):

Vasquez v. Markin, et al., 46 Wn. App. 480, 731 P.2d 510 (1986);

(a) date of representation: 1982-1986;

(b) the name of the court and the name of the judge or judges before whom the case was litigated: Yakima County Superior Court, Washington Court of Appeals, Division III; judge: Hon. Walter A. Stauffacher, retired;

(c) principal counsel for plaintiff/appellant: Lonny R. Suko and co-counsel Warren L. Dewar (137 Buchanan St., San Francisco, CA, 94102; phone 415-626-3412) assisted by James E. Baker (Miracle, Pruzan, Pruzan & Baker, 1000 Second Avenue, Suite 1550, Seattle, WA, 98104; phone 206-624-8830); principal counsel for defendants/respondents: Dan W. Keefe (Keefe, King & Bowman, P.S., 601 W. Main Ave., Suite 1102,

Spokane, WA, 99201; phone 509-624-8988) and David A. Thorner, (Thorner, Kennedy & Gano, P.S., 101 S. 12<sup>th</sup> Avenue, Yakima, WA, 98902; phone 509-575-1400).

. . .capsule summary of the substance of the case. . .

Forty-three (43) year old plaintiff with below normal hematocrit/hemoglobin taken into non-emergency surgery for dilation and curettement. Breathing slowed and stopped during anesthesia leaving victim blind, strapped to a wheel chair and permanently disabled. Case partially settled against hospital and anesthesiologist but thereafter taken to trial against victim's attending physician who was scheduled to perform surgery. Jury verdict rendered for defendant. Case appealed. Issues involved informed consent, liability, damages, criteria for directed verdict, and other contentions related to admissibility of evidence; trial court verdict affirmed.

. . .the party or parties whom you represented. . .

Vasquez (plaintiff/appellant);

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

Primary counsel with responsibility for initiation of litigation and responsible, with co-counsel, for trial preparation, discovery, presentation of evidence and final argument through trial court level as well as assistance on appeal.

#2. (Uninsured Motorist Insurance Coverage):

Perala v. First National Insurance Co. of America, 32 Wn. App. 527, 648 P.2d 472 (1982);

(a) date of representation: 1981-1983;

(b) the name of the court and the name of the judge or judges before whom the case was litigated: Yakima County Superior Court; judge: Hon. Carl Loy, retired;

(c) principal counsel for plaintiff/ appellant: Lonny R. Suko, assisted by James E. Baker (Miracle, Pruzan, Pruzan &

Baker, 1000 Second Avenue, Suite 1550, Seattle, WA, 98104; phone 206-624-8830); principal counsel for defendant: Walter G. Meyer (Meyer, Fluegge & Tenney, P.S., 230 S. 2<sup>nd</sup> St., Yakima, WA, 98902; phone 509-575-8500);

. . .capsule summary of the substance of the case. . .

Insurance carrier denied uninsured motorist coverage to owner of vehicle who was injured while riding as a passenger in his own vehicle. Carrier filed declaratory judgment action claiming that exclusionary language of insurance contract excluded coverage. Trial court ruled that public policy behind uninsured motorist coverage had priority over language of contract and found that coverage was provided. Ruling affirmed on appeal;

. . .the party or parties whom you represented. . .

Paki Perala (plaintiff/appellant);

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

Argument, preparation, briefing (shared) at trial court and appellate level and ultimate pursuit of case to successful six figure arbitration award following trial before panel of arbitrators. Results of case expanded underinsured motorist law in state of Washington.

#3 (Creditor's Rights):

Central Washington Production Credit Association v. Baker,  
11 Wn. App. 17, 521 P.2d 226 (1974);

(a) date of representation: 1973-1974;

(b) the name of the court and the name of the judge or judges before whom the case was litigated: Yakima County Superior Court; judge: Hon. Blaine Hopp, Jr., retired;

(c) principal counsel for respondent: Lonny R. Suko;  
principal counsel for appellant: Dwight Halstead (deceased);

. . .capsule summary of the substance of the case. . .

Debtor sold cattle on which security interest had been granted in favor of bank lender. Language required written consent before cattle could be sold and disposition of collateral was not authorized. Debtor relied on alleged past practice claiming that lender had knowingly permitted cattle to be sold without application of proceeds and urged the court to find that waiver had occurred. Issues involved meaning of language and whether course of waiver could arguably be shown. Court of Appeal vacated summary judgment and remanded case for further hearing on issue of whether waiver had occurred;

. . .the party or parties whom you represented. . .

Central Washington Production Credit Association  
(respondent);

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

Initiation of litigation, briefing and argument at trial court level and on appeal.

#4. (Lien Priorities):

Southwest Production Credit Association v. Seattle First National Bank, 92 Wn.2d 30, 593 P.2d 167 (1979);

(a) date of representation: 1979;

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

(c) principal counsel for plaintiff: James A. Vander Stoep (Vander Stoep, Remund, Kelly & Blinks, 345 N.W. Pacific Ave., Chehalis, WA, 98532; phone 360-748-9281); principal counsel for defendant: Marvin L. Gray, Jr., (Davis, Wright, Tremaine, LLP, 2600 Century Square, 1501 Fourth Avenue, Seattle, WA, 98101; phone 206-622-3150);

. . .capsule summary of the substance of the case. . .



Declaratory judgment action brought to assert priority of security interest belonging to crop lender (PCA) over inventory lien held by Seattle First National Bank on processed crop. Evidence showed that PCA had consented to sale of product subject to receipt of funds. Supreme Court ruled that lien in favor of lender who loaned money to grow crop had priority;

. . .the party or parties whom you represented. . .

Federal Intermediate Credit Bank of Spokane (friend of court brief);

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

Friend of court brief (with law firm assistance) and oral argument on appeal.

#5 (Termination of Employment):

McCorkle v. Sunnyside School District, 69 Wn. App. 384, 848 P.2d 1308 (1993);

(a) date of representation: 1992-1993;

(b) the name of the court and the name of the judge or judges before whom the case was litigated: Yakima County Superior Court, Washington Court of Appeals, Division III; judge: Hon. Stephen M. Brown;

(c) principal counsel for appellant: Jacob Rufus (address and phone number unknown); principal counsel for respondent: Lonny R. Suko, assisted by Kevin D. Kilpatrick (710 2<sup>nd</sup> Ave., Suite 1414, Seattle, WA, 98104; phone 206-684-7757);

. . .capsule summary of the substance of the case. . .

McCorkle had been discharged from his teaching position following an administrative hearing in which the school district had prevailed. McCorkle claimed that earlier similar acts of misconduct which had never resulted in discipline were res judicata and not admissible in pending discharge proceedings. Court of Appeals held in favor of

district, thereby confirming earlier ruling of administrative hearing officer and superior court judge who had heard the appeal at the trial court level;

. . .the party or parties whom you represented. . .

Sunnyside School District (respondent);

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

Preparation for, and presentation of all evidence and argument before administrative hearing officer, handling of argument at trial and appellate court levels (briefing duties shared).

#6 (Employee Rights):

Derrey v. Toppenish School District, 69 Wn. App. 610, 849 P.2d 699 (1993);

(a) date of representation: 1992-1993;

(b) the name of the court and the name of the judge or judges before whom the case was litigated: Yakima County Superior Court, Washington Court of Appeals, Division III; judge: Hon. Heather Van Nuys;

(c) principal counsel for plaintiff: Donald D. Bundy (28313 Redondo Way S. Apt. 201, Des Moines, WA, 98198; phone 206-910-5593) and Dale E. Becker (103 N. 3<sup>rd</sup> St., Suite A, Yakima, WA, 98901; phone 509-574-1160; principal counsel for defendant: Lonny R. Suko and assisted by J. C. Ditzler (1201 3<sup>rd</sup> Ave., Suite 5200, Seattle, WA, 98101; phone 206-340-1000);

. . .capsule summary of the substance of the case. . .

Retired school employee appealed reduction in retirement benefits incurred after the Department of Retirement Systems audited school records and reduced his monthly check by \$100. Because Derrey did not appeal the District's refusal to reimburse for the reduced benefit, an action was brought in Superior Court against the District, but more than 30

days after Derrey had been informed of the District's decision. Issues on appeal dealt principally with statutory interpretation. Result: former employee's claim based on contract thrown out for lack of timeliness but tort claim, if any, was preserved. Court of Appeals vacated trial court judgment and remanded for further hearing;

. . .the party or parties whom you represented. . .

Toppenish School District (respondent);

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

Preparation and argument at trial and appellate levels (briefing duties shared with J. C. Ditzler).

#7 (Statutory Construction):

Public School Employees of Sunnyside - Teaching Assistants v. Sunnyside School District, 69 Wn. App. 630, 849 P.2d 1287 (1993);

(a) date of representation: 1992-1993;

(b) the name of the court and the name of the judge or judges before whom the case was litigated: Yakima County Superior Court and Washington Court of Appeals, Division III; judge: Hon. Michael W. Leavitt;

(c) principal counsel for plaintiff: Eric T. Nordlof (Public School Employees, P.O. Box 798, Auburn, WA, 98071; phone 253-833-1223); principal counsel for defendant: Lonny R. Suko and assisted by Kevin D. Kilpatrick (710 2<sup>nd</sup> Ave., Suite 1414, Seattle, WA, 98104; phone 206-684-7757);

. . .capsule summary of the substance of the case. . .

Washington State law states that school districts shall provide liability and property insurance protection for employees, "while engaged in the maintenance of order and discipline and the protection of school personnel and students. . ." Employee union claimed that language included insurance coverage for automobiles belonging to

employees parked on school lots when damaged by vandalism during school hours. Issues involved statutory construction. Trial and appellate court ruled in favor of school district noting that insurance need only be provided under the very limited circumstances set forth in the statute and not at all times while employees were on duty;

. . .the party or parties whom you represented. . .

Sunnyside School District;

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

Preparation and argument at trial court and appellate levels (assisted on brief by Kevin D. Kilpatrick).

#8 (Wrongful Death):

Rogers v. Granger School District No. 204, 80 Wash. App. 1077 (Wash. App. Div. 3 1996); 1996 WL 123154 (Wash. App. Div. 3, Mar. 19, 1996), *petition for review denied* 925 P.2d 988 91996); Yakima County Superior Court Cause No. 92-2-00484-4;

(a) date of representation: 1991-1993;

(b) the name of the court and the name of the judge or judges before whom the case was litigated: Yakima County Superior Court and Washington Court of Appeals, Division III; judge: Hon. Michael W. Leavitt;

(c) principal counsel for defendant: Lonny R. Suko and co-counsel Robert M. Boggs (Lyon Law Offices, P.O. Box 1689, Yakima, WA, 98907; phone 509-248-7220); principal counsel for plaintiff: Edward A. Dawson (1300 W. Dean Ave., Spokane, WA, 99201; phone 509-328-4266);

. . .capsule summary of the substance of the case. . .

High school student killed from knife wound inflicted by young man coming onto premises, assisted by his father, near end of normal school day. Personal representative claimed District had failed to have adequate protection in place.

Despite extensive witness testimony and affidavits, District prevailed in its summary judgment motion at the trial court level. Affirmed on appeal;

. . .the party or parties whom you represented. . .

Granger School District No. 204;

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

Preparation and oral argument at trial court level, assisted on briefs and affidavits by Robert M. Boggs (appeal handled entirely by Boggs following my appointment as U.S. Magistrate Judge in mid 1995).

#9 (Contract Rights):

Naches Valley School District No. JT3 v. Cruzen, et al., 54 Wn. App. 388, 775 P.2d 960 (1989);

(a) date of representation: 1988-1989;

(b) the name of the court and the name of the judge or judges before whom the case was litigated: Yakima County Superior Court, Washington Court of Appeals, Division III; judge: Hon. Cameron Hopkins, deceased;

(c) principal counsel for plaintiff/appellant: Lonny R. Suko; principal counsel for defendants/respondents: Blaine G. Gibson (Talbot, Simpson, Gibson & Davis, P.S., 308 N. 2<sup>nd</sup> Street, Yakima, WA, 98901; phone 509-575-7501);

. . .capsule summary of the substance of the case. . .

Retired teacher claimed right to be paid for accumulated sick leave accruing prior to retirement under collective bargaining agreement no longer in effect. School district argued that right had been given up in negotiations leading to approval of later collective bargaining agreement governing rights of parties at time of retirement. Issues included vested rights, admissibility of evidence, bargaining history, and whether grievance required

arbitration. Trial court judgment largely favored teachers and was affirmed on appeal;

. . .the party or parties whom you represented. . .

Naches Valley School District No. JT3;

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

Presentation, briefing and argument at trial court and court of appeals.

#10 (Powers of School District):

Corcoran v. Lyle School District No. 406, 20 Wn. App. 621, 551 P.2d 185 (1978);

(a) date of representation: 1977-1978;

(b) the name of the court and the name of the judge or judges before whom the case was litigated: Klickitat County Superior Court; judge: Hon. Ted Kolbaba;

(c) principal counsel for respondent: Lonny R. Suko and co-counsel J. Eric Gustafson (Lyon Law Office, P.O. Box 1689, Yakima, WA, 98907; phone 509-248-7220); principal counsel for appellant: James D. Ladley (1014 Franklin St., Vancouver, WA, 98660; phone 360-735-8133);

. . .capsule summary of the substance of the case. . .

Teacher advised to sign and return contract to school board within specified time period. When contract not received by school district, district withdrew offer of employment. Issue on appeal was whether closely regulated public school employment statute permitted district to add time line for return of written contract. Trial court ruling in favor of school district affirmed on appeal;

. . .the party or parties whom you represented. . .

Lyle School District No. 406;

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

Presentation and argument at trial court level and on appeal (assisted by J. Eric Gustafson).

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

I have had the privilege of being assigned as a Special Master in Federal District Court prior to my appointment as full-time Magistrate Judge in 1995. I also acted as a private mediator in a number of instances and was called upon to settle pending litigation in both state and federal court.

Additionally, I have served as a full-time United States Magistrate Judge for almost eight (8) years. Some of the most significant, satisfying, and valuable legal activities which I have pursued have involved the mediation and settlement of protracted and complex cases pending in the U.S. District Court for the Eastern District of Washington. In each instance, finality has been effected by agreement in the midst of time-consuming, costly, and extended court proceedings.

Cases have run the gamut from the intentional killing and maiming of civilians by a disgruntled, former enlistee at an airbase hospital to settlement of ongoing environmental claims arising from the alleged discharged of dairy waste into waterways regulated by federal law. Other cases I have had the privilege of resolving by mediation include a ten year running legal dispute between some members of the Spokane Gypsy community and law enforcement agencies in the same community; and a wrongful death claim and numerous property damage claims against the Burlington Northern Railroad stemming from a 20,000 acre crop and range land fire.

In almost every case, earlier settlement efforts had failed and appeals had either occurred or were anticipated. A small sampling of the many cases which I have mediated as a United States Magistrate Judge follow:

Gypsy Church of the Northwest, et al. v. Spokane County, et al., C-89-423-AAM and C-89-425-AAM; litigation involved a running ten year dispute over illegal search and seizure issues with appeals both to the Supreme Court of the State of Washington and to the Ninth Circuit Court of Appeals; earlier mediations, including settlement discussions under supervision of the Ninth Circuit Court of Appeals had not resulted in a resolution;

Sigman, et al. v. USA, CS-95-534-JLQ; consolidated cases involved severe injury and death claims of more than two dozen plaintiffs who were victimized by a gunman at Fairchild Air Force Base near Spokane in the early 1990's. The case was appealed to the Ninth Circuit Court of Appeals, returned to the District Court and assigned for mediation; mediation occurred over several days and resulted in a comprehensive settlement and the payment of approximately 17 million dollars. Issues involved liability and damages as well as division of proceeds among grievously injured parties who were represented by separate counsel;

Community Association for Restoration of the Environment v. DeRuyter, CY-99-3092-WFN; environmental issues involving alleged discharge of effluent from dairies into waterways of the United States resulted in implementation of prospective measures designed to preclude additional litigation and ongoing damage;

Heider v. Burlington Northern Railway; CS-98-355-AAM; Perez v. Burlington Northern Railway; CS-98-356-WFN; cases involved claims by approximately 56 parties for personal injury and property damages, and a claim for wrongful death by the family of a man who was tragically killed in a fire which consumed thousands of acres of crops and range land in eastern Adams County, Washington; mediation sessions occurred on approximately seven separate days over a three month period. Total payments of approximately 11 million dollars apportioned between the parties were made;



Erickson v. United States, C97-5309(RJB) WFN; federal civil rights and related claims filed against the U.S. Marshal's Office in the Western District of Washington and assigned for trial by a Federal District Judge in this District were settled following mediation; resolution prior to trial was thought to be highly unlikely.

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

Monthly payments of \$1,600 from former law firm (Lyon Law Offices) will continue through approximately July, 2003, to compensate for ownership interest in firm.

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

Conflicts of interest can arise from many sources. A judge has a duty to be pro-active in monitoring his investment and property holdings and in making arrangements to cross-check the same against new civil and criminal cases assigned to him. While I currently know of no financial arrangements which are likely to present potential conflicts for me during my initial service (I have served as a full-time U.S. Magistrate Judge for almost eight (8) years), I plan to continue to avoid accepting cases which involve any members of my former law firm, former clients (whether corporate or individual) and others where an actual or apparent conflict may exist. I also intend to resolve any significant doubts concerning the appearance of conflict of interest in favor of recusal simply because form can be as important in the eyes of the litigants (and public) as substance. A judge's impartiality should never be placed in question by the actual or apparent existence of a potential conflict of interest.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during our service with the court? If so, explain.

No.

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

Sources of income for calendar years 2002.

See attached Financial Disclosure Report.

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

Financial net worth statement provided herewith.

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

No.

## FINANCIAL STATEMENT

## NET WORTH

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

ASSETS		LIABILITIES	
-Cash on hand and in banks	\$ 129,000	Notes payable to banks-secured	\$ 0
-U.S. Government securities-		Notes payable to banks-unsecured	0
add schedule	23,000	Notes payable to relatives	0
-Listed securities-add schedule	454,000	Notes payable to others	0
-Unlisted securities-add schedule	0	Accounts and bills due	3,000
-Accounts and notes receivable	0	Unpaid income tax	0
Due from relatives and friends	0	Other unpaid income and interest	0
Due from others	8,000	Real estate mortgage payable-	
Doubtful	0	add schedule	0
-Real estate owned-add schedule	395,000	Chattel mortgages and other liens	
-Real estate mortgages receivable	0	payable	0
-Autos and other personal property	50,000	Other debts-itemize:	0
-Cash value-life insurance	10,000		
-Other assets itemize:		Total liabilities	3,000
Cabin (leasehold)	90,000	Net Worth	\$2,171,000
Retirement Funds	1,020,000	Total liabilities and	
Total Assets:	\$2,179,000	net worth	\$2,179,000
CONTINGENT LIABILITIES		GENERAL INFORMATION	
-As endorser, comaker or guarantor	0	Are any assets pledged?	No
-On leases or contracts	0	(Add schedule)	
-Legal Claims	0	Are you defendant in any	
-Provision for Federal Income Tax	5,000	suits or legal actions	No
-Other special debt	0	Have you ever taken bankruptcy	No

## SCHEDULE

## U.S. Government Securities:

Rittenhouse Fin. Services	\$ 23,000
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## Securities:

Equities	184,000
Corporate Bonds	18,000
Municipal Bonds	177,000
Mutual Funds	60,000
Municipal Bond Fund	<u>15,000</u>
TOTAL:	\$454,000

## Real Estate:

Home	225,000
Partial Interest in Office Property	150,000
Partial interest in Farm Land (belongs to spouse)	<u>20,000</u>
TOTAL:	\$395,000

## III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

During the early years of my practice, I volunteered time at the local Southeast Community Center and elsewhere to assist those who were too poor to hire legal counsel. This typically involved a few hours on Saturday morning a couple of times per year. As the years passed, our office routinely gave advice to disadvantaged persons who were unable to afford counsel even though the client's original contact with the firm anticipated the payment of fees for the representation which was being provided. Almost all members of my former firm made contributions. Examples include advice on landlord tenant matters, domestic issues and related cases.

During the 1970's, I also served on the Board of Directors of the Mabel Swan Manor which raised government funding (through grants and assistance) to build a large retirement facility for the low-income elderly. In this capacity, I assisted with efforts to obtain funding and remained an active board member until a multi-story apartment complex was completed in the mid 1970's. All time which was spent on this project was donated.

As a sitting full-time judicial officer for the last eight (8) years, I am formally precluded from practicing law. Accordingly, my assistance to the disadvantage has taken other channels. For example, I have worked on multiple housing projects involving Habitat for Humanity and donated to the cause here in the community in which I live. Through our church affiliation, my wife and I have also contributed to relief causes, both at home and abroad. I have had occasion to ring the bells for the Salvation Army Christmas drive through my service club and have worked at charity fund raising activities.

In reality, none of us ever do enough to assist the "disadvantaged." In performing my professional duties, I do my level best to see that those who are not well off (and otherwise educationally or economically deprived) receive every consideration or service which is available beginning with courteous and thoughtful treatment, appointment of counsel, court intervention where necessary, and appropriate follow-up consistent with maintaining neutrality in a court setting.

On a broader level, I sit on the Board of Directors of the Washington Education Foundation which administers millions of dollars for college scholarships dedicated to the disadvantaged. In performing this role, I have attended meetings in several cities throughout the state of Washington, have participated in scholarship committee meetings, and have provided feedback at regular periodic intervals. I intend to continue this activity and currently dedicate total time involving several work days per year away from the office.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

I do not currently belong to any organization which discriminates.

I am a member of the Yakima Kiwanis service club (1977-present) which at one time did not have female members. The club voted to change its bylaws many years ago and now is composed of both men and women.

Although I never attended a single meeting, at one time I held a membership in the Elks club (approximately 1970's through early 1990's). Although the club admitted women to its facility (golf course, dining room), I do not believe women were included as voting members at that time.

Since I am a non-golfer and used the dining room only very rarely for occasional lunches with more senior members of my former law firm, I resigned my membership years ago.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

While the Eastern District of Washington does not have a standing selection commission, our state's two (2) Democratic Senators and the Republican members of Congress from this area cooperatively selected a six (6) member bipartisan screening committee composed of three (3) Democrats and three (3) Republicans. The committee ultimately selected three (3) names, including mine, which were then forwarded for further consideration.

A set of questions had been prepared for completion by all applicants and a tight time line for receipt of applications was established. Notice was provided publicly to prospective applicants and interviews were conducted only after all written materials were received and reviewed by the committee.

I felt that the process was demanding, expeditious and fair. The three finalists were individually interviewed by our two (2) United States Senators as well as the two (2) Congressmen from this area. I am extremely grateful for the time and dedication to this process which was shown by each of these elected officials whom I greatly respect.

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

Absolutely not.



5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Our founding fathers wisely separated the functions served by the legislative, executive and judicial branches of government. The role of the judiciary begins with an affirmation that the primary source of law lies with the constitution and legislative enactments of our federal, state and local governments, subject only to applicable constitutional restraints and any superior court precedents. Accordingly, judges should avoid deciding issues which are not legitimately placed before them. Judicial rulings should be confined to the facts of each case and not contain dicta which may be interpreted as judicial legislation. The court should respect precedent which gives stability to our body of laws.

Senator GRAHAM. Thank you, sir.  
Judge Yeakel?

**STATEMENT OF EARL LEROY YEAKEI III, NOMINEE TO BE  
DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TEXAS**

Judge YEAKEI. Mr. Chairman, I also will forego, in the interest of time, an opening statement. I would like to thank you for conducting this hearing and giving all of us an opportunity to be here today. I would thank Senators Hutchison and Cornyn for their recommendation, and the President for his nomination.

And I thank you my family who has already been introduced, for being here to support me today. Thank you again.<sup>6</sup>

[The biographical information of Judge Yeakel follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Earl Leroy Yeakel III (Lee Yeakel).

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

Residence: Austin, Texas

Office: Texas Court of Appeals, Third District  
Price Daniel Sr. Building  
209 West 14th Street, Room 101  
Austin, Texas 78701.

3. Date and place of birth.

April 18, 1945; Oklahoma City, Oklahoma USA

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

Married – Anne Paula Riquelmy (Yeakel), Executive Director, Texas Bar Foundation, 1414 Colorado Street, Room 605, Austin, Texas 78701.

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

University of Virginia School of Law  
June 1999 to May 2001  
Received Master of Laws in the Judicial Process  
May 20, 2001;

University of Texas School of Law  
September 1966 to May 1969  
Received Doctor of Jurisprudence  
May 31, 1969;

University of Texas at Austin  
September 1963 to August 1966  
Received Bachelor of Arts  
August 27, 1966.

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

Employment:

1998 – Present:

Justice, Texas Court of Appeals, Third District  
Price Daniel Sr. Building  
209 West 14th Street, Room 101  
Austin, Texas 78701;

1998:

Chief Justice, Texas Court of Appeals, Third District  
Price Daniel Sr. Building  
209 West 14th Street, Room 101  
Austin, Texas 78701;

1990 – 1998:

Shareholder/Attorney, Clark, Thomas & Winters, a Professional Corporation  
300 West 6th Street  
Austin, Texas 78701;

1985 – 1990:

Partner/Attorney, Giles & Yeakel  
7200 North MoPac  
Austin, Texas 78731;

1982 – 1985:

Shareholder/Attorney, Stubbeman, McRae, Sealy, Laughlin & Browder, P.C.  
221 West 6th Street  
Austin, Texas 78701;

1974 – 1982:

Partner/Attorney, Kammerman, Yeakel & Overstreet  
221 West 6th Street, Suite 1420  
Austin, Texas 78701;

1969 – 1974:

Associate Attorney and Law Clerk, Mitchell, Gilbert & McLean

315 Westgate Building  
Austin, Texas 78701;

1967 – 1970:  
Officer Candidate & Officer, United States Marine Corps;

1967 – 1968:  
Real Estate Salesman, M.D. Williamson Real Estate.

1966 – 1967:  
Tax Examiner, Internal Revenue Service.

Board Service:

2002 – 2003:  
President-Elect, Rotary Club of Austin, Texas

2002 – Present:  
Trustee, Austin Rotary Foundation;

2001 – Present:  
President (2003 – Present); Vice President (2001 – 2003); Austin Chapter, The English-Speaking Union

1990 – Present:  
Trustee (1990 – Present), Vice President (2001 – Present), & Member of Executive Committee 1997 – Present), Theodore Roosevelt Association;

1994 – 1996:  
Director, Rotary Club of Austin, Texas;

1971 – Approx. 1980:  
Director, Batco Incorporated;

Approx. 1970 – Approx. 1973:  
Director, Jiffy Franks, Incorporated.

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

Yes: United States Marine Corps, November 22, 1967 to October 22, 1970; Lance Corporal

& Officer Candidate #2404732 USMCR; 2d Lieutenant & 1st Lieutenant #0107870 USMCR; Honorable Discharge.

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

None.

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

1. American Bar Association:
  - a. Fellow, American Bar Foundation;
2. American Law Institute;
3. Texas Commission on Uniform State Laws (Appointed by Governor Perry, 2001)
4. National Conference of Commissioners on Uniform State Laws;
5. American Judicature Society;
6. Robert S. Calvert Inn, American Inns of Court;
7. State Bar of Texas:
  - a. Sustaining Life Fellow, Texas Bar Foundation;
  - b. Member, College of the State Bar of Texas;
  - c. Sunset Act Committee (1979);
  - d. Chairman, Subcommittee, District 9 Committee on Admissions (1977-1985);
8. Travis County Bar Association:
  - a. Director (1976-1978);
  - b. Member, Judicial Screening Committee (1989-1991);
9. Texas Young Lawyers Association (1969-1980):
  - a. State Director, District 29 (1978-1979);
  - b. Chairman, Legislative Committee (1976-1978);
  - c. Chairman, Local Affiliates Committee (1978-1979);
  - d. Member, various other committees;
10. Austin Young Lawyers Association (1969-1980):
  - a. President (1977-1978);
  - b. Vice-President (1976-1977);
  - c. Secretary-Treasurer (1975-1976);
11. Austin Chapter, Federal Bar Association:
  - a. President (1997-1998);
  - b. President-Elect (1996-1997);
  - c. Vice-President (1995-1996);
  - d. Secretary (1994-1995);
  - e. Delegate to National Council (1997);
12. Bar Association for the Fifth Federal Circuit (approx. 1990-1998);
13. Texas Association of Defense Counsel (approx. 1987-1998).

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

I am not a member of any organization which lobbies public bodies, although the courts appear in front of the Texas Legislature from time to time on budget matters. The National Conference of Commissioners on Uniform State Laws sends members to state legislatures to be resource witnesses on uniform acts it has recommended. The American Law Institute does the same.

Other organizations to which I belong:

1. Rotary Club of Austin;
  2. Theodore Roosevelt Association, Oyster Bay, New York;
  3. Leadership Austin Association;
  4. Travis County Grand Jury Association;
  5. Austin Chapter, The English-Speaking Union;
  6. Austin Lawyers Chapter, The Federalist Society;
  7. The Sons of the Republic of Texas;
  8. Longhorn Foundation Advisory Council, University of Texas at Austin;
  9. Chancellor's Council, University of Texas at Austin.
11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.
1. State Bar of Texas: September 15, 1969;
  2. The Supreme Court of the United States: November 3, 1975;
  3. The United States Court of Appeals for the Fifth Circuit: January 24, 1972;
  4. The United States Court of Appeals for the Ninth Circuit: April 25, 1988;
  5. The United States Court of Appeals for the Eleventh Circuit: October 13, 1981;
  6. The Temporary Emergency Court of Appeals: December 18, 1978;
  7. The United States District Court for the Western District of Texas: October 29, 1970;
  8. The United States District Court for the Northern District of Texas: November 16, 1970;
  9. The United States District Court for the Southern District of Texas: January 30, 1974;
  10. The United States District Court for the Eastern District of Texas: July 6, 1979;
  11. The United States District Court for the Western District of Louisiana: August 8, 1977;
  12. The United States District Court for the Western District of Oklahoma: August 1, 1979;
  13. The United States District Court for the Eastern District of Wisconsin: May 21, 1980;
  14. The United States District Court for the Southern District of Alabama: June 9, 1987;
  15. The United States Tax Court: April 28, 1997.

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

Lee Yeakel & Dane McKaughan, *Sovereign Immunity*, in STATE BAR OF TEX. 12TH ANNUAL ADVANCED ADMINISTRATIVE LAW COURSE 2 (2000);

*Quo Vadis Immunitas?* The Texas Sovereign Immunity Doctrine as Applied to Breach of Contract – Where Is It? How Did It Get There? Where Is It Going? (Thesis submitted to University of Virginia School of Law (2001));

Addresses to numerous civic clubs (such as Rotary, Lions, Kiwanis, and Sertoma), political clubs and organizations, bar associations, law firms, and schools on the Texas court system in general and the appellate process, both in general and with specific emphasis on the Third Court of Appeals, since joining the court in 1998. No specific speeches or papers were prepared other than those provided. I have generally spoken from an outline and am providing copies of those outlines that I have retained.

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

I am in good health and last had a physical examination September 24, 2002.

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

Chief Justice, Texas Court of Appeals, Third District of Texas (1998) & Justice, Texas Court of Appeals, Third District of Texas (1998 – Present). Both positions are elected positions. However, in Texas when there is a judicial vacancy, the governor may appoint a person to serve until the next general election. Governor Bush appointed me chief justice in February 1998. I lost my race to retain the office in November 1998 to a member of the court. Governor Bush appointed me to fill her position in December 1998. I was elected to a full six-year term in November 2000. The court is one of fourteen intermediate appellate courts in Texas. Our court hears all appeals from twenty-four Texas counties as well as cases that may be transferred to the court by the Supreme Court of Texas under its docket-equalization authority. The court hears all appeals from trial court decisions, both civil and criminal, except criminal cases in which the death penalty has been assessed. The court also entertains petitions for mandamus and other requests for extraordinary relief.



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

(1) Ten Most Significant Opinions:

1. *Dalisa, Inc. v. Bradford*, 81 S.W.3d 876 (Tex. App.—Austin 2002, no pet.) (Yeakel, J., dissenting). The majority reversed and remanded a case where the trial court severed the issue of attorney's fees, holding that the trial court could not so sever in order to allow the issues in the case in chief to be determined on appeal before determining whether attorney's fees should be awarded. I would have held that it is within the trial court's discretion to manage the case pending before it, that the trial court does have the power to sever an attorney's fees issue and reserve it for another day, and would have considered the merits of the appeal rather than dismissing the appeal for lack of jurisdiction on the basis that the trial court's judgment did not dispose of all the issues before it and thus was not a final judgment.

2. *Preiss v. Moritz*, 60 S.W.3d 285 (Tex. App.—Austin 2001, no pet.). The case holds that plaintiffs did not waive their complaint that a juror was unqualified when the complaint was raised for the first time in a motion for new trial, and that plaintiffs were materially injured when an unqualified juror voted with the 10-2 majority for the defendant. (Texas law provides that a civil case may be determined by a 10-2 vote, thus the unqualified juror's vote was determinative on the case.)

3. *South Tex. College of Law v. Texas Higher Educ. Coordinating Bd.*, 40 S.W.3d 130 (Tex. App.—Austin 2001, pet. denied) (Yeakel, J., dissenting). The majority affirmed a trial-court judgment that Texas A&M University and South Texas College of Law could not enter into a cooperative arrangement whereby the institutions would allow cross-attendance of students with credit awarded. The crux of the dispute was over whether this would give Texas A&M a *de facto* law school at South Texas, as the Coordinating Board had not authorized Texas A&M to award law degrees. Clearly, Texas A&M would require Coordinating Board approval if it sought to award a law degree. However, my view is that the cooperative arrangement was consistent with Texas law, which encourages cooperation among public and private educational institutions, and that the scope of the particular agreement did not come within the purview of the Coordinating Board, although an attempt to establish a college of law at Texas A&M, a merger of the two institutions, or an attempt by Texas A&M to award law degrees would. Thus, I would have held that the Coordinating Board exceeded its legislative mandate by its premature action to terminate the relationship.

4. *Travis County Attorney v. J.S.H.*, 37 S.W.3d 692 (Tex. App.—Austin 2000, no pet.).

The case holds that an admitted, but unadjudicated, offense is not a “final conviction” as the term is used in the Texas expunction statute and affirmed two trial court orders of expunction.

5. *Waldrep v. Texas Employers Ins. Ass'n*, 21 S.W.3d 692 (Tex. App.—Austin 2000, pet. denied). The case holds that a college football-scholarship athlete who was injured playing football for a university could not recover worker’s compensation benefits for his injury. (The injury occurred in 1974, and the court’s holding was based on Texas law and Southwest Conference and National Collegiate Athletics Association rules and regulations in effect at the time. The holding expresses no opinion as to whether the decision would be the same in an analogous situation arising today.)

6. *Vela v. Marywood*, 17 S.W.3d 750 (Tex. App.—Austin 2000), *pet. denied*, 53 S.W.3d 684 (Tex. 2001). The case holds that an adoption agency owes a duty of complete disclosure when discussing adoption procedures with and advising a birth mother, and the evidence conclusively established that the birth mother did not voluntarily sign a relinquishment affidavit because of misrepresentations by the adoption agency. Thus, the trial court erred in terminating the birth mother’s parental rights to her child based solely on the relinquishment affidavit.

7. *Boone Ins. Agency v. American Airlines, Inc.*, 17 S.W.3d 52 (Tex. App.—Austin 2000, pet. denied). The case holds that issues regarding airline ticket reissue fees and other airline-assessed penalties for failing to travel according to the ticket’s original terms were preempted by the federal Airline Deregulation Act and, thus, could not be determined under Texas state law.

8. *Gutierrez v. State*, 8 S.W.3d 739 (Tex. App.—Austin 1999, no pet.). The case holds that by confessing guilt at the punishment phase of his trial (Texas has a bifurcated trial procedure, the first phase determining guilt or innocence and the second phase determining punishment), a defendant is estopped from challenging the propriety of juror note taking during the trial’s guilt/innocence phase.

9. *In re L.M.*, 993 S.W.2d 276 (Tex. App.—Austin 1999, pet. denied). L.M., then eleven years old, was the youngest person ever charged with murder in Texas. The victim was a two-year old child staying at the house L.M. shared with her grandparents and older sister. Because of her age, she was tried as a juvenile. A jury acquitted L.M. of capital murder and manslaughter, but found her guilty of criminally negligent homicide and injury to a child. However, the juvenile court, on his own motion, ordered a new trial. At the second trial, the State charged L.M. with only injury to a child. The second jury convicted her. During its investigation, the Austin Police Department conducted an interview with and took statements, both written and oral, from L.M. outside the presence of either grandparent and without either a lawyer or other adult representing L.M. The grandparents, who were L.M.’s guardians, were not notified of the interview. The trial court admitted L.M.’s statements in

evidence before the jury. Our court held that L.M.'s statements were taken in violation of the Texas Family Code. Further, we held that to determine whether a juvenile has waived her right to counsel, the voluntariness of the waiver must be viewed through the eyes of the juvenile, here an eleven year-old girl who had no previous experience with law-enforcement officials. The interview was thus suspect and, at the very least, it could not be said that the juvenile's statements were not the product of fright or despair. We held that the statements should have been suppressed and that their admission was not harmless, and reversed the adjudication of delinquency.

10. *Gulf Metals Indus., Inc. v. Chicago Ins. Co.*, 993 S.W.2d 800 (Tex. App.—Austin 1999, pet. denied). The “qualified polluter’s exclusion” clause in Texas general-liability insurance policies provides that the insurance does not generally cover damages caused by the discharge of “irritants, contaminants, or pollutants” by the insured. However, the “discharge, dispersal, release, or escape” is covered if “sudden and accidental.” The federal Environmental Protection Agency ordered Gulf Metals to clean up a polluted site that had been maintained by Gulf Metals and its predecessors for many years. Gulf Metals made a claim on its insurer, who denied coverage on the basis that the release of the contaminants had been gradual and consistent over an extended period of time. Gulf Metals sued. Our court affirmed the trial court’s summary judgment in favor of the insurer, holding that “sudden,” as used in the “sudden and accidental” exception to the exclusion, includes a temporal element, requiring the release to be swift, rapid, or abrupt.

(2) Reversals:

1. *Central Counties Cent. for Mental Health & Mental Retardation Servs. v. Rodriguez*, 45 S.W.3d 707 (Tex. App.—Austin 2001), *rev'd & dism'd w.o.j.*, 46 Tex. Sup. Ct. J. 493, 2003 Tex. LEXIS 20 (Mar. 6, 2003) (*per curiam*); *Austin State Hosp. v. Fiske*, 46 Tex. Sup. Ct. J. 493, 2003 Tex. LEXIS 21 (Mar. 6, 2003) (*per curiam*). The Texas Board of Mental Health and Mental Retardation was required by statute to adopt a patients’ bill of rights, governing inpatient mental-health facilities, for the purpose of protecting the health, safety and rights of such facilities’ patients. The Board did so. In two different cases, consolidated for this appeal, patients sued facilities alleging violations of the bill of rights. In each instance, the facility moved the trial court to dismiss the case for lack of jurisdiction on the basis that, as the defendant facility was a state facility, it could not be sued without its consent. The trial courts denied the pleas to the jurisdiction, resulting in appeals to our court. The Texas Health and Safety Code allows a “mental health facility” to be sued for violations of, *inter alia*, the patients’ bill of rights and defines “mental health facility” by adopting the definition in another section of the code, which includes state-operated mental health facilities. Our court affirmed the trial courts, holding that the statutory scheme “clearly and unambiguously waives sovereign immunity from suit.” In two *per curiam* opinions, the supreme court reversed and dismissed for lack of jurisdiction on the basis of another case decided by the supreme court the same day (*Wichita Falls State Hosp. v. Taylor*, 46 Tex. Sup. Ct. J. 494, 2003 Tex. LEXIS 22 (Mar. 6, 2003)), which held that the code did not

clearly and unequivocally waive sovereign immunity from suit for state-operated mental-health facilities.

2. *St. Joseph Hosp. v. Wolff*, 999 S.W.2d 579 (Tex. App.—Austin 1999), *rev'd* 94 S.W.3d 513 (Tex. 2002). This extremely complex case originated as a medical-malpractice case by Wolff against various medical practitioners and institutions and, as is germane to the appeal, resulted in a judgment for Wolff against St. Joseph. The malpractice, which was undisputed, was committed at Brackenridge Hospital in Austin by a medical resident provided by St. Joseph, a Houston hospital, pursuant to an agreement with Brackenridge. The crucial issue on appeal was whether, under its agreement with Brackenridge, St. Joseph could be held liable for the negligent acts of a resident provided by St. Joseph to Brackenridge. Our court stated: “We hold there is legally and factually sufficient evidence to support the jury’s finding that St. Joseph and [Brackenridge] were engaged in a joint enterprise. As participants, both St. Joseph and [Brackenridge] are thereby responsible for the other’s negligent acts.” A divided supreme court, in a plurality opinion written by a court-of-appeals justice sitting with the supreme court by commission of the governor, reversed, holding that there was no evidence of a “community of pecuniary interest in [the common] purpose [of the enterprise], among its members.” The court also held that there was no joint enterprise because “the complete absence of any evidence that St. Joseph and [Brackenridge] agreed to share profits is fatal to [Wolff’s] joint venture theory.” Six justices joined in the judgment, but only four in the court’s opinion. All six of the justices who joined in the judgment held that the resident was a “borrowed servant,” thus relieving St. Joseph of vicarious liability for his acts. The dissent took the position that “because St. Joseph contractually retained and actually exercised the right of control over [the resident’s] work even when he was at Brackenridge, he could not have been [a borrowed servant].” The dissent further concluded that the resident “was in the course and scope of his employment with St. Joseph when he negligently injured Ms. Wolff.”

3. *Lofin v. State*, 6 S.W.3d 796 (Tex. App.—Austin 1999), *rev'd*, 45 S.W.3d 648 (Tex. Crim. App. 2001). Our court reversed a trial-court criminal conviction, holding that because the evidence at trial could have supported a conviction for a lesser-included offense, the trial court erred in not so charging the jury. The defendant was convicted of the offense of assault on a public servant (a police officer). He had requested that the trial court charge the jury on the lesser-included offense of resisting arrest. We held that “[f]rom the evidence before it, the jury could have rationally believed that appellant intended to obstruct the arrest and the force he used was incident to that intent.” A divided court of criminal appeals disagreed, holding that “[r]esisting arrest was not a rational alternative to assault on a public servant in the instant case.” The dissent would have affirmed, stating that “[i]f the jury had disbelieved the evidence that appellant struck and caused bodily injury to [the officer], there remains other evidence that appellant resisted arrest by the use of force that did not cause bodily injury. This is some evidence that appellant was guilty *only* of resisting arrest. Appellant was entitled to the instruction of the lesser offense on this basis.”

4. *Qwest Communications Inter'l Inc. v. AT&T Corp.*, 983 S.W.2d 885 (Tex. App.—Austin 1999), *rev'd sub. nom. Qwest Communications Corp. v. AT&T Corp.*, 24 S.W.3d 334 (Tex. 2000) (per curiam). AT&T and a related company sued Qwest and a related company for damages to AT&T's fiber-optic cables. Immediately before a hearing on a temporary injunction that had been requested by AT&T, AT&T and Qwest reached an agreement, which they announced in open court, resolving the issues to be heard at the temporary-injunction hearing. When the agreement was reduced to writing, Qwest refused to sign it. After a hearing, the trial court concluded that the proposed written agreement correctly reflected what had been announced in open court and signed an order enforcing it. Qwest appealed. Our court held that the order enforcing the agreement was not an appealable interlocutory order under Texas law and dismissed the appeal for lack of jurisdiction. The supreme court, in a *per curiam* opinion, reversed, stating: "We hold that, in character and function, the trial court's order grants a temporary injunction and is appealable under Texas Civil Practice and Remedies Code section 51.014(a)(4)."

(3) Federal and State Constitutional Issues:

1. *Mauldin v. Texas State Bd. of Plumbing Exam'rs*, 94 S.W.3d 867 (Tex. App.—Austin 2002, no pet.). The case holds that the Board's requirement that an applicant for a plumber's license provide the person's social-security number does not violate the equal-protection clause of the Texas Constitution.

2. *State v. Ware*, 86 S.W.3d 817 (Tex. App.—Austin 2002, no pet.). The case considers the takings clauses of the Fifth Amendment to the United States Constitution and the Texas Constitution and holds that the "undivided-fee rule," as a method for determining damages, is inapplicable in condemnation cases where the condemnor already holds a portion of the estate being condemned.

3. *Rylander v. Palais Royal, Inc.*, 81 S.W.3d 909 (Tex. App.—Austin 2002, pet. denied). The case holds that the earned-surplus amendments to the Texas franchise-tax act are not unconstitutional under the equal-taxation and equal-protection-of-law clauses of the United States and Texas Constitutions. Further, the amendments do no conflict with state or federal retroactivity, takings, or due processes clauses of those constitutions.

4. *State v. Fudge*, 42 S.W.3d 226 (Tex. App.—Austin 2001, no pet.). The issue in this case is whether evidence was obtained by the police in violation of the defendant's rights, under the Fourth Amendment to the United States Constitution and the Texas Constitution. The case holds that a cab driver, who reported to a police officer in a face-to-face manner that he observed the defendant driving drunk, was inherently reliable, thus, based on that information alone, the officer had reasonable suspicion to perform an investigative stop of the vehicle the defendant was driving. Thus, the officer's investigation was not unreasonable.

5. *Shelton v. State*, 41 S.W.3d 208 (Tex. App.—Austin 2001, no pet.). The issue in this case involves a defendant's right to free association under the First Amendment to the United States Constitution. The case holds that, because during the punishment phase of defendant's trial, the trial court admitted several items of evidence relating to defendant's involvement with the Ku Klux Klan, unrelated to the offense with which defendant was charged, he was entitled to a new punishment hearing.

6. *Low-Income Women v. Bost*, 38 S.W.3d 689 (Tex. App.—Austin 2000) (Yeakel, J., dissenting), *rev'd sub nom. Bell v. Low-Income Women*, 46 Tex. Sup. Ct. J. 309, 2002 Tex.LEXIS 216 (December 31, 2002). Writing in dissent, I would have held that the equal-rights amendment to the Texas Constitution does not create an Assistance Program.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.
- (1) Ran for state representative, District 37-B, Travis County, Texas in a special election to fill a vacancy in November 1977; lost then and in the 1978 primary election;
  - (2) Texas State Board of Canvassers of Elections; appointed by Governor William P. Clements, Jr. in 1987; served until 1989 when, partially at my suggestion, the Texas Legislature abolished the board through the sunset process.
  - (3) Ran for Travis County Republican Chairman in 1988; was defeated;
  - (4) Texas Commission of Licensing and Regulation; appointed by Governor William P. Clements, Jr. for six-year term beginning September 1, 1989; served as chairman from 1989-1993; reappointed by Governor George W. Bush for a six-year term beginning September 1, 1995; served as chairman from 1995 until February 27, 1998, when I resigned to become Chief Justice of the Texas Court of Appeals, Third District, having been so appointed by Governor George W. Bush;
  - (5) Ran for Travis County Republican Party Chairman in 1990; elected; served from 1990 to 1992; did not seek reelection;
  - (6) Running for Justice, Texas Court of Appeals, Third District, March 1998 Republican Primary; discontinued campaign when appointed Chief Justice of the Court by Governor George W. Bush on February 27, 1998;
  - (7) Ran for Chief Justice, Texas Court of Appeals, Third District, November 1998; was defeated by Marilyn Aboussie, a justice on the Court;

(8) Following defeat for Chief Justice, was appointed Justice, Texas Court of Appeals, Third District, by Governor George W. Bush on December 10, 1998;

(9) Ran for Justice, Texas Court of Appeals, Third District, March 2000 primary and November 2000 general election; elected to six-year term beginning January 1, 2001; currently serving;

(10) Texas Commission on Uniform State Laws; appointed by Governor Rick Perry in August 2001 to a term ending in 2006, thus becoming a member of the National Conference of Commissioners on Uniform State Laws;

(11) When Chief Justice Marilyn Aboussie announced that she was retiring at the end of 2002, I ran for Chief Justice, Texas Court of Appeals, Third District, in the March 2002 Republican Primary; was defeated.

17. Legal Career:

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

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

None.

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

None.

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

(a) Fall 1968 through December 31, 1973; Mitchell, Gilbert & McLean (while I was there, the firm was also known as the Law Offices of Arthur Mitchell and Mitchell, Yeakel, Orr & Trickey), 315 Westgate Building, Austin, Texas 78701; first as law clerk while in law school and, after graduation, as an associate attorney.

(b) January 1, 1974, through August 15, 1982; Kammerman, Yeakel & Overstreet (while I was there, the firm was also known as Kammerman, Yeakel & Hineman and Kammerman, Yeakel, Hineman & Trickey), 221 West 6th Street, Suite 1420, Austin, Texas 78701; partner.

(c) August 16, 1982, through February 28, 1985; Stubbeman, McRae, Sealy, Laughlin & Browder, Inc., 221 West 6th Street, Suite 1800, Austin, Texas 78701; shareholder.

(d) March 1, 1985, through September 30, 1990; Giles & Yeakel, 7200 North MoPac Expressway, Austin, Texas 78731; partner.

(e) 1987 through 1989; Texas State Board of Canvassers



of Elections, State Capitol, Austin, Texas 78711; Board member.

(f) September 1, 1989, through February 27, 1998; Texas Commission of Licensing & Regulation, Ernest O. Thompson State Office Building, Austin, Texas 78701; Commission member and chairman.

(g) October 1, 1990, through February 27, 1998; Clark, Thomas & Winters, A Professional Corporation, 700 Lavaca Street, 12th Floor, Austin, Texas 78701; shareholder.

(h) February 27, 1998 through the present; Texas Court of Appeals, Third District of Texas, Price Daniel Sr. Building, 209 West 14th Street, Room 101, Austin, Texas 78701; Chief Justice and Justice.

(i) August 8, 2001 through the present; Texas Commission on Uniform State Laws, c/o Texas Legislative Council, State Capitol, Austin, Texas 78711; Commission member.

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

My practice has always been that of a general practitioner, although its emphasis has changed from time to time over the years. With my first firm, from 1969 (when I graduated from law school) to 1974, I handled all types of cases as assigned to me by the firm. The cases on which I worked were both civil and criminal and involved trial and appellate work, both state and federal, and appearances before state agencies. The firm believed in letting you learn by doing, so I was, literally, in court from the day I received my law license. When I began my own firm in 1974, the practice remained pretty much the same, but began shift primarily to civil cases, with less emphasis on criminal. At this time, I also began to do a significant amount of work in the oil and gas area and more in the securities area. By the late 1970s, I was engaged almost exclusively in commercial litigation and transactions, including oil and gas and securities, and had developed a tax-exempt bond practice, representing primarily lending institutions who served as trustees for industrial development, housing, and other types of tax-exempt bonds. In the 1980s, my practice became more focused on civil commercial litigation and

appeals, as well as more administrative-agency hearings, and continued this way until 1998 when I was appointed to the court of appeals. I have practiced with small and large firms and have seen the strengths and weaknesses of both.

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

As has been described above, my law practice was varied and, thus, so were my clients. Although there have been periods in my practice when I represented corporate clients, over the years I have more often represented individuals and small businesses. Although I have neither designated a specialty nor sought board certification in any area, the common theme that runs throughout my practice has been commercial litigation—the trying of lawsuits involving disputes over agreements of one kind or another.

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

Frequently. This was steady over the course of my law practice.

2. What percentage of these appearances was in:

- (a) federal courts;

Approximately 20%.

- (b) state courts of record;

Approximately 60%.

- (c) other courts.

i. Administrative Hearings: Approximately 10%

ii. Mediation/Arbitration: Approximately 10%.

3. What percentage of your litigation was:

- (a) civil;

Approximately 95%.

- (b) criminal.

Approximately 5%.

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

I have not kept a count of the number of cases I have tried to verdict or settled, nor have I kept a record of when I was sole counsel, chief counsel or associate counsel. I can say, that except for the early days of my practice, I have generally been sole counsel. When with larger firms—Stubbeman, McRae and Clark, Thomas—I would sometimes be assisted by less-experienced attorneys. From time to time a referring attorney would serve as second-chair counsel in a trial. I estimate that over my career I tried 100 to 115 cases to verdict, either to a jury or to the bench.

5. What percentage of these trials was:

(a) jury;

Approximately 30%.

(b) non-jury.

Approximately 70%.

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

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

(1) *Rowden Oil & Gas, Inc. v. Eland Energy, Inc.*, 111th Judicial District Court, Webb County, Texas, Trial Judge: Antonio A. Zardenetta; Appellate Judges—Fourth Court of Appeals: Justices Catherine Stone, Phillip Hardberger, & Paul W. Green; Co-counsel: C.B. Harrison, Jr., 13101 Preston Road, Suite 413, Dallas, Texas 75240, (972) 934-0147; C.M. Zaffirini, 1407 Washington Street, Laredo, Texas 78040, (956) 724-8355; Amanda Foote

Schmidt, 3406 Glenview Avenue, Austin, Texas 78703, (512) 371-7309; Counsel for other Parties: Robert D. Jenkins, 2370 Rice Boulevard, Suite 202, Houston, Texas 77005, (713) 526-7100; W. Wendell Hall 300 Convent Street, Suite 2200, San Antonio, Texas 78205, (210) 224-5575; V.E. Lanfear, 8620 North New Braunfels Avenue, Suite 215, San Antonio, Texas 78217, (210) 824-9230; Donato Ramos, P.O. Box 452009, Laredo, Texas 78045, (956) 722-9909.

(a) *Eland Energy, Inc. v. Rowden Oil & Gas, Inc.*, 914 S.W.2d 179 (Tex. App.—San Antonio 1995, writ denied).

(b) The case involved a dispute over the meaning of language in an oil-and-gas-lease assignment and related documents between subsequent claimants under the lease. Eland asserted that the assignment was a conditional assignment of the entire interest in lease, but with a covenant to assign undeveloped portions back, thus being an agreement subject to the Texas four-year statute of limitations, because the suit was one for breach of a contract to reconvey. Rowden argued that the suit was one to quiet title and thus not burdened by a statute of limitations.

(c) I represented Eland Energy, Inc.

(d) I prepared all pleadings in the case, divided discovery responsibilities between myself and co-counsel, served as lead counsel at all hearings before the trial court, primarily prepared, with assistance of co-counsel, the appellate brief, and argued the case before the court of appeals. I supervised the preparation of the application for writ of error to the Texas Supreme Court. The case was decided unfavorably to Eland by the trial and appellate courts.

(2) *Denton v. Texas Department of Public Safety Officers Association*, 200th Judicial District Court, Travis County, Texas; Trial Judge: Joe B. Dibrell, Jr.; Appellate Judges—Third Court of Appeals: Chief Justice Jimmy Carroll, Justices Mack Kidd & Bea Ann Smith; Appellate Judges—Supreme Court: Chief Justice Thomas A. Phillips, Justices Craig T. Enoch, Jack Hightower, Nathan L. Hecht, John C. Cornyn, & Rose Spector (majority opinion), Raul A. Gonzalez, Bob Gammage, & Priscilla Own (concurring opinion); Co-Counsel: Amanda Foote Schmidt, 3406 Glenview Avenue, Austin, Texas 78703, (512) 371-7309; Counsel for other Parties: Guy M. Hohmann, 100 Congress Avenue, Suite 1600, Austin, Texas 78701, (512) 472-5997; Susan J. Dasher, 1107 1/2 Nueces Street, Austin, Texas 78701, (512) 478-0834; Kim D. Brown, 1310 Ranch Road 620 South, Suite 204, Lakeway, Texas 78734, (512) 263-7450.

(a) *Texas Dep't of Pub. Safety Officers Ass'n v. Denton*, 897 S.W.2d 757 (Tex. 1995), *aff'g Denton v. Texas Dep't of Pub. Safety Officers Ass'n*, 862 S.W.2d 785 (Tex. App.—Austin 1993).

(b) Lane Denton was the executive director of the Texas Department of Public Safety Officers Association (“DPSOA”), which terminated him under suspicion of misappropriating DPSOA funds. Under investigation by the district attorney, Denton was subpoenaed to appear before a state grand jury examining DPSOA’s allegations. The day he was to appear, he filed suit against DPSOA and others on several tort and contract grounds, all involving allegations of wrongful termination. During the pendency on Denton’s suit, he was indicted by the grand jury for misappropriating funds of DPSOA. He refused to produce documents, answer questions at his deposition, or otherwise provide information, and sought to abate his civil suit on the basis that he would risk self incrimination in going forward. DPSOA moved to dismiss the suit on the basis of Denton’s refusal to make discovery. The trial court granted the motion and dismissed Denton’s action. The court of appeals reversed and reinstated the case. DPSOA petitioned the Texas Supreme Court for writ of error, which the court granted. In affirming the court of appeals, the supreme court, for the first time, set forth the test that should be followed by a trial court in determining an appropriate sanction for offensive use of a constitutional privilege in a civil action.

(c) I represented the Texas Department of Public Safety Officers Association and several of its officers, directors, and employees.

(d) I handled all aspects of the case, including the appeals, drafting defensive pleadings, engaging in discovery, and drafting and urging the motion to dismiss before the trial court. I prepared the brief and argued the case before the court of appeals and prepared the application for writ of error and argued the case before the supreme court. After the supreme court remanded the case to the trial court, the case was settled.

(3) *Compton v. Davis Oil Company*, United States District Court for the District of Wyoming; Trial Judge: Clarence A. Brimmer, Jr.; Co-counsel: Bruce A. Salzburg; 314 East 21st Street, Cheyenne, Wyoming 82003, (307) 634-2240; Counsel for other Parties: Thomas D. Roberts, P.O. Box 668, Cheyenne, Wyoming 82003-0668, (307) 772-2124.

(a) *Compton v. Davis Oil Co.*, 607 F.Supp. 1221 (D. Wyo. 1985).

(b) The Compton family and the Lewis family each claimed rights to the minerals under a tract of land in Campbell County, Wyoming. Their claims originated from a common source, Dave Lewis, who had acquired fee title to the property in 1926. At the time, Dave Lewis was not married. In 1930 Lewis conveyed the property to T.L. Platt, but reserved “all oil, minerals and gas.” The deed to Platt was granted and executed by “Davis Lewis and Nettie Lewis, husband and wife, grantors.” Dave Lewis died intestate in 1935. The property was never the subject of probate. Dave and Nettie had no children, although Nettie Lewis had been previously married to Lewis Blanchard Johnson and had a son while married to Johnson. The Compton

family were Nettie Lewis's heirs at law through Johnson. The Lewis family were Dave Lewis's heirs at law through his siblings. Direct evidence of neither a divorce between Nettie Lewis and Johnson nor a ceremonial marriage between Dave and Nettie Lewis was discovered. The dispositive issues in the case concerned proving both a divorce of Johnson and Nettie Lewis and a common-law marriage of Dave and Nettie Lewis by circumstantial evidence.

Beginning in 1954, Nettie Lewis executed several oil and gas leases of the minerals. Nettie Lewis died testate in 1961, devising the property to her son, Lyle. Lyle died in 1967. In the 1960s and 1970s, Lyle's daughter and granddaughters (the Comptons) executed several oil and gas leases and division orders. In the 1970s, the Lewis family also began executing oil and gas documents. This litigation by the Comptons resulted to quiet title to the mineral interest.

The United States District Court, in what could be termed a primer on how to circumstantially prove a divorce and subsequent marriage, carefully reviewed all of the evidence of all of the parties and arrived at the conclusion that the Comptons should prevail. The case's significance today is found in the guidance that it gives real estate and oil and gas attorneys in proving and quieting title to both surface and mineral estates.

(c) I represented the heirs of Nettie Lewis, the Compton family.

(d) I handled every aspect of the case. I filed the original suit in United States District Court in Cheyenne, Wyoming and removed a related case pending in state court in Gillette, Wyoming to federal court. I conducted and participated in all discovery. I drafted all pleadings and attended all pretrial hearings. I prepared all briefing. I tried the case on behalf of the Compton family and was successful in obtaining a judgment for them.

(4) *Weisz v. Spindletop Oil & Gas Company*, 101st Judicial District Court, Dallas County, Texas; Trial Judge: Craig T. Enoch; Appellate Judges—13th Court of Appeals: Justices Raul A. Gonzalez, Norman L. Utter, & Gerald T. Bissett; Counsel for other Parties: Jeffrey L. Wood, PMB 600, 18352 Dallas Parkway, Suite 136, Dallas, Texas 75287, (972) 248-8186.

(a) *Weisz v. Spindletop Oil & Gas Co.*, 664 S.W.2d 423 (Tex. App.—Corpus Christi 1983, no writ).

(b) Spindletop was a seller of fractional undivided interests in oil and gas properties to investors. Although such interests are securities, Spindletop had not registered them under the Texas state securities act, believing the interests to be exempt from such registration. In an earlier action, the State of Texas had sued Spindletop and

related companies and had obtained the appointment of a receiver over the company. Although the receiver was later discharged, the court held that the interests were not exempt from registration and that Spindletop had been the seller of unregistered securities. Weisz and others, purchasers of oil and gas interests from Spindletop, then sued Spindletop for rescission of their agreements, costs, and attorney's fees. Spindletop moved for summary judgment on the basis that the suit was barred by the Texas three-year statute of limitations. Weisz conceded that the action had been brought more than three years after the last sale, but argued that the statute of limitations had been tolled during the pendency of the receivership.

(c) I represented Spindletop Oil & Gas Company.

(d) I handled all facets of the litigation, preparing all pleadings, conducting all discovery, arguing Spindletop's motion for summary judgment in the trial court, preparing Spindletop's appellate brief and arguing the case before the court of appeals. Spindletop prevailed in both the trial and appellate courts.

(5) *Hooks v. Texas Department of Water Resources*, 250th Judicial District Court, Travis County, Texas; Trial Judge: Hume Cofer; Appellate Judges—Third Court of Appeals: Chief Justice John C. Phillips, Justices Bob E. Shannon & Robert O. Smith; Appellate Judges—Supreme Court: Chief Justice Joe R. Greenhill, Justices Jack Pope, James G. Denton, Charles W. Barrow, Robert M. Campbell, Franklin S. Spears, C.L. Ray, & James P. Wallace; Appellate Judges—Third Court of Appeals (on remand from supreme court): Chief Justice John C. Phillips, Justices Bob E. Shannon, & John E. Powers; Counsel for other Parties: L.A. Greene, Jr., P.O. Box 66609, Houston, Texas 77266, (713) 529-7700; Pamela E. George, 1303 San Jacinto Street, Houston, Texas 77002, (713) 646-1882; James D. Marston, 44 East Avenue, Suite 304, Austin, Texas 78701, (512) 478-5161; Brian E. Berwick, Mail Code 015, P.O. Box 12548, Austin, Texas 78711, (512) 475-4005.

(a) *Hooks v. Texas Dep't of Water Res.*, 611 S.W.2d 417 (Tex. 1981), *rev'g* 602 S.W.2d 389 (Tex. App.—Austin 1980), *on remand* 645 S.W.2d 874 (Tex. App.—Austin 1983, writ *ref'd n.r.e.*).

(b) George H. Musterman, Inc. was granted a waste-discharge permit by the Texas Department of Water Resources that allowed it to discharge treated effluent from a wastewater treatment plant into Willow Creek in Houston, Texas. It was Musterman's plan to build a residential subdivision. Hooks, a downstream riparian landowner, contested the application before the Department and appealed the Department's order granting the permit to the trial court. The trial court upheld the Department's action. Hooks appealed to the court of appeals, which reversed the trial court's judgment and dismissed the appeal on the basis that Hooks lacked standing to contest the Department's order. The supreme court reversed the court of appeals, holding that Hooks, as a downstream riparian landowner affected by a decision of the

Department, had standing to contest the order and to appeal its being granted. The court remanded the case to the court of appeals, which affirmed the trial court's affirmation of the Department's grant of the permit.

(c) I represented George H. Musterman, Inc.

(d) I handled all matters for Musterman, beginning with Hooks's appeal from the Department to the trial court, including drafting pleadings and briefs in the trial and appellate courts and participating in the arguments before those courts. The case was ultimately decided in Musterman's favor.

(6) *Securities & Exchange Commission v. Southwest Coal & Energy Company*, United States District Court for the Western District of Louisiana, Shreveport Division; Trial Judge: Tom Stagg; Appellate Judges—Fifth Circuit: Chief Justice James P. Coleman, Justices Thomas M. Reavley & Joseph W. Hatchett; Co-counsel: C.B. Harrison, Jr. 13101 Preston Road, Suite 413, Dallas, Texas 75240, (972) 934-0147; Counsel for other Parties: James A. Burnett, 1400 Youree Drive, Shreveport, Louisiana 71101, (318) 221-3131; David N. Reed, 901 Main Street, Suite 3700, Dallas, Texas 75202, (214) 744-3700; James Schropp (lawyers.com (Martindale Hubbell) lists one attorney by this name at: 1001 Pennsylvania Avenue NW, Suite 800, Washington, D.C. 20004-2505, (202) 639-7110); Paul Gonson (lawyers.com (Martindale Hubbell) lists one attorney by this name at: 1800 Massachusetts Avenue NW, 2d Floor, Washington, D.C. 20036-1800, (703) 532-4699); Theodore S. Bloch. (lawyers.com (Martindale Hubbell) had no listing for a Theodore Bloch; an internet "people search" revealed a Theodore Bloch, attorney, at 1900 John F. Kennedy Boulevard, Philadelphia, Pennsylvania 19103-1440; (215) 851-8839) (Messrs. Schropp, Gonson, and Bloch were all with the United States Department of Justice at the time of this case. I have seen neither of them since the conclusion of the case and do not know if the addresses given here are for the same persons.)

(a) *SEC v. Southwest Coal & Energy Co.*, 624 F.2d 1312 (5th Cir. 1980), *rev'g in part, aff'g in part* 439 F. Supp. 820 (W.D. La. 1977).

(b) Southwest Coal & Energy Company ("Southwest") sold undivided fractional interests in oil and gas wells to investors. Such interests were securities as defined by the federal Securities Act of 1933 (the "33 Act"). However, the interests and their sales were exemption from registration through an exemption commonly known as "Schedule D." To claim the exemption, a seller was required to file an offering circular with the Securities and Exchange Commission, providing information about the seller and the proposed oil and gas venture. If the seller was subject to an injunction obtained by a securities regulatory body, state or federal, the exemption was unavailable. After filing several offering circulars with the SEC, Southwest was sued by the Texas State Securities Board for alleged violations of the Texas Securities Act. At the Board's request, a Texas state district court issued a temporary



injunction against Southwest and its officers and directors, enjoining them from future sales in Texas. Later, the SEC suspended Southwest's Schedule D exemptions. Because Southwest sold oil and gas interests in Louisiana *after* the issuance of the Texas state-court injunction, but *before* the SEC suspended the exemption, the SEC alleged that Southwest and certain of its officers and directors had violated the 33 Act. Although there were other issues in the case, the issue of importance was whether the issuance of the state-court injunction *ipso facto* destroyed the previously obtained federal-securities-law exemptions. The federal district court held that it did. The Fifth Circuit Court of Appeals reversed. This case established that a post-filing occurrence that would have rendered an exemption unavailable for subsequent offerings does not result in the dissolution of the previously acquired exemption. Thus, the sales that occurred between the issuance of the injunction, but before the SEC formally suspended the exemption, were not in violation of the 33 Act.

(c) I represented two individuals who were shareholders and directors of Southwest Coal & Energy Company and had been named by the SEC as defendants in this case.

(d) I represented the individuals from the time the SEC sued, handling all aspects of the case, including discovery and pleadings drafting. I tried the case to the trial court and prepared the brief and argued the case before the Fifth Circuit. The trial court decided issues concerning violations of the antifraud provisions of the 33 Act, as well as the above-described issue in favor of the SEC. He decided another antifraud allegation against the SEC. Both sides appealed. The final resolution by the Fifth Circuit affirmed all of the antifraud determinations of the trial court, but reversed the trial court's ruling on the exemption.

(7) *State of Texas v. EnnTex Oil & Gas Company*, 14th Judicial District Court, Dallas County, Texas; Trial Judge: Fred S. Harless; Appellate Judges—6th Court of Appeals: Chief Justice William J. Cornelius, Justices C.L. Ray & Stephen Oden; Counsel for other Parties: Bill Flanary, 1116 Lamar Avenue, Paris, Texas 75460, (903) 785-5521.

(a) *EnnTex Oil & Gas Co. v. State*, 560 S.W.2d 494 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.), *appeal dism'd, lack of substantial federal question* 439 U.S. 961, 99 S.Ct. 445, 58 L.Ed.2d 419 (1978).

(b) EnnTex was a seller of fractional undivided interests in oil and gas leases. Such interests are securities under both state and federal law. However, the interests were exempt from federal registration by virtue of an exemption commonly referred to as "Schedule D." Schedule D provided that if a seller sold only a limited number of interests and provided information to the Securities and Exchange Commission and the investors by means of an offering sheet, the seller did not have to register the securities. Historically, the Texas State Securities Board had taken the position that

if the seller was located within Texas, but sold interests only to investors located without Texas, and had qualified federally pursuant to Schedule D, the interests were not subject to registration in Texas. In 1975 the Texas State Securities Commissioner changed the position and sued numerous companies, including EnnTex, for failing to register in Texas the interests that they were selling. EnnTex asserted that, as its sales activities were solely in interstate commerce, further regulation by Texas placed an unreasonable restraint on interstate commerce. The trial and appellate courts ruled in favor of the state, holding that Texas had an independent right to regulate securities sales and that such regulation would be upheld where “its effects on interstate commerce are incidental unless the burden imposed on such commerce is clearly excessive in relation to the putative benefits.”

(c) I represented EnnTex Oil & Gas Company and several related entities and individuals.

(d) I was substituted as counsel after the state suit had been filed in the trial court. From that point forward, I handled all aspects of the litigation, conducting and participating in all discovery, drafting all pleadings and briefs in the trial court, appearing at all hearings, and acting as trial counsel. I prepared all appellate briefs, including the brief to the court of appeals, the application for writ of error to the Texas Supreme Court, and the jurisdictional statement to the United States Supreme Court. The disposition of the case was against EnnTex and in favor of the state.

(8) *Royer v. Ritter*, 58th Judicial District Court, Jefferson County, Texas; Trial Judge: Jack Brookshire; Appellate Judges—9th Court of Appeals: Chief Justice Martin Dies, Jr., Justices Homer E. Stephenson (concurring) & Quentin Keith (dissenting); Counsel for other Parties: V. Lane Nichols, P.O. Box 3827, Beaumont, Texas 77704, (409) 880-3715; Mary Jo Carroll (for *amicus curiae* on appeal) (deceased).

(a) *Royer v. Ritter*, 531 S.W.2d 448 (Tex. Civ. App.—Beaumont 1975, writ ref’d n.r.e.).

(b) Texas state law provided that liquor stores could remain open until 9:00 p.m. Although Texas law places most liquor regulation in the hands of the state, cities are given some regulatory powers. The City of Beaumont passed an ordinance that required liquor stores within the city limits of Beaumont to close at 8:00 p.m. Several liquor-store owners sued the mayor and city council members of Beaumont, seeking to have the ordinance declared void on the basis that the legislature had not delegated to Texas cities the power to regulate the hours of operation of liquor stores.

(c) I represented the liquor-store owners contesting the ordinance.

(d) I handled all aspects of the case, including the original filing of the suit in the

trial court and the drafting of pleadings and briefs and trying the case to the trial court. Following an unfavorable decision, I prepared and argued the case before the court of appeals. The court of appeals decided the case favorably to the liquor-store owners and struck down the ordinance.

(9) *Bloom v. Texas State Board of Examiners of Psychologists*, 167th Judicial District Court, Travis County, Texas; Trial Judge: Thomas D. Blackwell; Appellate Judges—Third Court of Appeals: Chief Justice John C. Phillips, Justices Trueman E. O’Quinn & Bob E. Shannon (dissenting); Appellate Judges—Texas Supreme Court: Justices Jack Pope, Zollie Steakley, Sears McGree, James G. Denton, & Price Daniel, Chief Justice Joe R. Greenhill, Justices Ruell Walker & Thomas M. Reavley (dissenting); Co-Counsel: Arthur Mitchell (deceased); Counsel for other Parties: J.C. Davis, 2905 Bowman Avenue, Austin, Texas 78703, (512) 478-4116; Pat Bailey (unknown; the State Bar of Texas has no listing for Mr. Bailey); Harvey C. Green (unknown; the State Bar of Texas has no listing for Mr. Green).

(a) *Bloom v. Texas State Bd. of Exam’rs of Psychologists*, 492 S.W.2d 460 (Tex. 1973), *rev’g* 475 S.W.2d 374 (Tex. Civ. App.—Austin 1972).

(b) In the late 1960s, the Texas legislature passed a statute regulating the practice of psychology. At the time of the act’s passage, Bloom was a practicing psychologist. The act contained a grandfather clause, allowing persons with a master degree in psychology and who had practiced psychology for at least eight years to obtain a license without an examination. The Texas State Board of Examiners of Psychologists denied Bloom’s application for a license under the grandfather clause. The Board took the position that because the statute said the Board “may” license someone who met the grandfathering qualifications, the Board had discretion to deny the license on any other basis it saw fit. Bloom sued the Board, asserting that the Board had no discretion if the grandfather qualifications were satisfied, and sought a writ of mandamus directing the Board to issue him a license.

(c) I represented Wallace Bloom.

(d) I handled all aspects of Bloom’s case. I prepared the trial pleadings and filed his suit in the trial court. I prepared all other pleadings, motions, and briefs in the trial court, and conducted all discovery. I prepared Bloom’s brief on appeal to the court of appeals and argued his case before that court. I prepared his application for writ of error to the supreme court and brief to that court, and argued his case to the supreme court. I prepared his motion for rehearing to the supreme court. On motion for rehearing, the supreme court conditionally issued the writ of mandamus, holding that, as Bloom had satisfied the statutory requirements for a license, the Board must license him.

(10) *State of Arkansas v. Hill*, Circuit Court of Howard County, Arkansas; Trial Judge:

Bobby Steel; Appellate Judges—Arkansas Supreme Court: Justices George Rose Smith, Lyle Brown, John A. Fogleman, J. Fred Jones, Conley Byrd, & J. Frank Holt; Chief Justice Carleton Harris (dissenting); Co-Counsel: A.J. Mobley, 128 East Main Street, Russellville, Arkansas 72811, (501) 968-6253; William F. Smith, Jr., 122 South Commerce Street, Russellville, Arkansas 72811, (501) 968-4020; Counsel for other Parties: George E. Steel, 102 North Main Street, Nashville, Arkansas 71852, (870) 845-1870; Ray Thornton (unknown; the State Bar of Arkansas has no listing for Mr. Thornton); James A. Neal (unknown; the State Bar of Arkansas has no listing for Mr. Neal).

(a) *Hill v. State*, 487 S.W.2d 624 (Ark. 1972).

(b) Thomas Hill was indicted by a Howard County, Arkansas grand jury for the criminal offense of disposing of property subject to a lien. Hill had purchased a herd of cattle and financed the transaction through the Nashville (Arkansas) Production Credit Association in late 1969. It was undisputed that Hill had sold the cattle. As a defense, Hill asserted that he had the consent of the PCA to sell the cattle. At trial he requested that the trial court charge the jury that "consent may be express or implied from the conduct of the parties." The trial court refused the requested charge, and the jury convicted. On appeal the Supreme Court of Arkansas held that such an instruction must be given, if properly requested.

(c) I represented Thomas Hill.

(d) I consulted on pleadings and motions filed in the trial court and maintained the day-to-day contact with the client. I appeared at pretrial hearings. Arkansas counsel did the primary drafting work and was lead at the pretrial hearings. We shared responsibility during trial. I assisted in the brief on appeal. Hill's conviction was reversed and remanded to the trial court. Hill worked out a pay-out agreement with the PCA, and the case was never retried.

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

In the late 1970s and early 1980s I acted as trustee's counsel to a number of Austin area lending institutions involved in tax-exempt bond offerings. I would review all documents on the trustee's behalf, whether prepared by bond counsel, user's counsel, or otherwise. I would prepare and sign trustee's counsel opinion letters and would attend and participate in the closings. During this same time period, one of my partners and I prepared and obtained registration for a public securities offering for a local bank holding company. Most recently,

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as a member of the National Conference of Commissioners on Uniform State Laws, I served as a member of the drafting committee for revisions to the Uniform Securities Act.

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

None.

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

The only areas that are likely to pose potential conflicts are stock ownership and organizational affiliations. I propose to provide the clerk's office with a schedule of companies in which I own stock and a list of the organizations to which I belong, in order that the clerk's office can assign cases in which those entities are parties to another judge. In addition, I will have my judicial assistant screen all pleadings against similar lists to ensure that no parties have been added that would create a conflict. If and when the stock market rebounds, I intend to dispose of some of the securities that I now hold in order to lessen the likelihood of conflict. In all such instances, I will follow the guidelines of the Code of Judicial Conduct.

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

No.

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

See attached financial disclosure report.

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

See attached net worth statement.

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

Yes:

- (1) Surrogate Speaker for George H.W. Bush, 1988 & 1992 Presidential Campaigns:
- (2) Surrogate Speaker for George W. Bush, 1994 Gubernatorial Campaign.

## 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	134,340	Notes payable to banks-secured	
U.S. Government securities-add schedule	100	Notes payable to banks-unsecured	
Listed securities-add schedule	408,142	Notes payable to relatives	
Unlisted securities-add schedule		Notes payable to others	
Accounts and notes receivable:		Accounts and bills due	6,708
Due from relatives and friends		Unpaid income tax	
Due from others		Other unpaid income and interest	
Doubtful		Real estate mortgages payable-add schedule	414,564
Real estate owned-add schedule	1,024,000	Chattel mortgages and other liens payable	
Real estate mortgages receivable		Other debts-itemize:	
Autos and other personal property	200,000	Jaguar Credit	20,849
Cash value-life insurance	60,909		
Other assets itemize:			
Clark, Thomas & Winters 401(k) Plan	122,979		
Employees Retirement System of Texas	32,375		
Gold Coins	34,075	Total liabilities	442,121
		Net Worth	1,574,844
Total Assets	2,016,965	Total liabilities and net worth	2,016,965
CONTINGENT LIABILITIES - None.		GENERAL INFORMATION	
As endorser, comaker or guarantor		Are any assets pledged? (Add schedule) No.	



On leases or contracts		Are you defendant in any suits or legal actions? No.	
Legal Claims		Have you ever taken bankruptcy? No.	
Provision for Federal Income Tax			
Other special debt			

**FINANCIAL STATEMENT**

**SCHEDULES**

A. U.S. Government Securities:

1. United States Savings Bond Series EE \$ 100.00

B. Listed Securities – Stocks:

1. Agere Systems Inc. Class A Common (2)	\$ 3.24
2. Agere Systems Inc. Class B Common (105)	159.60
3. American Express Company (300)	10,698.00
4. Anheuser Busch Companies Inc. (400)	19,532.00
5. AOL Time-Warner Inc. (225)	2,639.25
6. AT&T (28,652)	493.67
7. Avaya Inc. (33)	69.30
8. Boeing Company (323,942)	8,714.04
9. Bristol Meyers Squibb Co. (200)	4,484.00
10. Cass Information Systems Inc. (105)	2,840.25
11. Charles Schwab Corporation (300,898)	2,253.73
12. ChevronTexaco Corporation (291,3177)	18,851.17
13. Citigroup Inc. (311,981)	10,669.75
14. Comcast Corporation (45)	1,289.25
15. DaimlerChrysler AG (100)	2,900.00
16. Dell Computer Corporation (2000)	56,280.00
17. ExxonMobil Corp. (217,618)	7,627.51
18. Ford Motor Company (473,797)	3,406.60
19. Hewlett-Packard Company (126)	2,066.40
20. Home Depot Inc. (150)	3,585.00
21. Intel Corp. (400)	7,224.00
22. J.P. Morgan Chase & Co. (374,4853)	8,448.39
23. Lehman Brothers Holdings Inc. (40)	2,346.00
24. Loral Space & Communications Ltd. (100)	31.00

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25. Lucent Technologies (574.3166)	907.42
26. Microsoft Corporation (400)	\$ 10,372.00
27. Pioneer Drilling Company (500)	1,610.00
28. Rogers Cantel Mobile Communications Inc. (100)	1,424.00
29. Royal Dutch Petroleum Company (400)	16,060.00
30. Southwest Airlines Inc. (5600)	76,440.00
31. Spindletop Oil & Gas Co. (3334)	1,333.60
32. Target Corp. (200)	5,880.00
33. Travelers Property Casualty Corp. Class A Common (13.036)	185.76
34. Travelers Property Casualty Corp. Class B Common (26.072)	375.18
35. Unocal Corp. (113.649)	2,910.55
36. Viacom Inc. Class B Common (109.066)	4,253.57
37. Verizon Communications (79.1149)	2,848.14
38. Visteon (33.523)	190.41
39. Walt Disney Company (313.410)	5,331.10
40. Wells Fargo & Co. (100)	4,685.00
41. WorldCallNet Inc. (1694)	.17
42. Zimmer Holdings Inc. (20)	979.40

C. Listed Securities – Mutual Funds & Money Markets:

1. AIM Global Science & Technology Fund Class A (1248.05)	\$ 6,090.48
2. Fidelity Blue Chip Growth Fund (509.476)	16,231.91
3. Fidelity China Regional Fund (241.354)	2,510.08
4. Fidelity Municipal Money Market Fund (4028.44)	4,028.44
5. Fidelity U. S. Government Reserves Fund (5603.99)	5,603.99
6. Great Hall Investment Funds (13,810.63)	13,810.63
7. Vanguard Growth Index Fund (1500.1575+)	33,267.52
8. Vanguard Intermediate-Term Tax-Exempt Bond Fund (486.678)	6,657.76
9. Vanguard Prime Money Market Fund (6086.66)	6,086.66

D. Listed Securities – Bonds:

1. Lower Colorado River Authority Revenue Mini-Bond Series 1994	\$ 500.00
2. Lower Colorado River Authority Revenue Mini-Bond Series 1995	1,000.00

E. Other:

1. Clark, Thomas & Winters 401(k) Plan (as of 12/31/2002)	
a. Franklin Real Estate Securities Fund	\$ 14,174.64
b. Washington Mutual Investors Fund	29,792.11
c. Putnam New Opportunities Fund	46,105.73
d. Franklin Balance Sheet Investment Fund	32,906.81

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2. Employees Retirement System of Texas (as of 8/31/2002) \$ 32,374.58

F. Real Estate Owned:

1. Residence, Austin, Travis County, Texas \$ 975,000.00

2. Oil & Gas Working Interests, San Juan County, New Mexico \$ 49,000.00

G. Real Estate Mortgages Payable:

1. Wells Fargo Home Mortgage, Inc. \$ 414,563.68

As of March 17, 2003 (unless otherwise noted)

## III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

Although I have not done a large amount of *pro bono* work, what I have done has been steady throughout my practice, usually handling minor matters, such as divorce or licensing problems, for persons who were friends or referred to me by friends and who could not afford an attorney. I have also done *pro bono* work for my church. I generally made no attempt to keep records of these activities. However, two examples of cases that were out of the ordinary involved (1) an appeal from a denial of social-security benefits and (2) a civil-rights action against a Texas county on behalf of a jail inmate alleging an Eighth Amendment conditions-of-incarceration case. In the social-security case, a woman had suffered a double aneurysm in her brain, rendering her incapable of performing her normal job as a high-school teacher. She had applied for disability benefits, had been turned down, and sought my help. I appealed the decision, and tried it before a federal administrative law judge, who awarded the benefits. I did not charge a fee for my services and estimate that I expended approximately one hundred hours in the case as well as a small amount of out-of-pocket expenses. In the Eighth Amendment case, I was asked to represent an inmate of the state prison who had filed a *pro se* civil-rights action, which one of our United States Magistrate Judges felt may have established a *prima facie* case. Over a lengthy period of time, I repleaded the case, conducted discovery, visited with the client at his place of incarceration, which was a long distance from Austin, and, finally, represented him in a jury trial. Although the suit was unsuccessful, the client expressed his gratitude to both me and the court for being allowed to have his day in court. I did not charge a fee for my services and estimate that I expended approximately two hundred hours on the case as well as my firm's absorbing all out-of-pocket expenses, including the cost of depositions, which approximated \$1000.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates - through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

No.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

Yes, although I do not know if the committee recommended my nomination. Persons interested in becoming federal judges were requested to submit an application to Texas's two United States Senators on forms provided by them. I did so, and was later notified that I had been selected for an interview before the Senators' screening committee. I did so interview. Sixteen persons were interviewed for four benches in the Western District of Texas. I was later advised that the committee ranked the persons interviewed. The committee's rankings, along with comments of the committee members, were forwarded to the senators. The senators determined whom they would personally interview, in Washington, for the four positions. I was interviewed by the senators. I do not know where I fell in the rankings submitted to them by the screening committee. Following my recommendation to the president, I was interviewed by the White House, the FBI, and the Department of Justice, and completed numerous forms and questionnaires. I was nominated on May 1, 2003.

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

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The role of any court with any case is to decide only the particular controversy that is properly before it. In doing so, the court should decide the case on the most narrow basis that will resolve the controversy between the parties to the case. Courts that restrict themselves to this approach will seldom be criticized for being "activist courts." However, it is also the role of the federal judiciary to determine the constitutionality of acts of the Congress. Often, fulfilling this constitutional function subjects the courts to criticism. To lessen the criticism, the court should not only fashion its opinion narrowly, but explain its reasoning. The courts are the least democratic of our three great governmental institutions and should, where at all possible and consistent with the courts' constitutional and congressional mandates, refrain reaching solutions better left to the legislative and executive branches—the more democratic institutions.

Senator GRAHAM. Kind of everybody's Oscar moment. Thank you very much.

This is an important time to realize the ones who are most important to you, and that is your family. All the Senators have spoken glowingly, and House members have spoken glowingly of each of you. I don't want to prolong this, but I think for the sake of what we are all here to do today, I will just ask a general question. Each one of you can answer it as briefly as possible.

One of the things that we have to judge up here, as being in the advise and consent role, is judicial philosophy. I am a big believer that the President's nominees are given great weight. But I think it is important to the people of the country and the people of the Committee to have some understanding of how you view your role. You obviously have all had experience. But if you could, just in a minute or two, kind of summarize your philosophy of what it is like to be a judge and what you want to bring to the bench at the Federal level. We will start with Judge Brack.

Judge BRACK. Thank you, Mr. Chairman.

I was 40-years-old having served just in private practice for 19 years prior to going on the bench. Was asked by a district judge in Clovis to consider filling his vacancy or being suggested to fill his vacancy when he retired. And was struck for the very first time, with the notion of a career, a life spent in public service. Up to that point I had been very happy to serve my clientele, and I hope that I served them well, but I was struck with the notion of public service.

And the opportunity to serve in the Federal Judiciary is something that I consider just among the highest honors that you can be accorded, and one of the best places to serve the public. I didn't get to—I registered for the selective service. I didn't get to serve. I wasn't selected back in those days. There was a lottery.

This is an opportunity to serve my country, and I'm excited about it and honored by it.

In terms of judicial philosophy, early I was asked in this process what my judicial philosophy was, and I was so far out of this loop, never had considered being a Federal judge to that point. I didn't know I was being asked to describe whether I was a strict constructionist or a judicial activist. I told the person that asked that I take my judicial philosophy from a prophet in the Old Testament, Micah, due justice, love mercy and walk humbly with your God. And that says it all for me.

Due justice means due process for everybody that comes in front of you. Treat them fairly, treat them with respect according to law. All justice needs to be tempered by mercy, and this is an exalted position that you are being asked to confirm us in today. I think with that tremendous power comes the need to be humbled by it and stand in awe of it. And that's my philosophy.

Thank you, Mr. Chairman.

Senator GRAHAM. Pretty tough act to follow there. Thank you very much, very well said.

Judge Der-Yeghiayan?

Judge DER-YEGHIAYAN. Mr. Chairman, thank you for giving me opportunity to discuss my judicial philosophy based on my background. I am of Armenian heritage. I was born in Syria and was

raised in Lebanon. I grew up in a modest home with my parents and three siblings. We did not have much, but my parents instilled in me the values of honesty, fairness and a strong work ethic. I have lived by those values throughout my professional and personal life.

As an immigrant to this country, I was given a home, a belonging, and the opportunity for higher education.

After graduation from law school, I dedicated my entire life to give something back to this country through public service, first, 22 years as a lawyer for the Government, and in the past few years as a judge.

As a judge, I have demonstrated my dedication to duty, my adherence to the rule of law, and my unwavering commitment to the notions of fairness. I cannot think of a higher or more noble calling than serving as a Federal judge. As a Federal judge, I will uphold the Constitution faithfully, I will apply the laws of Congress faithfully, and I will follow Supreme Court precedents faithfully. That is my judicial philosophy.

Senator GRAHAM. Thank you very much.

Judge Flanagan?

Judge FLANAGAN. Thank you, Mr. Chairman. I believe a judge's role is a limited one, to interpret and to apply the law, and also qualities of temperament and integrity are exceedingly important. I believe that a dose of common sense is also a very useful quality and a necessary quality for a judge to have.

I echo my colleagues' remarks concerning a willingness and understanding that it is my duty to faithfully follow precedents set forth by the Supreme Court and my circuit, and I pledge to you that I will uphold that duty and every other incumbent on me.

Thank you.

Senator GRAHAM. Thank you very much.

Judge Suko?

Judge SUKO. I think I would supplement those remarks, and there is none that I can disagree with so far. But I would start this way, by saying that I believe that my philosophy and my belief begins with a respect for the law and for all people who come before it. And I add the words "no matter what."

I say that because I believe that temperament is extremely important. I think judges are in a position to affect lives, both adversely sometimes, and sometimes for the good. I think the issues that come before the courts are important ones. Part of the privileges that I have had up to this point in my career have been to serve as a mediator in Federal district court cases, and I have enjoyed very much the opportunity to bring resolution where resolution has not occurred previously.

I think a judge has to be willing to take a second look on occasion, to reconsider positions, to be open-minded, to be fair, to be diligent, and to recognize that the human condition is not perfect.

With that in my mind, I set those as goals that I would continue to hopefully aspire to meet, and if I am confirmed by this body to a Federal district court judgeship, I intend to fully follow those types of precepts.

Senator GRAHAM. Thank you, sir.

Judge Yeakel?



Judge YEAKEL. Thank you, Mr. Chairman, for giving us the opportunity to answer questions very important, I know, to the Senate and also the people of this country.

I have been fortunate for the past 5 years to serve on the Texas Court of Appeals and during that period of time have never really thought about putting a tag on judicial philosophy. And if I'm fortunate enough to be confirmed by the Senate of the United States to the position of United States district judge, that will again be my goal.

I think that what I strive to do and what I have strived to do over the past 5 years is to resolve the issue that is in front of the court by strict adherence to precedent and the canons of statutory construction. And if you do that, you seldom get in trouble. It is very difficult for me to improve upon what my four colleagues have said today. I tried lawsuits for 29 years and appealed them before I went on the court of appeals. I echo their remarks that judicial temperament is of great importance, that litigants and their attorneys should be treated not only fairly but courteously before the courts of this Nation. And I give you that pledge, again, if I'm fortunate enough to get the advice and consent from the Senate.

Senator GRAHAM. I would like the record to reflect that Senator Cantwell was present at the Committee in support of Judge Suko and that is a former Committee member, and we want to acknowledge her input and presence here today.

In summary, I am a lawyer, and I think most lawyers love to be in front of judges that are at least halfway nice and understanding of our failings. And it seems to me from what we have here today very nice people who have had extraordinary backgrounds, understand the humble part of being a judge, which is a big deal to me. And you will all serve our Nation well. This is a demanding, tough job you are about to embark upon. The fact that you were nominated speaks so well of you and your families, and I hope you find the nomination process rewarding. And I am honored to have been the Chairman while you were here.

Thank you for your willingness to serve our country. Thank you very much.

Senator GRAHAM. Panel four, Karen Tandy and Mr. Wray. Raise your right hand. Do each of you solemnly swear that the testimony you are about to give before the Committee is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. WRAY. Yes, sir.

Ms. TANDY. I do.

Senator GRAHAM. Thank you. Do you have an opening statement, Ms. Tandy?

**STATEMENT OF KAREN P. TANDY, NOMINEE TO BE ADMINISTRATOR, DRUG ENFORCEMENT ADMINISTRATION, DEPARTMENT OF JUSTICE**

Ms. TANDY. Yes, thank you so much for permitting me to appear before the Committee today, Senator, and I also want to thank the Senators from Virginia for their statements for the record on my behalf and for the support of Senator Hutchison from Texas.

I am extremely delighted to have my family with me, who were introduced previously: my husband, Steve, and our daughters

Lauren and Kimberly. But I also am privileged to recognize, Senator, a true hero with DEA, and that is Jack Lawn, who is with me today and is not only a hero to DEA but a mentor of mine. As you may recall, he valiantly led DEA through some of its greatest challenges and certainly handled with heroic valor the aftermath of the kidnapping, torture, and killing of DEA Special Agent Enrique Camarena.

It is an honor, Senator, to have been nominated by President Bush, and I am so grateful to the men and women of the Drug Enforcement Administration for being a part of my 25 years of public service and for the possible opportunity to serve this President and warrant the confidence that both President Bush and Attorney General Ashcroft have placed in me.

The opportunity to lead the courageous and enormously talented almost 10,000 men and women of DEA would not have been possible, Senator, without Deputy Attorney General Eric Holder from the prior administration, who gave me the opportunity to work in his office for the last year of that administration, and certainly not without my present boss, Deputy Attorney General Larry Thompson, whose extraordinary leadership has enabled me, along with his support, to restore the OCDEF program to its original mission.

I want to thank you, Senator, and this Committee lastly for your incredible support and valiant efforts in the battle against drugs over the past years and also, Senator, for the assistance of this Committee specifically to DEA over the 30 years of its existence.

If I am so fortunate to be confirmed by this Committee, I pledge to you, Senator, my unwavering support for the President, his goals of reducing drug supply and drug use in this country, and I pledge to do my utmost for the security of this country and for our future generations.

Thank you.

[The biographical information of Ms. Tandy follows:]

## I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)  
Karen P. Tandy (married name: Pomerantz)
2. Address: List current place of residence and office address(es.)  
Home: Annandale, VA. 22003  
Office: 950 Pennsylvania Avenue  
Room 4212  
Washington, DC 20530
3. Date and place of birth.  
10/24/53 – Tarrant County, Texas
4. Marital Status: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).  
Husband – Steven L. Pomerantz, Executive Director for Criminal Justice Technology, Mitretek Systems, 3150 Fairview Park Drive South, Falls Church, VA.
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.  
Texas Tech University, May 1971 to May 1974, BS Education awarded May 1974  
Texas Tech School of Law, May 1974 to May 1977, Juris Doctorate awarded May 1977
6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.  
May 1977 - July 1978, Clerk to U.S. District Court Judge Halbert O. Woodward (deceased), Northern District of Texas, 1205 Texas Avenue, Lubbock, Texas, 79401  
August 1978 - August 1979, Trial Attorney, U.S. Department of Justice, Criminal Division, Organized Crime and Racketeering Section and Office of Special Investigations, 950 Pennsylvania Avenue, Washington, DC 20530

September 1979 - November 1988, Assistant U.S. Attorney, Eastern District of Virginia, Alexandria Division. Chief of Narcotics and Senior Litigation Counsel. (Note – served on detail to the District of Hawaii June 1983 to October 1983). 2100 Jamieson Avenue, Alexandria, VA, 22314

November 1988 - November 1990, Assistant U.S. Attorney, Western District of Washington. Chief of Asset Forfeiture Unit. 601 Union Street, Suite 5100, Seattle, Washington 98101

November 1990 - December 1994, Trial Attorney and Litigation Unit Chief, U.S. Department of Justice, Criminal Division, Asset Forfeiture Office. 1400 New York Ave., Washington, DC 20530

December 1994 - November 1999, Deputy Chief for Litigation and Deputy Chief for Special Operations Division (SOD), U.S. Department of Justice, Criminal Division, Narcotic and Dangerous Drug Section (NDDS). NDDS -- 1400 New York Ave., Washington, DC 20530 and SOD -- 14560 Abion Parkway, Chantilly, VA 20151

November 1999 - current, Associate Deputy Attorney General and Director of the Organized Crime Drug Enforcement Task Forces, U.S. Department of Justice, 950 Pennsylvania Avenue, Washington, DC 20530

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

Not Applicable

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

1971 – Employee Scholarship from Six Flags Over Texas  
1971 – Award from the Daughters of the American Revolution

Attorney General's Award for Distinguished Service  
DOJ Criminal Division Award for Extraordinary Achievement  
Executive Office for United States Attorneys, Director's Award for Superior Performance as an Assistant U.S. Attorney  
Executive Office for United States Attorneys, Special Commendation Award

Awarded Senior Litigation Counsel in the Eastern District of Virginia  
Various DOJ Criminal Division awards for outstanding performance

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

1977 admitted to the Texas Bar and Texas Bar Association  
1985 admitted to the State Bar of Virginia and Virginia Bar Association

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

Girl Scouts of America, Troop Leader, September 1996 - September 2001  
Congregation Adat Reyim, Springfield, VA, member since 1992  
Wakefield Chapel Swim Club, Annandale, VA, member since 1994

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

U.S. District Court for the Eastern District of Virginia, September 1979 to current  
U.S. Court of Appeals for the Fourth Circuit, approximately 1980 to current  
U.S. District Court for the District of Hawaii, approximately June 1983 to current  
U.S. District Court for the Western District of Washington, November 1988 to current

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

Survey, "Labor Law - Fifth Circuit Symposium," 8 Texas Tech Law Review, 1185-1210 (1977)

I have spoken to several parent and community groups about drug demand reduction, including the Fairfax County, VA School Administrators, "We Care" in

Alexandria, VA, and a community group in Winchester, VA. I also have spoken extensively to prosecutors and law enforcement groups regarding criminal law, forfeiture, electronic surveillance, money laundering, and drug enforcement. All of my remarks have been extemporaneous with the exception of the attached draft remarks as follows: the National HIDTA Conference in December 2001, and the OCDETF Financial Investigation Conference in January 2003.

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

Excellent. Last physical was January 2002

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

Not Applicable

15. Legal Career:

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

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

May 1977 - July 1978, Clerk to U.S. District Court Judge Halbert O. Woodward (deceased), Northern District of Texas, 1205 Texas Avenue, Lubbock, Texas, 79401

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

I have not been a sole practitioner.

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

August 1978 - August 1979, Trial Attorney, U.S. Department of Justice, Criminal Division, Organized Crime and Racketeering Section and Office of Special Investigations, 950 Pennsylvania Avenue, Washington, DC 20530

September 1979 - November 1988, Assistant U.S. Attorney, Eastern District of Virginia, Alexandria Division, Chief of Narcotics and Senior Litigation Counsel. (Note – served on detail to the District of Hawaii June 1983 to October 1983). 2100 Jamieson Avenue, Alexandria, VA, 22314

November 1988 - November 1990, Assistant U.S. Attorney, Western District of Washington, Chief of Asset Forfeiture Unit, 601 Union Street, Suite 5100, Seattle, Washington 98101

November 1990 - December 1994, Trial Attorney and Litigation Unit Chief, U.S. Department of Justice, Criminal Division, Asset Forfeiture Office, 1400 New York Ave., Washington, DC 20530

December 1994 - November 1999, Deputy Chief for Litigation and Deputy Chief for Special Operations Division (SOD), U.S. Department of Justice, Criminal Division, Narcotic and Dangerous Drug Section (NDDS). NDDS -- 1400 New York Ave., Washington, DC 20530 and SOD – 14560 Abion Parkway, Chantilly, VA 20151

November 1999 - current, Associate Deputy Attorney General and Director of the Organized Crime Drug Enforcement Task Forces, U.S. Department of Justice, 950 Pennsylvania Avenue, Washington, DC 20530

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

Throughout my government career, from 1979 to current, my practice has focused on criminal law and related civil forfeiture -- primarily illegal drugs, money laundering and violent crime.

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

As a federal prosecutor, my client is the people of the United States. My practice is principally criminal law, with a specialization in drug trafficking, money laundering, and forfeiture.

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

As an Assistant U.S. Attorney, 1979 - 1990 – I appeared in Court frequently. During the period from 1990 to 1994, I moved to the Department of Justice as a Trial Attorney and soon thereafter as a supervisor, handling only a few cases and appearing in court only occasionally. During the period 1994 through 1999, I was a full time supervisor and appeared in court twice. From 1999 to current, I have not appeared in court because I have served in the Department of Justice leadership offices.

2. What percentage of these appearances was in:
- (a) federal court – 99 per cent
  - (b) state courts of record – one to two occasions on sentencing matters
  - (c) other courts.
3. What percentage of your litigation was:
- (a) civil: 5% civil forfeiture 1978 -1988; 70 % civil forfeiture during 1989 - 1990; 25% civil forfeiture 1991 - 1994 (approximate)
  - (b) criminal: 95% criminal prosecutions 1978 -1988 and 30% criminal prosecutions during 1989 - 1990; 75% criminal prosecutions 1991- 1994 and 100% criminal prosecutions 1995 - 1999 (approximate)
4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.



I do not recall my exact number of trials, but I handled at least 25 trials, most of which I served as chief counsel, and argued more than 15 cases in the Fourth Circuit Court of Appeals.

5. What percentage of these trials was:
  - (a) jury -- all but 2 trials
  - (b) non-jury -- 2 trials
  
16. **Litigation:** Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:
  - (a) the date of representation;
  - (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
  - (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

My active trial practice occurred during my tenure as an Assistant U.S. Attorney during the 1980s. Due to the age of these cases, I no longer have the files or the details regarding these prosecutions. Consequently, I have included a list of professional references who have worked with me since 1990.

(1) United States v. Barry Toombs et. al., 82-00151-A, 1982, EDVA, U.S. District Judge Richard Williams. This was an eighteen-month grand jury investigation during which two recalcitrant grand jury witnesses were held in contempt and incarcerated and two other witnesses were convicted of perjury. Approximately 20 defendants, including two attorneys, were charged with a RICO conspiracy to import and distribute 150 tons of marijuana and hashish. I handled the grand jury investigation through conviction. At least six of the defendant leaders fled to Costa Rica during the investigation, which was during the time that Costa Rica had become a safe haven for fugitives. I secured the return of these defendants for prosecution, by traveling to Costa Rica as part of a State Department team to meet with foreign officials. These were the first extraditions from Costa Rica. All of the defendants were convicted and their assets, valued at \$8 million, were forfeited. One of the forfeited assets included a Tiffany lamp collection that was auctioned by Sotheby's in New York for more than \$1 million. Each of the defendants pleaded guilty to felony drug trafficking offenses. One of the leaders of the drug organization pleaded guilty to

the drug kingpin violation known as the continuing criminal enterprise charge and five other leaders pleaded guilty to racketeering charges under RICO.

Government Co-Counsel: AUSA Justin Williams  
2100 Jamieson Ave.  
Alexandria, VA 22314  
703-299-3700

Former AUSA Clarence H. (Bud) Albright, Jr.  
801 Pennsylvania Ave., Suite 620  
Washington, DC 20004  
202-783-7220

Defense Counsel: Tom Green  
Sidley, Austin, Brown & Wood  
1501 K Street, NW  
Washington, DC 20005  
202-736-8069

Honorable A. Raymond Randolph  
U.S. Court of Appeals for the District of Columbia  
E. Barrett Prettyman U.S. Courthouse  
Room 3108  
333 Constitution Avenue, NW  
Washington, DC 20001  
202-216-7425

(2) United States v. Reckmeyer, et. al., 85-00010-A, 1985, EDVA, U.S. District Judge James C. Cacheris. This case resulted from a nineteen-month grand jury investigation involving illegal drug trafficking, money laundering, tax evasion, and trafficking in firearms including machine guns. This criminal investigation was complicated by the bribery of witnesses and, obstruction of the grand jury. Approximately 26 defendants were charged with conspiracy to import and distribute approximately 200 tons of marijuana and hashish, along with other charges against the leaders including conducting a continuing criminal enterprise and tax evasion. The defendants, except for one who remains a fugitive, pleaded guilty to felony drug trafficking and, where charged, to tax offenses. The proceeds of the drug conspiracy and trafficking were forfeited, with the forfeited assets valued at more than \$12 million. I was lead counsel and handled the grand jury investigation through conviction.

Government Co-Counsel: AUSA Kent Robinson  
U.S. Attorney's Office, District of Oregon  
1000 SW Third Avenue  
Portland, Oregon  
503-727-1019

Former AUSA Bill Otis  
c/o Evelyn Rotzler  
2100 Jamieson Avenue  
Alexandria, VA 22314  
703-916-1847

Defense Counsel: Bernard S. Bailor and Stanley Reed for Christopher Reckmeyer

Stanley J. Reed  
Lerch, Early & Brewer  
3 Bethesda Metro Center  
Suite 460  
Bethesda, MD 20814  
301-657-2719

Bernard S. Bailor  
Caplin & Drysdale, Chartered  
One Thomas Circle, N.W.  
Washington, DC 20005  
202-429-3301

John M. Dowd for Robert Reckmeyer  
Akin Gump Strauss Hauer & Feld LLP  
Robert S. Strauss Building  
1333 New Hampshire Avenue, N.W.  
Washington, DC 20036-1564  
202-887-4000

(3) United States v. Leon Durwood Harvey, 85-00224-A, 1986 EDVA, U.S. District Judge Albert V. Bryan, Jr.. The defendant was charged with a conspiracy to import and distribute tonnage quantities of marijuana and hashish, obstruction of justice for bribing a grand jury witness, and firearms offenses. The defendant was a co-defendant of Barry Toombs, but was prosecuted separately because he was a fugitive for a number of years. The defendant, one of the leaders in the drug conspiracy, was tried without a jury and convicted of felony drug offenses involving the distribution of marijuana and hashish. He was acquitted on related gun charges. I handled the grand jury investigation through trial and conviction.

Defense counsel: John Kenneth Zwerling  
Zwerling & Kemler, P.C.  
108 North Alfred Street  
Alexandria, VA 22314  
703-684-8000

(4) United States v. Edward Ford, et. al., 80-00105-A, EDVA, U.S. District Judge Robert Merhige. The three defendants were charged with breaking into the Lorton Reformatory prison to commit the execution style murder of an inmate. One of the co-conspirators pleaded guilty and cooperated after being admitted into the Department of Justice Witness Protection program. The remaining two defendants were convicted of murder by a jury. The underlying trial was complicated when the murder weapon was ruled inadmissible due to law enforcement evidence handling. Corroborating evidence against one of the defendants, who was a look-out, was difficult to obtain, and ultimately relied on repeated forensic tests of soil samples from the murder scene which positively compared with soil samples from the defendant's shoes at the time of his arrest.

Co-Counsel: Former AUSA Joseph J. Aronica  
Duane & Morris  
1667 K St. NW  
Suite 700  
Washington, DC 20006  
202-776-7824

Defense Counsel: P. David Gavin (Defendant Ford)  
200 Monroe Street, #A  
Rockville, MD 20850  
301-279-2700

Thomas Rawles Jones, Jr. (Defendant Ford)  
U.S. Magistrate Judge  
401 Courthouse Square  
Alexandria, VA 22314  
703-299-2122

Alfred D. Swersky (Defendant Germaine Preston Stoddard)  
Alexandria Circuit Court Judge  
520 King Street, 4<sup>th</sup> Floor  
Alexandria, VA 22314  
703-838-4044

Edwin C. Brown, Jr. (Defendant John Elbert Landon)  
6269 Franconia Road  
Alexandria, VA 22310  
703-924-0223

(5) United States v. Tom Burgess, 81-00129-A, EDVA, U.S. District Judge Richard L. Williams. The defendant was convicted by a jury of distributing 5 kilograms of cocaine. The defendant, a Vietnam veteran, unsuccessfully posed a mental competency defense alleging that he committed the drug trafficking offenses due to Post Traumatic Stress Disorder (PTSD) suffered from his military service in

Vietnam. This was among the first attempts to present a Vietnam PTSD defense in the country and the first such defense in the Eastern District of Virginia.

Government Counsel: AUSA Nash Schott  
2100 Jamieson Ave.  
Alexandria, VA 22314  
703-299-3700

Defense Counsel: John Kenneth Zwerling  
Zwerling & Kemler, P.C.  
108 North Alfred Street  
Alexandria, VA 22314  
703-684-9700

(6) United States v. Steve McConnell, 82-00151-A, 1982, EDVA, U.S. District Judge Richard L. Williams. The defendant, a former Department of Justice attorney, was charged with drug conspiracy based upon his laundering of drug proceeds as private counsel to Julian Pernell, a co-defendant of defendant Barry Toombs. The grand jury investigation was complicated by the defendant's creation of offshore corporations and insurance policies to launder the drug proceeds. The criminal investigation against the defendant concluded with the first judicially authorized search of a law firm in the Eastern District of Virginia, which was among the first such searches in the United States. Following unsuccessful motions to suppress the search of his law firm office, the defendant pleaded guilty to aiding and abetting the drug traffickers in the preparation of false tax returns.

Co Counsel: AUSA Justin Williams  
2100 Jamieson Avenue  
Alexandria, VA 22314  
703-299-3700

Former AUSA Clarence H. (Bud) Albright, Jr.  
801 Pennsylvania Ave., Suite 620  
Washington, DC 20004  
202-783-7220

Defense Counsel: Lou Koutoulakas  
Varoutsos & Koutoulakos  
2009 N. 14<sup>th</sup> Street  
Arlington, VA 22201  
703-527-0124

(7) United States v. Durant Berry, 87-00077-A, 1987, U.S. District Court Judge Albert V. Bryan Jr. The Defendant, a prisoner at the Lorton Reformatory, attacked and raped a teacher at the prison. The victim suffered multiple injuries and required particularly sensitive handling to encourage her to be a witness against the

defendant. I handled the investigation and prosecution of the case, which resulted in the defendant pleading guilty to assault with intent to murder.

Defense Counsel – Gregory Bruce English  
526 King Street  
Alexandria, VA 22314  
703-548-8911

(8) United States v. Terry Wright and Anthony Tolliver, 81-00026-A, 1981, U.S. District Court Judge Albert V. Bryan Jr. The Defendants kidnaped and raped a young woman. The case, which pre-dated DNA analysis, was complicated by the lack of eyewitnesses. Both defendants pleaded guilty to rape before trial.

Defense Counsel: Aubrey Strode Brent, Jr.  
Whitestone, Brent, Young & Merrill PC  
10513 Judicial Drive  
Suite 300  
Fairfax, VA 22030  
703-591-0200

(9) United States v. Real Property Identified as 4442 27<sup>th</sup> Ave. West, Seattle, WA, its buildings, improvements, appurtenances, fixtures, attachments and easements and misc items of inventory valued at \$300,000 more or less, C89-1691WD, C90-785WD, WDWA, U.S. District Judge Dwyer. As part of a nationwide enforcement operation against the cultivation of marijuana, the government seized substantial business products and equipment used to facilitate the manufacture of marijuana from the claimant's (Dan Murphy) wholesale business in Seattle. I handled the civil forfeiture case from the investigation and seizure of the products to the ultimate Consent Judgment for Forfeiture in which the property was forfeited in exchange for an agreement not to prosecute criminally the claimant business owner. This case, among the first cases handled by the new forfeiture unit in the U.S. Attorney's Office, was difficult due to limited evidence connecting the defendant property to actual marijuana cultivation sites.

Claimant's Counsel: Lynn Sarko  
Keller & Rohrback LLP  
1201 Third Ave., Suite 3200  
Seattle, WA 98101  
206-623-1900

(10) United States v. Tom Henry et al. (criminal forfeiture only), 3:91-00095, 1991, MDTN, U.S. District Judge John Nixon. I handled the criminal forfeiture ancillary hearing proceedings following the defendant's conviction for medicare and medicaid fraud and money laundering, which further resulted in the criminal forfeiture of the laundered proceeds. The criminal forfeiture litigation dealt with then novel legal issues regarding the forfeiture of substitute assets and spousal

property interests. Following multiple ancillary hearings, I successfully defeated the defendant spouse's ancillary petition seeking return of the defendant's residence, which the court adjudged forfeited in substitution for the unavailable laundered healthcare fraud proceeds.

Co-Counsel: AUSA Wendy Goggin  
600 E Street NW  
Room 7600  
Washington, DC 20530  
202-616-6444

Defense Counsel: Jack Lowery, Sr.  
Lowery & Lowery  
150 Public Square  
Lebanon, Tennessee 37087  
615-444-7296

Professional References:

Larry Thompson, Deputy Attorney General – (202) 514-2101  
Eric Holder, former Deputy Attorney General – (202) 662-6021  
John Walters, Director, Office of National Drug Control Policy – (202) 395-6700  
Chris Marston, Chief of Staff, Office of National Drug Control Policy – (202) 395-7286  
Mary Jo White, former U.S. Attorney, Southern District of New York – (212) 909-6000  
Paul Warner, U.S. Attorney, District of Utah – (801) 325-3224  
Mike Horn, Director, National Drug Intelligence Center – (814) 532-4601  
Jay Apperson, Chief Counsel, U.S. House of Representatives Committee on the Judiciary  
Subcommittee on Crime – (202) 225-6727  
Martin Pracht, Chief of International Operations, DEA – (202) 307-4233  
Grant Ashley, Assistant Director, FBI – (202) 324-4260  
Diane Tebelius, U.S. Trustee – (206) 553-2000 (ext. 261)  
Jerry Speziale, Sheriff of Passaic County, New Jersey – (973) 389-5919  
Chauncey Parker, Director, State of New York Criminal Justice – (518) 457-1260  
Robert Sharp, former Deputy Director, DOJ Asset Forfeiture Office – (301) 262-8425  
Theresa Van Vliet, former Chief, Narcotic and Dangerous Drug Section – (954) 527-2484  
Mike Walther, NDDS Deputy Chief, Special Operations Division – (703) 488-4345  
Katharine Armentrout, Associate Director, OCDETF – (410) 323-5262

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

(1) Caplin & Drysdale v. United States, 491 U.S. 617, 1989. I handled the criminal prosecution and restraining order that gave rise to litigation posing a Sixth Amendment challenge to the forfeiture of attorneys fees. In a precedent-setting decision, the United States Supreme Court found that the forfeiture of attorneys fees paid from the proceeds of crime did not violate the Sixth Amendment privilege. I handled the underlying criminal case and forfeiture action that led to the Supreme Court decision, but the appeals to the Fourth Circuit Court of Appeals and to the U.S. Supreme Court were handled by the Department of Justice.

(2) I worked with the private bar, banking community and forfeiture attorneys to develop the first "Expedited Forfeiture Settlement Policy for Mortgage Holders," adopted by the Department of Justice in 1991. I co-authored this policy, which eliminated unnecessary litigation and costs to lien holders, protected their property rights during a related criminal prosecution, and streamlined the ancillary hearing process for lien holders to perfect their claims to criminally forfeited property. The original policy remains in effect and was recently updated in March 2003, both of which are attached. I was recognized by the Department of Justice with the Criminal Division Award for Extraordinary Achievement for my work in developing this policy.

(3) 1992, I developed and authored the Criminal Forfeiture Form Handbook, which was published by the Department of Justice for federal prosecutors. This Handbook was widely used by Assistant U.S. Attorneys especially during the 1990's when prosecutors were learning how to conduct criminal forfeiture proceedings.

(4) In 2000, I was responsible for arranging and planning a Caribbean Ministerial on Regional Law Enforcement in Port of Spain, Trinidad, hosted by U.S. Attorney General Reno and the Attorney General of Trinidad and Home Office of the United Kingdom. The purpose of the Ministerial was to develop a regional drug and violent crime enforcement plan among the Caribbean Islands and Territories, the European Union donor countries and the United States. The Ministerial participants included Attorney General Reno, Deputy Attorney General Eric Holder and their counterparts from the Caribbean Islands, Canada, United Kingdom, France, the Netherlands and the fifteen Caribbean Territories, as well as official organizations such as the Organization of American States and the United National Drug Control Program. To develop the agenda and plan the Ministerial, I coordinated with the State Department, Drug Enforcement Administration, Federal Bureau of Investigation, Department of Justice Criminal Division, Office of National Drug Control Policy, and the U.S. Embassies in Trinidad and Barbados and the Trinidad Attorney General's office.

(5) I represented the Department of Justice (DOJ) in meetings with the Congress to develop and achieve passage of the Civil Asset Forfeiture Reform Act, 2000. During this process, I worked with DOJ leadership and DOJ components as well as the federal, state and local law enforcement community to address enforcement concerns and reach appropriate compromises to lead to reforms in forfeiture law and practice.



(6) In 2000, I developed a comprehensive plan to control the diversion of precursor chemicals used to manufacture methamphetamine. To develop the plan, which I authored and Attorney General Reno approved, I coordinated with Drug Enforcement Administration Executives and Diversion experts, agents and attorneys involved in methamphetamine enforcement, various DOJ components, and the Office of the Attorney General to develop the plan.

(7) In 2000, I developed a pilot project and training for judicial districts designated by the Attorney General to create model community coalitions to address issues related to methamphetamine abuse -- from enforcement to education, prevention, and treatment. Specifically, I worked with six judicial districts to build community-based coalitions as a complement to methamphetamine drug enforcement and related existing programs such as Weed and Seed and Drug Courts. In developing the training for these six designated "meth model cities," I coordinated with the United States Attorneys, the Attorney General and Deputy Attorney General, the National Crime Prevention Council, city government leadership, school administrators, health care providers and officials conducting successful community meth coalitions.

(8) During 1997-1999, I represented the Department of Justice in establishing and managing a unit comprised of DOJ attorneys co-located at the Special Operations Division (SOD) of DEA. This SOD unit is responsible for coordinating multi-district wiretap investigations and prosecutions in related drug investigations across the country. I received the Attorney General's Award for Distinguished Service for my work at SOD.

(9) I was responsible for developing the Department of Justice Domestic Drug Enforcement Strategy for 2002-2004, which strategically focuses enforcement efforts on achieving and measuring meaningful reductions in drug availability in the United States.

(10) During 2002-2003, I co-chaired an inter-agency working group, along with the Office of National Drug Control Policy and the Drug Enforcement Administration, to develop U.S. drug supply estimates for marijuana, cocaine, heroin and methamphetamine. This is the first time drug availability estimates have been developed. These estimates will serve as a benchmark in measuring our success in reducing the availability of drugs.

(11) Since January 2000, I have served as the Director of the Organized Crime Drug Enforcement Task Forces (OCDETF), a nationwide drug enforcement task force program instituted twenty years ago under President Reagan, which spans three U.S. Departments and is funded at almost one-half billion dollars. OCDETF is comprised of more than 2,400 federal agents, almost 500 federal prosecutors, and various state and local law enforcement task forces across the country. As the

Director of OCDETF, I have redirected the OCDETF program from a passive funding mechanism to a managed program accountable for reducing the U.S. drug supply by attacking the most significant nationwide drug trafficking networks.

Under my OCDETF leadership, the first, inter-agency target list, known as the Consolidated Priority Organization Target (CPOT) list, was collaboratively developed by DEA, FBI, U.S. Customs, the Intelligence community, and the Special Operations Division (SOD). The nine OCDETF regions also have been required to develop strategic enforcement plans to achieve maximum impact against the drug threat in that region and to identify targets that are a priority to the region but do not rise to the level of CPOT. Through these strategic plans and the CPOT list, OCDETF agencies are jointly identifying and directing their focus on the most wanted drug trafficking organizations and their operational components across the United States, from the drug transporters to the various drug distribution cells.

As the OCDETF Director, I have worked to restore the OCDETF program to its original twenty-year-old vision of disrupting and dismantling the most significant drug trafficking and related money laundering organizations responsible for our drug supply. In addition to developing the CPOT list, I have issued law enforcement field guidance to enhance drug and money intelligence collection, to require that each drug investigation include a financial investigation, and to focus OCDETF agents and prosecutors on expanding their investigation to make connections across the nation against all pieces of the drug trafficking network instead of limiting investigations to the jurisdictional boundary of a particular task force. Over the past year, I also have developed and delivered joint training for more than 1,600 OCDETF prosecutors and agents on the nuts and bolts of conducting financial investigations.

In addition, I have instituted new accountability and measurements for OCDETF and engaged an outside contractor to review the program and develop new systems to enhance field management, accountability and national oversight for the OCDETF program. As interim steps in increasing accountability and measuring our progress towards reducing the availability of drugs in the U.S., I have instituted new field reporting at the end of each investigation. These closing reports require an evaluation by law enforcement of the targeted organization's capacity to move and distribute drugs. By collecting drug capacity information in addition to the standard drug seizure data, OCDETF will be able to measure how effective law enforcement has been in reducing the drug supply after each drug organization is disrupted and dismantled.

During my OCDETF leadership – from January 31, 2001 to current – OCDETF has indicted 18,066 defendants, convicted 15,678 defendants, and sentenced 17,362 defendants, with 219 of them sentenced to life imprisonment. My leadership of OCDETF over the past sixteen months, has observed the following improvements to the program from FY 2000 to date:

- OCDETF financial investigations are up from 16% in FY 2000 to 59%,
- OCDETF deposits to the DOJ Assets Forfeiture Fund (AFF) increased 33% from \$90 million in FY2000 to \$119 million in FY2002,
- criminal charges against leadership level defendants are up from 31% in FY 2000 to an average of 34%, and
- multi-jurisdiction investigations increased from 9% in FY 2000 to 84% of OCDETF investigations.
- In FY 2003, OCDETF received the first funding enhancement in nine years.

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

Personal – U.S. Government Thrift Savings – \$95,000  
Individual IRA – \$19,000

Spouse – 401K – \$106,000  
U.S. Government Thrift Savings \$55,000  
Legg Mason SEP IRA – \$35,000  
U.S. Government Retirement Annuity – \$90,000

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

I have no known or potential conflicts of interest. As a government employee serving in the Deputy Attorney General's office, for each of the past 3 years, I have filed financial disclosure reports that have been reviewed and cleared by the ethics office. In the event of a potential conflict of interest, I would seek guidance from the Department of Justice Ethics Office.

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

No

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

See the attached Financial Disclosure Report.

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

See attached

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

No

## III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I assisted my synagogue as liaison with the Fairfax County Police to avoid possible trespassing and disruptive behavior during the High Holy Days. I also appeared before the Synagogue Board of Directors to discuss the potential issues, all of which required at least 8 hours.

I assisted college students who were erroneously accused of failing to return rented videos, assisting them in the preparation of affidavits and correspondence with executives of the video corporation, which required approximately 6 hours.

I have spoken to several parent and community groups about drug demand reduction, including the Fairfax County, VA School Administrators, "We Care" in Alexandria, VA, and to a community group in Winchester, VA, all of which required at least 10 hours.

As a Girl Scout Leader, from 1996-2001, I arranged and handled several trips to community shelters to decorate the shelter for the holidays, to provide food, sing songs and play games with disadvantaged children. We also made pillows for homeless children, bag lunches for the county food pantry, and walked as a troop in the Race for the Cure to raise money for breast cancer research. I devoted more than 200 hours to these and related Girl Scout activities.

2. Do you currently belong, or have you belonged, to any organization which discriminates on the basis of race, sex, or religion - through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies.

No

## FINANCIAL STATEMENT

## NET WORTH

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

ASSETS				LIABILITIES			
Cash on hand and in banks	10	000	00	Notes payable to banks-secured			
U.S. Government securities-add schedule				Notes payable to banks-unsecured	2	500	00
Listed securities-add schedule				Notes payable to relatives			
Unlisted securities--add schedule				Notes payable to others			
Accounts and notes receivable:				Accounts and Bills Due: DOJ Credit Union	1	500	00
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid tax and interest			
Doubtful				Real estate mortgages payable-add schedule (Sun Trust Bank)	406	000	00
Real estate owned -- personal residence-- Annandale, VA	750	000	00	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property	50	000	00	VISA, DOJ Credit Union	2	500	00
Cash value-life insurance				MasterCard, First USA Bank, N.A.	4	000	00
Other assets itemize:				Nordstrom	1	500	00
U.S. Government Thrift Savings	95	000	00	MBNA	2	000	00
Individual IRA (schedule attached)	19	000	00	First Union Credit Line	2	763	00
Spouse -- 401K (schedule attached)	106	000	00	Total liabilities	422	763	00
Spouse -- US Government Thrift Savings	55	000	00	Net Worth	787	237	00
Individual -- Legg Mason SEP IRA -- \$35,000 (schedule attached)	35	000	00				
Spouse -- U.S. Government Retirement Annuity (approximate annual amount)	92	000	00				
Total Assets	1,210	000	00	Total liabilities and net worth	1,210	000	00

CONTINGENT LIABILITIES		GENERAL INFORMATION			
As endorser, co-maker or guarantor	No		Are any assets pledged? (Add schedule) NO		
On leases or contracts	No		Are you a defendant in any suits or legal actions? NO		
Legal Claims	No		Have you ever taken bankruptcy? NO		
Provision for Federal Income Tax	No				
Other special debt	No				



**FINANCIAL STATEMENT  
(ATTACHMENT)**

1. Individual IRA

AIM Constellation Fund-CLA  
Nuveen Unit Investment Claymore SECS Defined Ports Peroni Top Ten Picks  
Legg Mason Preferred Account  
Legg Mason Value (Trust)

2. Spouse – Individual IRA

Royce Fund – Pennsylvania  
UIT First Trust (10 Uncommon Values 2001)  
Davis Series, Inc. (Financial Fund)

3. Spouse – Mitretek Systems 401(k)

Fidelity Select Computers  
Fidelity Equity Income Fund  
Fidelity Growth & Income  
Fidelity Magelian  
Fidelity Spartan U.S. Equity Index  
Fidelity Spartan Extended Market Index  
Fidelity Small Cap Stock  
Fidelity Overseas



U.S. Department of Justice

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Washington, D.C. 20530

**JUN - 4 2003**

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

Dear Ms. Comstock:

In accordance with the provisions of Title I of the Ethics in Government Act of 1978 as amended, I am forwarding the financial disclosure report of Karen P. Tandy, who has been nominated by the President to serve as Administrator, Drug Enforcement Administration (DEA), Department of Justice. We have conducted a thorough review of the enclosed report.

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

We have advised Ms. Tandy that because of the standard of conduct on impartiality at 5 CFR 2635.502 she should seek advice before participating in a particular matter having specific parties in which a member of her household has a financial interest or in which someone with whom she has a covered relationship is or represents a party.

Ms. Tandy's spouse works for Mitretek Systems, a non-profit scientific research and system engineering company. Mitretek has no contracts with DEA. Mitretek has contracts with the Federal Bureau of Investigation (FBI) and with the Department of Justice (DOJ) for programs that may affect certain law enforcement activities of DOJ, including DEA. DEA does not participate in the administration of the contracts. Ms. Tandy will obtain advice about disqualification or seek a waiver before participating in any particular matter that could affect the financial interests of Mitretek.

Ms. Amy L. Comstock

Page 2

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

Sincerely,

A handwritten signature in black ink, appearing to read "P. R. Corts", with a long horizontal stroke extending to the right.

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

Enclosure

5010-108 (Rev. 05/2000)  
 SCS Form 2834  
 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 Box)		Incumbent		Calendar Year Covered by Report		New Entrant, Nominee, or Candidate		Termination Date (Month, Day, Year)		Termination Date (Month, Day, Year)		Fee for Late Filing Any individual who files 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 reporting period, shall be subject to a \$200 fee.	
Reporting Individual's Name		Last Name Tandy		First Name and Middle Initial Karen P.		Department or Agency (if Applicable)		Title of Position		Administration, Drug Enforcement Administration/DOJ		Telephone No. (Include Area Code)		Reporting Periods Incumbents: The reporting period is the preceding calendar year except Part II of Schedule C and Part I of Schedule D which are for the calendar year ending year up to the date you file. Part II of Schedule D is not applicable. Termination Filers: The reporting period begins on the first day of the period covered by your previous filing and ends at the date of termination. Part II of Schedule D is not applicable.	
Position for Which Filing		Address (Number, Street, City, State, and ZIP Code)		Do You Intend to Create a Qualified Diversified Trust?		Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>		Name of Congressional Committee Considering Nomination		Associate Deputy Attorney General, Nov. 1999-Present		Do You Intend to Create a Qualified Diversified Trust?		Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	
Location of Present Office (Transmitting Address)		Position(s) Held with the Federal Government (Transmitting Address)		Signature of Reporting Individual		Date (Month, Day, Year)		Signature of Other Reviewer		Date (Month, Day, Year)		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 current calendar year up to the date of filing.			
Presidential Nominees Subject to Senate Confirmation		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 Designated Agency Ethics Official/Reviewing Official		Date (Month, Day, Year)		Signature of Designated Agency Ethics Official/Reviewing Official		Date (Month, Day, Year)		Agency Use Only		OGE Use Only	
Other Review (If desired by agency)		Agency Ethics Official's Opinion On the basis of information furnished in this report, I conclude that the filer is in compliance with applicable laws and regulations (subject to any comments in the box below).		Signature		Date (Month, Day, Year)		Signature		Date (Month, Day, Year)		Agency Use Only		OGE Use Only	
Office of Government Ethics		Comments of Reviewing Officials (If additional space is required, use the reverse side of this sheet)		Signature		Date (Month, Day, Year)		Signature		Date (Month, Day, Year)		Agency Use Only		OGE Use Only	

• SF 278 (Rev. 03/2000)  
5 C.F.R. Part 2634  
U.S. Office of Government Ethics

Reporting individual's Name		SCHEDULE A												Page Number							
Karen P. Tandy														2							
Assets and Income	BLOCK A	BLOCK B										BLOCK C									
		Valuation of Assets at close of reporting period										Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.									
		None (or less than \$1,001)	\$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	Over \$1,000,000*	Over \$1,000,000*	\$1,000,001 - \$5,000,000	\$5,000,001 - \$25,000,000	Over \$25,000,001 - \$50,000,000	Over \$50,000,000	Type	Amount	Other Income (Specify Type & Amount)	Date (Mo., Day, Yr.) Only if Honoraria			
Examples	Central Airlines Common																				
	Doe Jones & Smith, Hometown, State																				
	Keystone Equity Fund																				
	100 International 500 Index Fund																				
1	Mitretek Systems (Spouse Salary)-Fairfax, VA																				
2	American Jewish Committee (Spouse), New York, NY																				
3	Legg Mason Preferred Account																				
4	Legg Mason Value Trust																				
5																					
6	Royce Fund - Pennsylvania																				
	UIT First Trust																				
	10 Uncommon Values 2001																				

\* 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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**SCHEDULE A continued**  
(Use only if needed)

**Assets and Income**

**Valuation of Assets**  
at close of reporting period

Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.

	BLOCK B										BLOCK C																				
	None (or less than \$1,001)	\$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	Over \$1,000,000*	Over \$5,000,000	\$25,000,001 - \$50,000,000	\$50,000,001 - \$25,000,000	Over \$50,000,000	Accepted Investment Fund	Excepted Trust	Qualified Trust	Dividends	Rent and Royalties	Interest	Capital Gains	None (or less than \$201)	\$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	
1 Davis Series, Inc. Financial Fund		X																		X											
2 Mitretek Systems 401 (k) Spouse														X																	
3 Fidelity Equity Income Fund	X												X							X											
4 Fidelity Growth & Income	X												X							X											
5 Fidelity Magellan																				X											
6 Fidelity Spartan US Equity Index																				X											
7 Fidelity Spartan Extended Market Index																				X											
8 Fidelity Small Cap Stock																				X											
9 Fidelity Overseas																				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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**SCHEDULE C**

None

**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. See instructions for revolving charge during the reporting period. Exclude accounts.

Creditors (Name and Address)	Type of Liability	Date Incurred	Interest Rate	Term if applicable	Category of Amount or Value (\$)
Examples First District Bank, Washington, DC John Jones, 123 St., Washington, DC	Mortgage on rental property; behavior Promissory note	1991 1999	8% 10%	25 yrs. on demand	
1 Justice Federal Credit Union, Washington, DC	Personal Loan	2001	9%	18mos X	
2					
3					
4					
5					

\* This category applies only if the liability is 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

Example	Status and Terms of any Agreement or Arrangement	Parties	Date
1	Pursuant to partnership agreement, will receive lump sum payment of capital account & partnership share calculated on service performed through 1/06.	Doe, Jones & Smith, Hometown, State	7/85
2			
3			
4			
5			
6			

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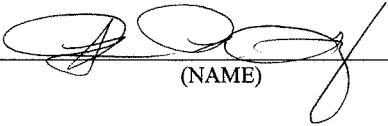
<b>SCHEDULE D</b>		Page Number <b>7</b>			
Reporting Individual's Name <b>Karen P. Tandy</b>					
<p><b>Part I: Positions Held Outside U.S. Government</b>                  Report any positions held during the applicable reporting period, whether compensated or not. Positions include but are not limited 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 <input checked="" type="checkbox"/></p>					
Examples	Organization (Name and Address)	Type of Organization	Position Held	From (Mo., Yr.)	To (Mo., Yr.)
1	Rep'l Assn. of Book Collectors, NY Doe Jones & Smith, Hometown, State	Non-profit education Law firm	President Partner	6/92 7/85	Present 1/00
2					
3					
4					
5					
6					
<p><b>Part II: Compensation in Excess of \$5,000 Paid by One Source</b>                  Do not complete this part if you are an officer or director of a Federal, State, or Presidential or Presidential Candidate, 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. None <input checked="" type="checkbox"/></p>					
Examples	Source (Name and Address)	Legal Services	Brief Description of Duties		
1	Doe Jones & Smith, Hometown, State Metro University (Client of Doe Jones & Smith), Hometown, State	Legal services Legal services in connection with university construction			
2					
3					
4					
5					
6					

Prior Editions Cannot Be Used.

AFFIDAVIT

I, Karen P. Tandy, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

6-2-03  
(DATE)

  
(NAME)

Valerie J. Jach  
(NOTARY) D.C.

my Commission expires: 2/29/04

Senator GRAHAM. Thank you.  
Mr. Wray?

**STATEMENT OF CHRISTOPHER A. WRAY, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE**

Mr. WRAY. Thank you, Mr. Chairman. I don't have an opening statement. I would like to thank you and the other members of the Committee for allowing me the opportunity to appear before you and, of course, to thank the President for nominating me.

I also wanted to express my gratitude to my home State Senators, Senators Chambliss and Miller, for their introductions. It meant the world to me.

And I wanted to introduce several members of my family who came here today. My wife, Helen, and my daughter, Caroline, who is 8, and my son, Trip, who is 6, are here. My father, Cecil Wray, is here, and my mother would have liked to have been here but couldn't make the trip this time. My sister, Katie Baughman, and her husband, Steve, are here, as well as my sister-in-law, Kate Klitenic, and her husband, Jason.

[The biographical information of Mr. Wray follows:]

## I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)  
**Christopher Asher Wray ("Chris")**
2. Address: List current place of residence and office address(es.)  
**Current place of residence: Bethesda, Maryland**  
**Office address: U.S. Department of Justice**  
**950 Pennsylvania Ave.**  
**Washington, DC 20530**
3. Date and place of birth.  
**Born December 17, 1966, New York, NY, USA**
4. Marital Status: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).  
**Married to Helen Howell Wray, homemaker, Bethesda, MD**
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.  
**Yale Law School (1989-1992), JD 1992**  
**Yale University (1985-1989), BA 1989**
6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.  
**2001-Present Office of the Deputy Attorney General, U.S. Department of Justice, Washington, DC [Principal Associate Deputy Attorney General, 9/01-present; Associate Deputy Attorney General, 5/01-9/01]**  
**1997-2001 U.S. Attorney's Office, Northern District of Georgia, Atlanta, GA [Assistant U.S. Attorney, Criminal Division]**  
**1993-1997 King & Spalding, Atlanta, GA [Associate/Litigation]**  
**1992-1993 Judge J. Michael Luttig, U.S. Court of Appeals for the Fourth Circuit [Law clerk]**  
**7/1992 King & Spalding, Atlanta, GA [Summer Associate]**  
**7-8/1991 Davis Polk & Wardwell, New York, NY [Summer Associate]**  
**6-7/1991 King & Spalding, Atlanta, GA [Summer Associate]**  
**1-5/1991 Professor Stephen L. Carter, Yale Law School, New Haven, CT [Research Assistant]**  
**6-8/1990 Howard Darby & Levin, New York, NY [Summer Associate]**

7. Military Service: Have you had any military service: If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.  
No.
8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.  
**1999 Letter of commendation from FBI Director Louis Freeh**  
**1998 Letter of commendation from U.S. Secret Service Director Lewis Merletti**  
**1998 U.S. Department of Justice Special Achievement Award**  
**1996 award from Central Atlanta Progress, Inc. for *pro bono* contributions to its Public Safety Initiative**  
**1991-1992, Executive Editor, Yale Law Journal**  
**1989 B.A. *cum laude* with Distinction in the Major**
9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.  
**Judicial Conference Advisory Committee on Evidence Rules (member, 2001-present)**  
**State Bar of Georgia (member, 1993-present)**  
**Atlanta Bar Association (member, 1994-1997 [approx.])**  
**American Bar Association (member, 1994-1997 [approx.])**  
    Section on Litigation  
    Section on Criminal Justice  
    Young Lawyers Division  
    Southeastern White-Collar Crime Subcommittee  
**Joseph Henry Lumpkin American Inn of Court, Atlanta, GA (Barrister, 1999-2001)**  
**Supreme Court Historical Society (member, 1994)**
10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.  
**I do not belong to any organizations that are active in lobbying before public bodies.**  
**I am a member of the following other organizations:**  
- Cathedral of St. Philip, Atlanta, GA  
- Federalist Society  
- Ausable Club, St Hubert's, NY  
- Wood Acres Citizens Association, Bethesda, MD  
- River Falls Community Center Association, Potomac, MD

11. **Court Admission:** List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.  
**U.S. Court of Appeals for the Eleventh Circuit (admitted, 07/25/95)**  
**U.S. Court of Appeals for the Fourth Circuit (admitted, 11/07/93)**  
**U.S. District Court for the Northern District of Georgia (admitted, 01/20/94)**  
**Supreme Court of Georgia (admitted, 11/04/93)**  
**Georgia Court of Appeals (admitted, approx. 11/93)**  
**Georgia Superior Court (admitted, 11/93)**
12. **Published Writings:** List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.  
**Corporate Probation Under the New Organizational Sentencing Guidelines, 101 YALE L.J. 2017 (1992).**  
  
**Giving Compliance Programs Greater Effect, FULTON COUNTY DAILY REP. (Supp. June 23, 1994).**  
  
**Remarks regarding Project Safe Neighborhoods, Annual U.S. Attorneys' Conference, Washington, DC, November 11, 2001.**  
  
**Keynote remarks, "Project Safe Neighborhoods," 8<sup>th</sup> Annual Gatlinburg Law Enforcement Conference, Gatlinburg, TN, May 13, 2002.**  
  
**Remarks regarding corporate fraud enforcement, 12<sup>th</sup> Annual White-Collar Crime Conference, Atlanta, GA, February 7, 2003.**
13. **Health:** What is the present state of your health? List the date of your last physical examination.  
**My health is excellent. My last physical examination was in April 2003.**
14. **Public Office:** State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.  
**9/2001-present Principal Associate Deputy Attorney General, U.S. Department of Justice, Washington, DC**  
**5/2001-9/2001 Associate Deputy Attorney General, U.S. Department of Justice, Washington, DC**  
**5/1997-5/2001 Assistant U.S. Attorney, Northern District of Georgia, Atlanta, GA**

15. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:
1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;  
**Upon graduation from law school, I clerked for Judge J. Michael Luttig, U.S. Court of Appeals for the Fourth Circuit from June 1992 until June 1993.**
  2. whether you practiced alone, and if so, the addresses and dates;  
**I have never practiced law alone.**
  3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;
 

<b>5/01- present</b>	<b>Office of the Deputy Attorney General U.S. Department of Justice 950 Pennsylvania Avenue, Washington, DC 20530 [9/01-present, Principal Associate Deputy Attorney General; 5/01-9/01, Associate Deputy Attorney General]</b>
<b>5/97-5/01</b>	<b>U.S. Attorney's Office Northern District of Georgia 600 U.S. Courthouse, 75 Spring Street Atlanta, GA 30303 [Assistant U.S. Attorney, Criminal Division]</b>
<b>9/93-5/97</b>	<b>King &amp; Spalding 191 Peachtree Street Atlanta, GA 30303 [Associate, Litigation Department/ Special Matters Team]</b>



- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?  
**My law practice has been a litigation one, primarily in the law enforcement or criminal justice arena. From 1993 to 1997, it consisted generally of internal corporate investigations, white-collar criminal defense, and complex civil litigation. From 1997 to 2001, it consisted exclusively of federal prosecution of a wide variety of offenses, ranging from violent crime to fraud and public corruption, and spanning all phases, from grand jury investigations to jury trials and plea negotiations, to sentencing and appeals. Since 2001, my practice has been more focused on management, coordination, and oversight, focusing primarily on issues, policies and operations of the Department of Justice's Criminal Division, the FBI, and the U.S. Attorneys' Offices.**
2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.  
**While in private practice, my typical former clients were corporations or individual executives or professionals. I concentrated on internal corporate investigations, white-collar criminal matters, and complex litigation. I handled cases in the areas of health care fraud, defense procurement fraud, public and foreign corruption, bank fraud, False Claims Act *qui tam* litigation, and securities fraud. I represented clients in class actions, grand jury and administrative investigations, and litigation in federal and state trial and appellate courts. I also helped corporate clients design and implement compliance programs. As a prosecutor, my client has been the United States, working with a wide variety of federal law enforcement and regulatory agencies.**
- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.  
**While in private practice (1993-1997), I appeared in court only occasionally, since much of my practice was either pre-indictment in enforcement matters or consumed with briefing, discovery and negotiations in civil litigation. From 1997 to 2001, however, I appeared in court very frequently (usually several times a week), as a federal prosecutor.**

2. What percentage of these appearances was in:

- (a) federal court;
- (b) state courts of record;
- (c) other courts.

**My court appearances have been overwhelmingly (approximately 90%) in federal court. The remaining approximately 10% was in various state courts, primarily in Georgia and Florida.**

3. What percentage of your litigation was:

- (a) civil;
- (b) criminal.

**My litigation experience has been predominantly (approximately 75%) in the criminal arena, although I have also handled civil litigation matters (approximately 25%), during my years in private practice and some civil asset forfeiture matters as an Assistant U.S. Attorney.**

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

**I have tried to conclusion nine (9) cases: two (2) as sole counsel, six (6) as chief counsel, and one (1) as associate counsel.**

5. What percentage of these trials was:

- (a) jury;
- (b) non-jury.

**All but one of these trials (i.e., approximately 90%) were jury trials.**

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

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties



**United States v. Robert Ethan Miller, Jr.****No. 1:97-CR-496** approx. July 1997-December 1999**U.S. District Court, Northern District of Georgia, Judge Orinda D. Evans****Opposing counsel: John W. Harbin, counsel for Miller  
Powell, Goldstein, Frazer & Murphy  
191 Peachtree Street, NE, 16<sup>th</sup> Floor  
Atlanta, GA 30303  
(404) 572-6609**

I was the sole prosecutor in this counterfeiting and murder-for-hire case. The defendant was the head of a counterfeiting ring who hired a hitman to murder a young woman who was a critical government witness. An undercover operation by federal and state agents disrupted the plot. After a jury trial, the defendant was convicted of all charges, including attempted witness murder, solicitation to commit witness murder, and counterfeiting. Before sentencing, the defendant attempted to escape by having weapons smuggled into the jail. Miller received a prison sentence of 40 years. I continued to handle the case on appeal, and the Eleventh Circuit affirmed in all respects.

**United States v. Ernest Patton a/k/a "Spanky"****No. 1:94-CR-339** approx. July 1997-January 2001**U.S. District Court, Northern District of Georgia, Judge J. Owen Forrester****Co-counsel: Arthur W. Leach [then-Assistant U.S. Attorney]  
Boone & Stone  
3166 Mathieson Drive  
Atlanta, GA 30305  
(404) 239-0305****Opposing counsel: Stephanie Kearns, counsel for Patton  
Federal Defender Programs, Inc.  
The Equitable Building  
100 Peachtree Street, Suite 200  
Atlanta, GA 30303  
(404) 688-7530**

I was the lead prosecutor in this RICO case. The defendant was the leader of a national drug ring that trafficked cocaine (both crack and powder), heroin, and marijuana. The defendant also hired a team of hitmen to murder a grand jury witness, whom they killed, shooting him 14 times at close range. Identified as a suspect on television, the defendant assumed a new identity and remained a fugitive for more than a year until he was arrested after a highway stop. After his first trial ended with a deadlocked jury, the defendant was convicted of both RICO and RICO conspiracy in his retrial. The judge sentenced Patton to 40 years in prison. I continued to handle the case on appeal, including oral argument, and the Eleventh Circuit affirmed both his conviction and sentence.

United States v. Jay Scott Ballinger

No. 2:99-CR-26 & No. 2:01-CR-032 approx. December 1999-present  
 2001 U.S. Dist. LEXIS 20903 (N.D. Ga. 2001); 2001 U.S. Dist. LEXIS 209096 (N.D. Ga. 2001); 153 F. Supp. 2d 1361 (N.D. Ga. 2001), *rev'd*, 312 F.3d 1264 (11<sup>th</sup> Cir. 2002), *petition for en banc review filed* (Jan. 17, 2003)

U.S. District Court, Northern District of Georgia, Senior Judge William C. O'Kelley

Opposing counsel: Paul S. Kish, counsel for Ballinger

Federal Defender Program, Inc.  
 The Equitable Building  
 100 Peachtree Street, Suite 200  
 Atlanta, GA 30303  
 (404) 688-7530

I was the prosecutor in this serial church arson case (most of which I handled as an Assistant U.S. Attorney, but the sentencing and appeal of which I continued to handle after transferring to the Deputy Attorney General's office). The defendant was a "Luciferian" who traveled around the country burning down churches – more than 30 churches in 9 different states. The investigation required working closely with a rapidly-convened task force of federal, state, and local authorities, and with prosecutors around the country. The church arsons in our state (Georgia) were particularly serious, since one had killed a volunteer firefighter and severely injured three others. The defendant entered a conditional guilty plea, preserving his right to raise certain Commerce Clause issues on appeal. The judge sentenced Ballinger to life imprisonment. I continued to handle the case on appeal, including oral argument before the Eleventh Circuit, which recently reversed on Commerce Clause grounds. The Department's petition for *en banc* review is now pending.

United States v. Robert Patrick Jarvis

No. 1:99-CR-033 approx. June 1997-March 1999

U.S. District Court, Northern District of Georgia, Judge Thomas W. Thrash, Jr.

Co-counsel: Assistant U.S. Attorney Sally Q. Yates

600, U.S. Courthouse  
 75 Spring Street, S.W.  
 Atlanta, GA 30303  
 (404) 581-6081

Opposing counsel: Craig A. Gillen, counsel for Jarvis

Gillen Dailey Cromwell Withers & Brantley, LLC  
 One Securities Centre, Suite 1050  
 3490 Piedmont Road, NE  
 Atlanta, GA 30305  
 (404) 842-9456

I was co-counsel in this public corruption prosecution. The defendant was the longtime sheriff of a metropolitan Atlanta county, a former Atlanta Braves pitcher known as "The Little Bulldog." I helped oversee an investigation that included the FBI, IRS, and state investigators. The defendant pled guilty to a mail fraud and received 15 months in prison.

**United States v. Dayna Nicole Cummings Dunn**

No. 1:98-CR-262                      approx. June 1998-January 1999  
U.S. District Court, Northern District of Georgia, Judge G. Ernest Tidwell  
Opposing counsel: Lynne Y. Borsuk, counsel for Dunn  
Peters, Roberts, Borsuk & Taylor, P.A.  
DeKalb Oaks, Suite 245  
2786 N. Decatur Road  
Decatur, GA 30033  
(404) 296-5300

I was the sole prosecutor in this kidnapping case. The defendant kidnapped a five-month-old infant from a rural Georgia neighbor and, pretending the baby was hers, fled to Canada. There, the FBI, working closely with Canadian authorities, arrested her and recovered the infant, unharmed. The defendant pled guilty and received a prison sentence of approximately five years. I ultimately dismissed the charges against her co-defendant, her husband.

**United States v. Patrick Jerome Brown**

No. 1:98-CR-539                      approx. November 1998-October 2000  
U.S. District Court, Northern District of Georgia, Judge Julie E. Carnes  
Co-counsel: Assistant U.S. Attorney Bernita Malloy  
600 U.S. Courthouse  
75 Spring Street, S.W.  
Atlanta, GA 30303  
(404) 581-6052

Opposing counsel: Stephanie Kearns, counsel for Brown  
Federal Defender Programs, Inc.  
The Equitable Building  
100 Peachtree Street, Suite 200  
Atlanta, GA 30303  
(404) 688-7530

I was the lead trial counsel in this armed bank robbery prosecution. The defendant and his partner engaged in two armed bank robberies, the second of which culminated in a protracted gunfight, wounding a security guard and killing his partner. After a jury trial, the defendant was convicted of all counts and sentenced to 30 years in prison. I continued to handle the case on appeal, and the Eleventh Circuit affirmed in all respects.

**United States v. David Paul Johnson**

No. 1:96-CR-164 approx. July 1997-January 1998  
U.S. District Court, Northern District of Georgia, Judge Willis B. Hunt, Jr.  
Co-counsel: Assistant U.S. Attorney Katherine B. Monahan  
600, U.S. Courthouse  
75 Spring Street  
Atlanta, GA 30303  
(404) 581-6049

Opposing counsel: Michael J. Trost, counsel for Johnson  
1800 Peachtree Street, NW  
Suite 300  
Atlanta, GA 30309  
(404) 352-9300

I was associate counsel in this prosecution for a string of six armed bank robberies. The defendant had robbed six Atlanta-area banks at gunpoint, firing his gun during several of the robberies. After a jury trial that included close to 50 witnesses, the defendant was convicted of all six robberies. Johnson received a sentence of 113 years in prison. He did not appeal.

**United States v. Codell Juan Griffin, Frederick Deon Bracy a/k/a Frederick Boyer Taylor, David Lasean Jeffries, & Lolita Maria Hauser-Rios**

No. 1:99-CR-141 approx. February 1999-May 2001  
U.S. District Court, Northern District of Georgia, Judge Jack T. Camp  
Co-counsel: Glenn D. Baker [then-Assistant U.S. Attorney ]  
U.S. Department of Justice  
Suite 1176, Richard B. Russell Building  
Atlanta, GA 30303  
(404)730-2957

Opposing counsel: R. Gary Spencer, counsel for Hauser-Rios  
2600 The Equitable Building  
100 Peachtree Street, NW  
Atlanta, GA 30303  
(404) 526-9955

I was the lead prosecutor in this gun-trafficking case. The defendants “straw purchased” and smuggled 112 guns from Atlanta to Detroit. Two of the defendants pled guilty and cooperated, and one went to trial, where the jury convicted her of all counts. The final defendant was killed in a robbery in Detroit. The other three defendants received prison sentences.

**United States v. David Anderson, Jr. a/k/a "Super Dave," Darryl L. Chaney & Andre K. Randall a/k/a "Chase"**

No. 1:00-CR-283                      approx. March 1998-May 2001  
U.S. District Court, Northern District of Georgia, Judge Orinda D. Evans

Opposing counsel: L. David Wolfe, P.C., counsel for Anderson  
1800 Peachtree Street, NW, Suite 300  
Peachtree Palisades West  
Atlanta, GA 30309  
(404) 352-5000 ext. 306

George O. Lawson, Jr., counsel for Chaney  
Lawson & Thornton, P.C.  
970 Martin Luther King Jr. Drive, SW, Suite 202  
Atlanta, GA 30314  
(404) 522-6964

John R. Hesmer, counsel for Randall  
321 Lawrence Street  
Marietta, GA 30060-2056  
(770) 429-0190

I was the sole prosecutor in this counterfeiting and bank fraud case, sometimes called the "Platinum Printing" case after the printing and graphics shop in which it was based. The case involved a large national ring that manufactured both huge quantities of counterfeit currency using old-fashioned offset printers and counterfeit payroll checks using sophisticated computer equipment. All three named defendants, as well as a number of cooperating defendants who entered separate pleas, ultimately pled guilty and received prison sentences ranging from three to eight years. In addition, our office secured the forfeiture of extensive equipment from the shop, shutting it down.

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

In addition to my aforementioned work as a defense attorney and prosecutor, as Principal Associate Deputy Attorney General, I have had significant leadership, oversight and coordination responsibilities for several components of the Department of Justice. I have focused primarily on issues, policies, operations, and initiatives relating to the Criminal Division, the U.S. Attorneys' Offices, and the FBI. I have devoted particular attention to counter-terrorism coordination, the President's Corporate Fraud Task Force, and Project Safe Neighborhoods. I also



**served, for a number of months in 2001, on the Attorney General's Review Committee on Capital Cases. Finally, I have had significant management responsibilities for the Department as well, representing the Department on the President's Management Council, overseeing the implementation of the President's Management Agenda at the Department, and coordinating the work of the Department's own Strategic Management Council.**

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.  
**Since 1998, I have been contributing part of my Department of Justice salary to the federal FERS/Thrift Savings Plan (TSP). Over the same time period, I have been contributing to the FERS/Basic Benefit retirement plan. While in private practice at King & Spalding, I contributed part of my salary to a 401(k) plan, now administered by Charles Schwab. The only contributions to the 401(k) were my own. No contributions are being made, nor have been made, by me or anyone else since 1997; rather, I have simply left intact my investment in that 401(k).**
2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.  
**I will consult with the appropriate Department ethics official(s) for advice on how to handle any potential conflicts-of-interest that may arise.**
3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service in the position to which you have been nominated? If so, explain.  
**No.**
4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more. (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)  
**Financial disclosure report SF278 substituted.**
5. Please complete the attached financial net worth statement in detail (add schedules as called for).  
**Financial net worth statement and supporting schedules attached.**
6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.  
**No.**

## III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.  
**The last six years of my career have been devoted exclusively to public service, especially victims of crime, as a prosecutor in the U.S. Attorney's Office in Atlanta and more recently with the Department of Justice here in Washington, DC. While in private practice, my most significant *pro bono* work was on behalf of the public safety initiatives of Central Atlanta Progress, Inc., a not-for-profit community-service organization dedicated to downtown Atlanta. I devoted approximately 120 hours to this *pro bono* work, primarily in 1996. I also spent some time in private practice helping to raise money for the YMCA Partners with Youth and for the March of Dimes.**
2. Do you currently belong, or have you belonged, to any organization which discriminates on the basis of race, sex, or religion - through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies.  
**No.**

## FINANCIAL STATEMENT

## NET WORTH

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

ASSETS				LIABILITIES			
Cash on hand and in banks	10	243	43	Notes payable to banks-secured			
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities-add schedule	262	766	87	Notes payable to relatives			
Unlisted securities--add schedule				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due			
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid tax and interest			
Doubtful				Real estate mortgages payable-add schedule	458	371	04
Real estate owned-add schedule	595	000	00	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property	335	805	00				
Cash value-life insurance							
Other assets itemize: [see schedule]	720	059	19				
				Total liabilities	458	371	04
				Net Worth	1,465	503	45
Total Assets	1,923	874	49	Total liabilities and net worth	1,923	874	49
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor	No.			Are any assets pledged? (Add schedule)	No.		
On leases or contracts	No.			Are you a defendant in any suits or legal actions?	No.		
Legal Claims	No.			Have you ever taken bankruptcy?	No.		
Provision for Federal Income Tax	No.						
Other special debt	No.						

## Financial Statement - Schedules

(S) = Owned by spouse (DC) = Owned by dependent child

<u>Listed Securities</u>	
(S) SunTrust Banks, Inc.	\$ 146,589.60
(S) Coca-Cola Co.	\$ 44,658.60
(S) AmSouth Bancorp.	\$ 10,535.04
(S) FleetBoston Fin. Corp.	\$ 12,005.42
(S) Verizon Communications	\$ 11,695.65
(S) Regions Financial Corp.	\$ 37,282.56
<b>Total</b>	<b>\$ 262,766.87</b>
<u>Real estate owned</u>	
Personal residence, Bethesda, MD	\$595,000.00
<b>Total</b>	<b>\$595,000.00</b>
<u>Other assets</u>	
Pelican Fund/Evergreen Investments	\$ 11,427.76
Fidelity Growth & Income Fund	\$ 5,239.86
Scudder International Equity (BT) Fund	\$ 5,328.13
Vanguard Windsor II Fund	\$ 5,880.88
Fidelity Municipal Money Market	\$ 10,931.43
Vanguard Index Trust S&P Port. Fund	\$ 5,946.92
401(k): STI Classic Capital Appreciation Tr.	\$ 2,101.22
401(k): STI Classic Small Cap. Growth Stk. Tr.	\$ 1,348.44
401(k): INVESCO Int'l Blue Chip Value Inv.	\$ 743.09
401(k): STI Classic Balanced Tr.	\$ 1,436.49
FERS- Thrift Savings Plan	\$ 45,532.38
FERS- Basic Benefit plan	\$ 5,243.43
(S) IRA: Fidelity Blue Chip Growth Fund	\$ 713.04
(S) IRA: Fidelity Dividend Growth Fund	\$ 4,356.31
(DC) Fidelity Growth & Income Fund	\$ 9,381.89
(DC) Fidelity Growth & Income Fund	\$ 4,406.32
(S) Consolidated Ventures, Inc.	\$ 1,395.60
(S) Howells Wood, LP [limited partnership interest in holding company for residentially zoned, undeveloped land in Atlanta, GA & securities]	\$ 598,646.00
<b>Total</b>	<b>\$ 720,059.19</b>

<b><u>Real estate mortgages payable</u></b>	
GMAC Mortgage [on residence, Bethesda, MD]	\$ 386,315.88
Prime Equity Line, Wachovia Bank, NA [home equity line]	\$ 72,055.16
<b>Total</b>	<b>\$ 458,371.04</b>



U.S. Department of Justice

Washington, D.C. 20530

JUN 11 2003

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

Dear Ms. Comstock:

In accordance with the provisions of Title I of the Ethics in Government Act of 1978 as amended, I am forwarding the financial disclosure report of Christopher A. Wray, who has been nominated by the President to serve as Assistant Attorney General, Criminal Division, Department of Justice. We have conducted a thorough review of the enclosed report.

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

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

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

Sincerely,

A handwritten signature in black ink, appearing to read "P. R. Corts".

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

Enclosure

SF 278 (Rev. 03/2000) Form Approved: OMB No. 3209-0001  
 5 C.F.R. Part 2634  
 U.S. Office of Government Ethics  
**Executive Branch Personnel PUBLIC FINANCIAL DISCLOSURE REPORT**

Director/Appointing Candidate, Election, or Re-election (Month, Day, Year)		Reporting Status (Applicable) <input type="checkbox"/> Incumbent <input type="checkbox"/> New Entrant, Nominee, or Candidate		Termination Date (Month, Day, Year) <input type="checkbox"/> Filer <input type="checkbox"/> (If Applicable)		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 shall be assessed a fee of \$200.00. If more than 30 days after the last day of the filing extension period, shall be subject to a \$200 fee.
Reporting Individual's Name <b>Wray</b>		Last Name <b>Wray</b>		First Name and Middle Initial <b>Christopher A</b>		
Position for Which Filing <b>Assistant Attorney General Criminal Division</b>		Title of Position <b>Department of Justice</b>		Department or Agency (If Applicable) <b>U.S. Department of Justice</b>		Reporting Periods Incumbent: 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 of the reporting period. Part II of Schedule D is not applicable. Termination Filers: The reporting period is the preceding calendar year 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. All assets are reported as 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 the date of filing. Schedule C, Part II (Agreements or Arrangements)--The reporting period is the preceding two calendar years and the current calendar year up to the date of filing.
Location of Present Office <b>950 Pennsylvania Avenue, N.W.</b>		Address (Number, Street, City, State, and ZIP Code) <b>(202) 514-2105</b>		Telephone No. (Include Area Code)		
Positions Held with the Federal Government in the Preceding 12 Months (If Not Same as Above)		Title of Position(s) and Date(s) Held		Do You Intend to Create a Qualified Diversified Trust? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		
Presidential Nominee Subject to Senate Confirmation		Name of Congressional Committee Considering Nomination		Senate Judiciary Committee		
Certification I CERTIFY that the statements I have made on this form and all attachments are true and correct to the best of my knowledge.		Signature of Reporting Individual <i>Christopher Wray</i>		Date (Month, Day, Year) <b>6/9/03</b>		
Other Reviewer (If Applicable by Agency)		Signature of Other Reviewer		Date (Month, Day, Year)		
Agency Ethics Official's Opinion On the basis of information contained in this report and any other information available to me, I have reviewed this report for compliance with applicable laws and regulations (subject to any comments in the box below).		Signature of Designated Agency Ethics Official/Reviewing Official <i>R. R. R.</i>		Date (Month, Day, Year) <b>6-11-03</b>		
Office of Government Ethics Use Only		Signature		Date (Month, Day, Year)		
Comments of Reviewing Officials (If additional space is required, use the reverse side of this sheet) <input type="checkbox"/>						
(Check box if filing extension granted & indicate number of days _____)						
(Check box if comments are contained on the reverse side) <input type="checkbox"/>						
Agency Use Only						
OGE Use Only						



55 278 (Rev. 02/7/2000)  
5 C.F.R. Part 2634  
U.S. Office of Government Ethics

Reporting Individual's Name  
**Wray, Christopher A.**

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**SCHEDULE A**

Assets and Income	BLOCK B Valuations of Assets at close of reporting period						BLOCK C Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.								
	BLOCK A						Type		Amount				Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria	
	None <input type="checkbox"/>	\$1,001 - \$15,000	\$50,001 - \$100,000	\$250,001 - \$500,000	Over \$1,000,000*	Over \$5,000,000	Dividends	Interest	None (or less than \$201)	\$1,001 - \$2,500	\$5,001 - \$15,000	\$50,001 - \$100,000			Over \$1,000,000*
<p>For you, your spouse, and dependent children, report each asset held for investment or the reportable interest in an asset if the asset's value exceeded \$1,000 at the close of the reporting period, or which generated more than \$200 of net income during the reporting period, together with such income.</p> <p>For yourself, also report the source and actual amount of any honoraria over \$200 of net income received from the U.S. Government. For your spouse, report the source but not the amount of earned honoraria over \$200 of net income received from your spouse.</p> <p>None <input type="checkbox"/></p> <p>Examples: <input type="checkbox"/> Central Airlines Common <input type="checkbox"/> Dick J. Koss &amp; Smith, Homebased, Seattle <input type="checkbox"/> Kempeone Equity Fund <input type="checkbox"/> IRA: Heartland 500 Index Fund</p>															
1. Pelican Fund/ Evergreen Investments															
2. Fidelity Growth & Income Fund															
3. Scudder International Equity (BIT) Fund															
4. Vanguard Windsor II Fund															
5. Fidelity Municipal Money Market															
6. Vanguard Index Trust S&P 500 Port. Fund															

\* 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.

Operating Individual's Name  
**Wray, Christopher A.**

**SCHEDULE A continued**  
 (Use only if needed)

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BLOCK A Assets and Income	BLOCK B Valuation of Assets at close of reporting period		BLOCK C Income: type and amount. If "None (or less than \$20)" is checked, no other entry is needed in Block C for that item.										
	\$1,001 - \$15,000	\$15,001 - \$50,000	Type	None (or less than \$20)	\$1,001 - \$2,500	\$5,001 - \$15,000	\$50,001 - \$100,000	\$100,001 - \$500,000	\$500,001 - \$1,000,000	Over \$1,000,000	Over \$5,000,000	Other Income (Specify Type, Year, and Amount)	Date (Mo., Day, Yr.) Only if Honoraria
401(k): STI Classic Capital Appreciation Tr.	X		Dividends										
401(k): STI Classic Small Cap. Growth Ssk. Tr.	X		Dividends										
401(k): STI Classic Balanced Tr.	X		Dividends										
S/Sun Trust Banks, Inc.		X	Interest										
S/Coca-Cola Co.			Dividends										
S/AmSouth Bancorp.			Dividends										
S/Fleet Boston Fin. Corp.	X		Dividends										
S/Verizon Communications	X		Dividends										

\* 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.

Reporting individual's Name  
**Wray, Christopher A.**

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**SCHEDULE A continued**  
 (Use only if needed)

BLOCK A	BLOCK B	BLOCK C										
		Valuation of Assets at close of reporting period		Type	Amount							Other Income (Specify Type & Amount)
<b>Assets and Income</b> 1 S/Regions Fin. Corp 2 S/Consolidated Ventures, Inc., Princeton, N.J. 3 S/Howells Wood, LP, Atlanta GA (ltd. partnership interest/holding co. for real estate & securities) Holdings: 4 S/Residentially zoned, undeveloped land in Atlanta, GA 5 S/Anadarko Corp. 6 S/Bank of America Corp. 7 S/Coca-Cola Co. 8 S/Deutsche Telekom AG	\$1,001 - \$15,000		Dividends	None (or less than \$201)	\$1,001 - \$2,500	\$5,001 - \$15,000	\$50,001 - \$100,000	\$50,001 - \$100,000*	Over \$1,000,000*	Over \$5,000,000		
	\$15,001 - \$50,000		Dividends	None (or less than \$201)	\$1,001 - \$2,500	\$5,001 - \$15,000	\$50,001 - \$100,000	\$50,001 - \$100,000*	Over \$1,000,000*	Over \$5,000,000		
	\$50,001 - \$100,000		Dividends	None (or less than \$201)	\$1,001 - \$2,500	\$5,001 - \$15,000	\$50,001 - \$100,000	\$50,001 - \$100,000*	Over \$1,000,000*	Over \$5,000,000		
	\$100,001 - \$250,000		Dividends	None (or less than \$201)	\$1,001 - \$2,500	\$5,001 - \$15,000	\$50,001 - \$100,000	\$50,001 - \$100,000*	Over \$1,000,000*	Over \$5,000,000		
	\$250,001 - \$500,000		Dividends	None (or less than \$201)	\$1,001 - \$2,500	\$5,001 - \$15,000	\$50,001 - \$100,000	\$50,001 - \$100,000*	Over \$1,000,000*	Over \$5,000,000		
	\$500,001 - \$1,000,000		Dividends	None (or less than \$201)	\$1,001 - \$2,500	\$5,001 - \$15,000	\$50,001 - \$100,000	\$50,001 - \$100,000*	Over \$1,000,000*	Over \$5,000,000		
	\$1,000,001 - \$5,000,000		Dividends	None (or less than \$201)	\$1,001 - \$2,500	\$5,001 - \$15,000	\$50,001 - \$100,000	\$50,001 - \$100,000*	Over \$1,000,000*	Over \$5,000,000		
	\$5,000,001 - \$25,000,000		Dividends	None (or less than \$201)	\$1,001 - \$2,500	\$5,001 - \$15,000	\$50,001 - \$100,000	\$50,001 - \$100,000*	Over \$1,000,000*	Over \$5,000,000		
	\$25,000,001 - \$50,000,000		Dividends	None (or less than \$201)	\$1,001 - \$2,500	\$5,001 - \$15,000	\$50,001 - \$100,000	\$50,001 - \$100,000*	Over \$1,000,000*	Over \$5,000,000		
	Over \$50,000,000		Dividends	None (or less than \$201)	\$1,001 - \$2,500	\$5,001 - \$15,000	\$50,001 - \$100,000	\$50,001 - \$100,000*	Over \$1,000,000*	Over \$5,000,000		

\* 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.

Reporting Individual's Name <b>Wray, Christopher A.</b>		Page Number <b>5 of 9</b>								
<b>SCHEDULE A continued</b> (Use only if needed)										
BLOCK A Assets and Income	BLOCK B Valuation of Assets at close of reporting period			BLOCK C Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.						
	\$1,001 - \$15,000	\$50,001 - \$100,000	\$250,001 - \$500,000	Over \$1,000,000*	\$5,000,001 - \$25,000,000	Over \$50,000,000	Type	Amount	Other Income (Specify Type & Amount)	Date (Mo., Day, Yr.)
1 S/Union Pacific Corp.							Dividends			
2 S/State of Georgia general obligation bonds							Interest			
3 S/Fulton County, GA Hosp. Auth. bonds							Interest			
4 S/Evergreen Investments (money market)							Interest			
5 S/Atlantic Investment Co., Atlanta, GA -- investment co. holding interests in Merrill Lynch mon. mkt f'd.							Interest			
6 Exxon Mobil							Dividends			
7 Cousins Properties, Inc., (commercial real estate)							Dividends			
8 John H. Harland Co., (software & other products for finan. institutions)							Dividends			

\* 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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Reporting Individual's Name

Wray, Christopher A.

**SCHEDULE A continued**  
(Use only if needed)

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Assets and Income	BLOCK B		BLOCK C		Date (Mo., Day, Yr.) Only if Honoraria
	Valuation of Assets at close of reporting period	Type	Amount	Other Income (Specify Type and Amount)	
1 S/Atlantic Inv. Co. cont'd: ExecuCourt, LLC (office rentals)	\$1,001 - \$15,000	Dividends	\$50,001 - \$100,000	Over \$5,000,000	
2 Alliance Tech. Ventures III	\$1,001 - \$15,000	Interest	\$50,001 - \$100,000	Over \$5,000,000	
3 Office building & garage, Atlanta, GA	\$1,001 - \$15,000	None (or less than \$201)	\$50,001 - \$100,000	Over \$5,000,000	
4 Evercore Cap. Partners, LP (see attachment)	\$1,001 - \$15,000	None (or less than \$201)	\$50,001 - \$100,000	Over \$5,000,000	
5 (None, not readily available for Atlantic Inv. Co. sub-assets)	\$1,001 - \$15,000	None (or less than \$201)	\$50,001 - \$100,000	Over \$5,000,000	
6 S/IRA Fidelity Dividend Growth Fund	\$1,001 - \$15,000	Dividends	\$50,001 - \$100,000	Over \$5,000,000	
7 DC/Fidelity Growth & Income Fund	\$1,001 - \$15,000	Dividends	\$50,001 - \$100,000	Over \$5,000,000	
8 DC/Fidelity Growth & Income Fund	\$1,001 - \$15,000	Dividends	\$50,001 - \$100,000	Over \$5,000,000	

\* If the asset/income is either that of the filer or jointly-held



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Reporting Individual's Name  
**Wray, Christopher A.**

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**SCHEDULE C**

**Part I: Liabilities**  
 Report liabilities over \$10,000 owed to you, your spouse, or dependent children during the reporting period by you, your spouse, or dependent children. Check the highest amount owed during the reporting period. Exclude accounts.

None  **None**

Examples	Creditors (Name and Address)	Type of Liability	Date Incurred	Interest Rate	Terms if applicable	Category of Amount or Value (2)
1	First District Bank, Washington, DC John Jones, 123 St., Washington, DC	Mortgage on rental property, Delaware Promissory note	1991	8%	25 yrs. on demand	\$15,001 - \$50,000.00
2						\$50,000.01 - \$100,000
3						\$100,001 - \$500,000
4						\$500,000.01 - \$1,000,000
5						\$1,000,000.01 - \$5,000,000
6						\$5,000,000.01 - \$25,000,000

\*This category applies only if the liability is solely that of the filer, 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.

Examples	Status and Terms of any Agreement or Arrangement	Parties	Date
1	Pursuant to partnership agreement, will receive lump sum payment of capital account & partnership share calculated on service performed through 1/00.	Dee Jones & Smith, Newtown, State	7/85
2			
3			
4			
5			
6			

None  **None**

OMB/Action Number: 3045-0181 (02/98)

Print Editions Cannot Be Used.

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Reporting Individual's Name  
**Wray, Christopher A.**

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**SCHEDULE D**

**Part I: Positions Held Outside U.S. Government**

Report any positions held during the applicable reporting period, whether compensated or not, in any capacity, including as an officer, director, trustee, stockholder, 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, fraternal, or political entities and those solely of an honorary nature.

1	2	3	4	5	6	7	8	9
Organization (Name and Address)	Type of Organization	Position Held	From (Mo. Yr.)	To (Mo. Yr.)	None	From (Mo. Yr.)	To (Mo. Yr.)	Present
Example: Dept. Assn. of Rock Collectors, NY, NY Doi Jones & Smith, Hometown, State	Non-profit educational Law firm	President Partner	6/92	7/85	1/00			

**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 compensation from any source of any corporation, firm, partnership, or other business enterprise or any other source. Do not complete this part if you are an incumbent, Termination Filer, or Vice Presidential or Presidential Candidate. Do not report the payment of more than \$5,000. You need not report the U.S. Government as a source.

1	2	3	4	5	6
Source (Name and Address)	Legislative	Legal services in connection with university construction	Other	None	Brief Description of Duties
Example: Doi Jones & Smith, Hometown, State Metro University (Client of Doi Jones & Smith), Hometown, State					

Prior Editions Cannot Be Used.



Attachment to SF-278 for Christopher A. Wray. Schedule A, p.6.

Holdings of Evercore Cap Partners LP (values not readily available):

AMERICAN MEDIA, INC. (magazine publisher)

CADOGAN CAPITAL LLC (business systems for broadcasting & advertising)

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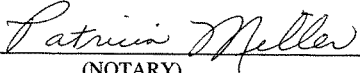
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I, Christopher A. Wray, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

6/12/03  
(DATE)   
(NAME)

  
(NOTARY)

 January 31, 2004

Senator GRAHAM. Thank you all.

Ms. Tandy, I am very fond of your predecessor, Mr. Hutchinson. He is a tough act to follow, and it speaks well of you to be selected by the President and all the glowing recommendations that have come from the members of the Committee, members of the Senate, and others.

Just very quickly, what is your biggest challenge as you see the job? And what would be the biggest help the Congress could provide in meeting that challenge? And, lastly, I would like to acknowledge the fact that you will be in charge of some of the bravest, most dedicated public servants this country has. They are very brave men and women who work in unbelievably tough conditions, and we owe a great debt to them. And anything we can do to help you in your endeavors to help them, count me in. But if you could kind of outline what you think is the biggest challenge you face and what we can do to help.

Ms. TANDY. Thank you, Senator. After 9/11 and the redirection of resources that flowed from that, drug enforcement responsibility was never more squarely placed on the shoulders of the Drug Enforcement Administration than after that moment. The President and the Attorney General called upon every agency to take its part and perform its utmost for the security of this country.

My vision for DEA and, if I am confirmed, my greatest goals in leadership of DEA is to ensure that DEA is prepared to be the leaders that they are and must be for the protection of this country and for the security of our future generations against illegal drugs.

Senator over the next 18 months, more than half of the Senior Executive Service staff and professionals of the Drug Enforcement Administration will be eligible to retire. It is critical that I, if I am confirmed, ensure that there is career development to shape the future leaders of the Drug Enforcement Administration as it engages in the most incredibly difficult fight against illegal drugs and drug trafficking.

Other challenges, Senator, and visions that go with those challenges are to ensure that there is real information-sharing, widespread information-sharing so that we can achieve our greatest goals of drug enforcement with our State and local law enforcement partners, and our partners throughout private industry.

I also, Senator, see as other challenges and, concomitant with that, opportunities achieving—the goal of achieving the maximum impact from our enforcement efforts, to develop strategic plans so that we use our resources most effectively in the Drug Enforcement Administration, and that, most critically, Senator, we sharpen our focus on the money side that actually fuels the drug trafficking, the \$63 billion-plus industry that it has become in this country.

Senator GRAHAM. Thank you. Thank you very much.

That will be a good segue into talking to you. Your very impressive resume, Mr. Wray, and the testimony from both Senators, it seems like you would be a very worthy adversary in the courtroom. You are about to embark on a position that I think is one of the most rewarding and challenging in the prosecutorial world. I was a judge advocate in the Air Force, both defense and prosecution side.

Just as briefly as you could, what do you see as the main obligation of a prosecutor in the Federal system post-9/11? And has that changed your job at all?

Mr. WRAY. Senator, I think that is an excellent question because it goes to the heart of what the Department has been doing since September 11th, really just in days immediately afterwards, and in particular the Criminal Division. We have undergone really a cultural shift, which is to place the prevention of another terrorist attack as our number one priority.

If confirmed, I would maintain this as the number one priority of the Criminal Division. We have never, as you know, experienced anything as savage and cowardly as the attack that occurred on September 11th, and we must do everything within our power, within the Constitution and the law, to make sure it never happens again.

I believe that there are public estimates that around 10,000 people went through those camps in Afghanistan, and there were only 19 killed on September 11th. So that would be my number one priority as head of the Criminal Division.

Senator GRAHAM. Thank you very much.

I recognize the fact that our distinguished Senator from Alabama has arrived. Senator Sessions, if you would like to make any statements or comments or ask any questions, please do so.

Senator SESSIONS. Thank you very much, Mr. Chairman, and for your being here. It is great to see these two nominees to very, very important positions. Karen Tandy, it is great to see you.

I was United States Attorney for a number of years, served on the United States Attorneys Advisory Committee and during that time served as Chairman of the Narcotics Subcommittee, and already—and that was a number of years ago—Karen Tandy was recognized as one of the finest prosecutors in the country and one of the leaders of the Organized Crime Drug Enforcement Task Force programs.

Since that time, she has consistently shown extraordinary capabilities and understanding of this issue. I would just say, Karen Tandy, I congratulate you and the President for nominating you. There are few people in this country that have the practical experience, the intellectual ability that you do, and the respect of the professionals who deal with drugs in America. So I think you will just do a great job, and I am excited for you on that.

Mr. Wray, congratulations to you.

Mr. WRAY. Thank you.

Senator SESSIONS. The Criminal Division is a great job. Every day you get to put on the white hat and go after bad guys. What more can you ask other than a little raise every now and then, maybe?

[Laughter.]

Senator SESSIONS. You will not get many.

But I think the leadership to all the way out in the field where 90 percent of the cases that are tried are tried not in the D.C. office here, tried by your Assistant United States Attorneys all over America. And I think if you support them, encourage them, motivate them, give them good guidance, they will respond and we will see improved law enforcement in the country.

I do not want to take too much time, Mr. Chairman. What is the agenda?

Senator CHAMBLISS. [Presiding.] The floor is yours.

Senator SESSIONS. All right. Ms. Tandy, let me ask you this: It seems there has been—well, I was present at the creation of the Organized Crime Drug Enforcement Task Force. Maybe you are too young for that.

Ms. TANDY. No. I was there, too.

Senator SESSIONS. You were there, too? You did not have to admit that. But it was a good program. I think it selected top narcotics prosecutors and motivated them, got them the kind of resources they needed.

I sense that it is perhaps typical of those kinds of entities that it may have lost some of its luster as time went by. Do you think in your position you could utilize that? Or do you feel like you might seek to have the Department of Justice give more emphasis to that area? I know you have personally been involved in it.

Ms. TANDY. Thank you, Senator.

Senator SESSIONS. And would that help the DEA, of course, in the prosecution of its cases?

Ms. TANDY. DEA is a leader in the Organized Crime Drug Enforcement Task Force and is responsible, along with its other agency colleagues, for initiating the vast majority of the OCDETF investigations.

Just quickly, Senator—and thank you so much for your kind remarks—the experience that I had in reshaping OCDETF from a passive funding mechanism to an accountable, focused task force program responsible for reducing drug supply has certainly inured to my benefit, Senator, in the future that, if I am confirmed, holds for me and for DEA with my leadership.

Essentially, Senator, getting to real measures of our performance is a significant future piece for OCDETF and for DEA. Dismantling and disrupting and using our resources to go after and dismantle and disrupt the most significant supply, drug-trafficking organizations are what DEA is all about and what OCDETF has been about for 20 years. So I feel very fortunate, Senator, to have had the opportunity to reshape and restore the mission of OCDETF and feel that that will position me very capably to be a leader of real value in making a difference along with DEA.

Senator SESSIONS. Would you say that fundamentally the OCDETF program that you helped revitalize, if that would be the primary prosecutor of the most important cases DEA makes in the drug field?

Ms. TANDY. Senator, those are—you're absolutely right, those are the most significant cases because they go after organizations that are responsible for our greatest volume of drug supply from the international, national, regional, down to the local distribution points across this country. It is DEA and OCDETF that make the greatest difference and provide the model for ensuring that we reach our drug supply and ultimately reach the President's goals of reducing drug use.

Senator SESSIONS. One thing I would like to ask you—and this is true of all agencies—I have heard complaints about DEA and some others about the promotion policy for agents, whether or not

it is fair, whether or not people get a fair shake, whether or not the most talented get the most promotions and the ones who work the hardest.

I think it is important and I would ask you, if you take this job, that you take seriously every agent and their opportunity to be promoted to try to promote rapidly those who deserve it and not promote those—just move them along and pay them more every year if they are not performing. In my observation—and I think you would agree—as a prosecutor is some agents just seem to make lots of cases, and other seems to make very few. It is not just make a few more. It is like some make ten big cases and somebody else will make one. And making a big case and handling that is a complicated thing, and they are very, very valuable, the agent who can do it.

Would you say to us that you would be committed to reviewing your procedures and making sure the most talented get promoted that deserve it?

Ms. TANDY. Thank you, Senator. Absolutely, you can count on that. As a career public servant, it was through hard work and the recognition of hard work that I am able to appear before you today. And you have my pledge that, if confirmed, I will ensure that DEA's career promotion opportunities match your expectations, our country's expectations, that those who succeed are the ones who are the most accomplished in carrying out the policies and goals of this administration and the Drug Enforcement Administration.

Senator SESSIONS. That is well stated. I think we need to work on that constantly in Government. Businesses do a better job of seeing talented people and moving them as fast as possible into the places they can contribute the most, and we can do a better job, I think, in Government.

I will just mention one thing that you and I discussed earlier. I think DEA does have a prevention role and education role, but fundamentally that should not fall on DEA in my opinion. It is a waste to take a highly paid, highly trained, experienced DEA agent and have them work in junior high schools or things like that. They are the best of the best. DEA agents are terrific agents. And they are very valuable national resources, and maybe you can—I just think it is a mistake to go too far in all of a sudden taking those highly skilled agents capable of working Colombian drug gangs and billions of dollars at stake and drain away their attention too much from the skills they need.

Would you comment on that?

Ms. TANDY. Yes, thank you, Senator. DEA's enforcement skills are superior in drug enforcement, and those skills need to be fostered and ensured that they are focused in that direction.

The demand reduction role of DEA represent less than 1 percent of its budget, and demand reduction is something that really goes with the passion of the men and women who serve in DEA and the leadership of DEA. The demand reduction role principally, however, must fall to those agencies that are most skilled in demand reduction—obviously, the Department of Education, HHS, and, clearly, the Office of the National Drug Control Policy in the White House.

Senator SESSIONS. I agree. I think you stated that well. The 1-percent figure I did not know. I thought some changes had been made recently that may have gone a good bit beyond that. So I think you do have a role. You can contribute in the local groups. When I led those groups in Mobile, Alabama, DEA always played an important role in it. But they are great law enforcement officers, the best anti-drug investigators in the world, and I think they should focus on that.

Mr. Wray, briefly, when Attorney General Ashcroft was sworn in, we asked him some questions about gun crime prosecutions. I remember when I came to this Senate a little over 6 years ago, we had a host of new laws that were going to, Mr. Chairman, constrict the right of law-abiding citizens to get guns. Every kind of law, just every bill that went by, there were gun amendments that were going to make it tougher for legitimate legal citizens to get a gun.

Again, I look at the prosecutions, and since the time of the Reno administration took office, prosecutions dropped 40 percent. So we were passing new laws, but nobody was getting prosecuted for them. So we asked Attorney General Ashcroft was he going to prosecute the laws that he had and he said that he would. I think the numbers are going up. I am not sure what they are.

Maybe you will know, Mr. Wray, but I would first of all ask you, will you make that an emphasis, people who are carrying guns in drug crimes and burglaries and in bars? That is how people are getting killed too often and if we prosecute those cases aggressively, I am convinced murder rates go down, and I think the numbers are showing that.

Do you have any thoughts on that subject?

Mr. WRAY. Absolutely, Senator, I couldn't agree with you more, and I know that you have been a strong supporter of the administration's efforts in that area.

Project Safe Neighborhoods, which is this administration's gun crime reduction initiative, is a comprehensive strategy that kicked into gear in, I think it was around May or June of 2001, and the numbers are very encouraging.

Over the last fiscal year, gun crime prosecutions, again using the laws that are on the books, are up about 38 percent in 1 year. Even in the specific area of gun trafficking offenses, over the last 2 years of this administration they are up about 55 percent.

We are trying to send home the message that gun crime means hard time, using the felon in possession statute, the armed career criminal statute where appropriate, and going after precisely the sort of defendants that you are talking about.

Senator SESSIONS. You can pass a lot of them. A number of the crimes that were new laws that were passed only had one or two prosecutions in the whole United States. But the cases of a felon in possession, an armed career criminal carrying a firearm during a drug trafficking offense or some other felony, are the bread-and-butter cases.

I think this Department of Justice will be judged by whether you maintain an aggressive posture against that kind of criminal activity because that is where people end up getting shot. So I appreciate that.

I would mention a couple of things, also. I know that the Federal agencies are going to spend a lot more time on terrorists and terrorism-related issues. I would ask you, though, to not too lightly back away from cases that are important to the legal system or to the commercial system, cases, for example, of bankruptcy fraud. We could prosecute a lot more cases of bankruptcy fraud.

And, frankly, it is my impression that a lot of bankrupts and a lot of lawyers think nobody ever gets prosecuted, no matter what they put down on their forms and bankruptcy petitions, which the court relies on totally, and they end up defrauding creditors and people in need.

I believe that the credit and banking system—it is important to have integrity in that. My experience is that a good Federal prosecutor, working with State and local investigators and Federal investigators, can really be effective in identifying those people that travel around passing bad checks. Maybe they do \$20,000 in one place and \$20,000 in the next place, and oftentimes are ignored by the Federal system, but are really big-time repeat offenders.

What is your thought about white-collar crimes of that nature? Will they be deemphasized or will you do your best to keep those numbers up?

Mr. WRAY. Well, Senator, I agree that bankruptcy fraud is a very pernicious kind of fraud that goes to the heart of both the integrity of the banking and credit systems that you are referring to, as well as to the integrity, frankly, of the bankruptcy court system.

Senator SESSIONS. It is a Federal court.

Mr. WRAY. And without the Federal Government aggressively moving in that area, frankly, there is no one else to do it. So we would not want to neglect that area. The Criminal Division has a very effective Fraud Section and, of course, the U.S. Attorneys' offices, as you mentioned earlier, are where the bulk of that work is done. When I was a prosecutor in the field, I had some bankruptcy fraud investigations of my own, so I hear you loud and clear.

Senator SESSIONS. Mr. Chairman, I thank you for this time. I believe these are two good nominees and I think we are going to have a good leader at DEA. I know her and I know Karen's background and integrity, and I know she will do a good job.

This is an important agency. This is one of the great agencies in the Department. I have some great personal friends to this day who are DEA agents. We had some marvelous cases that they handled involving international smuggling organizations and seizures of millions of dollars in assets. They have the highest-paid lawyers and it is tense.

A good agent is worth his weight in gold when you are in a big case, and you have got a lot of them in DEA and I am a big fan. I look forward to working with you.

Ms. TANDY. Thank you, Senator. I think half of DEA is in the back of this room right now and I know they are so pleased and proud to hear what you have just said. Thank you.

Senator SESSIONS. Thank you.

Senator CHAMBLISS. Spoken like an outstanding former United States Attorney.

Mr. Wray, your experience as an Assistant U.S. Attorney and in the management of the Justice Department has been significant



and substantial. Would you outline how these positions have prepared you for assuming a leadership role in the Criminal Division for us?

Mr. WRAY. I would be happy to do that, Senator. If fortunate to be confirmed, I feel like I have had the fairly unique experience of seeing the Department and understanding the Department from three different perspectives, from the perspective of a defense attorney on the other side, from the perspective of a career prosecutor in the field in the U.S. Attorney's office, and from the perspective of part of its senior leadership, especially during the September 11 attacks and really ever since.

In the U.S. Attorney's office, I prosecuted a wide variety of cases, everything from securities fraud to murder, from public corruption to gun crime, to church arson, and so forth.

Since that time, in the leadership of the Department, I have seen just about all of the issues confronting the Criminal Division at this particularly critical juncture in its history. I have had leadership responsibilities relating to the Division before and literally during and after the September 11 attacks.

For well over a year now, I have been attending and participating in daily terrorism threat briefings conducted by the CIA and FBI with the Attorney General, the Deputy, and the FBI Director.

In my role as Principal Associate Deputy Attorney General, I have been involved in just about every significant terrorism prosecution and investigation that the Department has had since September 11, whether in Virginia or in New York or Chicago, Buffalo, Portland.

During the course of that time, I have gotten to know and develop excellent personal working relationships not only with the leadership of the Criminal Division—and there are some really first-rate folks working there, as well as the 93 U.S. Attorneys. I think I know on a first-name basis just about every one of them.

I spend an awful lot of my time interacting with the leadership of the FBI, the ATF, the SEC in corporate fraud matters. And, of course, Ms. Tandy and I know each other quite well, having offices two doors apart. So if we are both fortunate enough to be confirmed, I think that would be a great thing for both the Criminal Division and the Drug Enforcement Agency.

On the management front, I have had significant management responsibilities within the Department of Justice as a whole, with its roughly \$23 billion budget and 130,000 employees. I was the Department's representative on something called the President's Management Council, which is a council that consists of essentially the chief operating officers of the different Cabinet agencies and has responsibility for implementing the President's management agenda.

I was also entrusted with significant responsibilities relating to the Justice Department's own strategic management council. So I had a lot of responsibility for management of the Department as a whole over the last few years.

So putting all those things together, I feel like this is the time in which we have to be particularly vigilant. Just in the last couple of weeks, we have had both a guilty plea from Iman Ferris in the Eastern District of Virginia and we have had the enemy combatant

designation of Ali Almari, both of which highlight the fact that we cannot to let down our guard, that there continue to be efforts to put sleeper operatives in the United States.

And I feel that this is the time for us to place the prevention of terrorism as the number one priority. The need for a smooth and orderly hand-off is imperative, and I believe I am the right person at the right time for the job and I am honored by the trust of the President and by the kind words of your introduction and by others that you have placed in me.

Senator CHAMBLISS. Well, your bio suggests, and you have just alluded to a broad background that you have got with respect to terrorism and prosecution of other cases, from narcotics to basically any violation of any statute of the Federal Government.

I think you just answered my other question, and that is what are going to be your priorities, or where are you going to start or what are you going to focus on, Chris?

Mr. WRAY. My number one priority, as you mentioned, is the number one priority of the Department, which is preventing further terrorist attack against Americans. Clearly, at this day and time there is nothing that can be as foremost in our minds as that.

My other priorities would be, if confirmed, the corporate fraud prosecutions. I think it is a particularly important time for us to try to hold accountable corporate wrongdoers and to restore integrity and investor confidence to the marketplace; gun crime, as I mentioned in response to Senator Sessions, especially through Project Safe Neighborhoods, since gun crime, as you know, is really a problem all over the country and really needs to be a major priority of the Justice Department; drug trafficking, both for its own nexus to terrorism and for the threat it poses to society.

Those would be probably my four major areas, but I would want to be careful not to neglect a number of areas in which the Federal Government plays a crucial role—public corruption, espionage, cyber crime, things like that. But those would be my primary focuses.

Senator CHAMBLISS. Ms. Tandy, there is a direct relationship between drug trafficking and terrorism, and you have had extensive experience with regard to investigating and prosecuting drug traffickers. You have had extensive experience with money laundering and related crimes.

What is going to be your focus on the nexus of drug trafficking, money laundering, asset forfeiture, and how we use those tools to disrupt and interrupt terrorist activity?

Ms. TANDY. Senator, certainly for the major supply organizations, the focus will be through the OCDETF program, the longest running task force program that includes 90 percent State and local law enforcement efforts as part of that program, along with nine Federal agencies.

The Drug Enforcement Administration has developed a wonderful priority targeting system to ensure that we are reaching from the international end of our focus down to the borders and across the borders to the lowest drug trafficking local priority across the country.

The money piece of that effort, Senator, is something that I will be very focused on enhancing because, as you know, it is the money

that fuels this horrific preying upon our children and our society. And it is only by attacking the money side as vigorously as we attack the drug side that we will truly dismantle and disrupt these supply organizations that have become their own marketplace in this country.

Senator CHAMBLISS. Thank you very much, and let me just say to both of you that I am very pleased to see that the two of you are willing to dedicate yourselves to public service. You obviously are committed to making sure that America is a safer place to live, and those of us, like you, who are parents appreciate the fact that you are as committed as you are and we thank you for your willingness to serve your country. I am sure that your nominations are going to move through in short order.

We thank you for being here today and we thank you for your testimony.

Ms. TANDY. Thank you, Senator.

Senator CHAMBLISS. Before we close the hearing, I am including in the record, without objection, the following: a statement of Chairman Hatch on the nominations of Karen Tandy and Christopher Wray, as well as his statement in support of our judicial nominees; a statement of Senator George Allen introducing Karen Tandy; letters of support for the nomination of Christopher Wray; letters of support for the nomination of Karen Tandy.

With that, we will stand in adjournment.

[Whereupon, at 3:46 p.m., the Committee was adjourned.]

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

## QUESTIONS AND ANSWERS

RESPONSES OF ROBERT BRACK  
TO FOLLOW-UP QUESTIONS FROM  
SENATOR RICHARD J. DURBIN

1. On your Senate questionnaire addendum, you noted your involvement with the organization OneMillionDads.com as follows:

ONE MILLION DADS.com. Internet-based service which keeps subscribers alerted to family issues in the media. Encourages members to contact legislators regarding specific issues. It occurred to me shortly after I became aware of the service that it might not be appropriate for me to use my state-owned computer for personal lobbying so I have not responded to any requests since.

- A. What personal lobbying efforts did you engage in using your state-owned computer? Please describe them.

What I described as "personal lobbying" in my questionnaire was limited solely to responding to requests for action from OneMillionDads.com (OMD). These requests typically sought an e-mail addressed to companies that advertised on, or otherwise supported, prime-time television programs which contained content believed by OMD to be inappropriate. My responses to such requests did not reference my judicial position, were few in number (5 or less) and ceased altogether when I considered the computer-use question.

- B. Do you think it is appropriate for a state or federal judge to engage in personal lobbying of any sort? If so, what types of lobbying do you believe are appropriate?

I believe that judges should follow the law and the canons of judicial ethics when determining whether to engage in personal lobbying of any kind. In New Mexico, pursuant to §21-700(A) of the Code of Judicial Conduct, "a judge may engage in political activity on behalf of the legal system, the administration of justice, measures to improve the law and as expressly authorized by law or by this Code." Relative to non-political activity, a judge shall conduct all of his extra-judicial activities so that they do not:

- (1) cast doubt on the judge's capacity to act impartially as a judge;
- (2) demean the judicial office;

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- (3) interfere with the proper performance of judicial duties;  
or
- (4) violate the judge's oath and obligation to uphold the laws and constitution of the United States and the State of New Mexico. §21-500(A), New Mexico Code of Judicial Conduct.

I have endeavored to follow the Code during my years as a state district court judge and I will strive to similarly follow the Code of Conduct for United States Judges, if confirmed.

2. The organization OneMillionDads.com is run by the American Family Association. One of the goals of the AFA is to - in their words - expose the misrepresentation of the radical homosexual agenda and stop its spread through our culture."

- A. Do you support this goal of the AFA? If so, please explain why you support it, and what you believe the "radical homosexual agenda" to be.

I am not a member of the American Family Association (AFA) and I don't believe I have ever read the stated goals of the organization. I am not sure what the AFA means when they use the phrase you noted and, therefore, could not be said to support it. The Constitution, as interpreted by our courts, defines the rights of all Americans, including gays and lesbians, and all such rights deserve the protection of our courts.

- B. In last week's Lawrence v. Texas decision, there were several opinions issued. Which of these opinions - the majority, the concurrence, or one of the two dissents - most reflects how you would have ruled in this case had you been a member of the Supreme Court?

I have not read the Lawrence v. Texas decision, and thus, I could not tell you which of the opinions reflects how I would have ruled. Even if I had read the decision, the separate Lawrence opinions were informed as the result of enormous time, study and briefing which I haven't spent or considered. Additionally, the New Mexico Code of Judicial Conduct, §21-700(B)4(b) & (c) indicates that judges "shall not:

- (b) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court;

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- (c) announce how the candidate would rule on any case or issue that may come before the court.”

The official commentary to the cited sections makes it clear that Rule (B)(4) applies to statements made to legislative bodies confirming nominations. Thus, I believe that it would be inappropriate for me to comment on the opinions except to state that, if confirmed, my duty as a federal district judge would be to follow the law, including all precedents of the Supreme Court and the 10<sup>th</sup> Circuit, as I have sought to do during my 6 ½ years as a state court judge.

Senator Joseph R. Biden, Jr.  
Questions for the Record for Karen Tandy

1. Earlier this year I wrote a letter to the Appropriations Committee requesting that the DEA receive \$26 million more than the President requested in his budget.

When the FBI transferred 567 agents from counter-drug investigations to counter-terrorism investigations, the DEA was left to fill in the gap without adequate funding: the President's 2004 budget only provides funding for an additional 233 Special Agents. By shutting down popular programs such as the Mobile and Regional Enforcement Teams, DEA has been able to shuffle around 362 agents, making them look like new agents when they are not.

Ms. Tandy, if confirmed you will have a tough job ahead of you fighting for scarce resources and keeping the drug issue on the national agenda. As Administrator, how will you make sure that drug investigations remain a priority – both in terms of the attention given to the investigations as well as the resources devoted to them?

If confirmed as Administrator, I will be committed to insuring that, as the federal government's only single-mission drug law enforcement agency, the DEA will continue to focus the bulk of its resources on Priority Drug Trafficking Organizations (PDTOs) – drug trafficking organizations having the most significant impact in America today at the national, regional, and local levels. By targeting PDTOs in each domestic field division and dismantling the transportation, distribution, and financial networks that link them to international targets, we will disrupt the drug market, reduce availability, and produce longer lasting results. At present, 35 percent of all PDTO investigations designated by DEA worldwide are "local impact" type investigations.

I have been advised that, in FY 2002, DEA conducted a review of its resource allocation and analyzed its investigative work hours based on an internal, intelligence-driven domestic threat assessment. Based on this assessment, DEA determined that an additional 300 Special Agents were required to sustain the nation's offensive against illegal drugs in FY 2004.

Between the FY 2003 enacted appropriation, and the FY 2004 President's budget request, if enacted, DEA will add 449 new agents along with funding to support another 100 State and local Task Force officers. DEA will also redirect 362 MET/RET agents to priority targets, and away from "street sweeps," which have limited long-term value.

The President's FY 2004 budget takes significant steps toward addressing the gaps in drug enforcement identified by the GAO in its recent report on the FBI Reorganization. These increases will allow DEA to maximize its available resources with regard to the FBI's shifting priorities.

Even with the personnel changes after September 11, 2001, DEA has continued to conduct investigations that impact the Nation's drug availability. This is something I have repeatedly witnessed while collaborating with DEA through OCDETF. If confirmed as Administrator, I will make certain that significant drug investigations will continue to receive the attention and resources required to maximize the DEA's contribution to our nation's counterdrug strategy.

Senator Joseph R. Biden, Jr.  
Questions for the Record for Karen Tandy

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2. Ms. Tandy, there have been a number of press reports about a DEA Agent in Billings, Montana who misinterpreted the Illicit Drug Anti-Proliferation Act when he approached the manager of the local Eagles Lodge to warn her that she may be violating the new law if the Lodge allowed the National Organization to Reform Marijuana Laws (NORML) to have a fundraiser at their facility.

I was troubled to hear this because, according to press reports, the Eagles Lodge had no knowledge that there might be drug activity at their location before the DEA approached them. And following the DEA Agent's visit, the Lodge decided to cancel the NORML event, leading to an outcry from various groups that the new law has stifled free speech.

As I'm sure you know, the law only applies to those who have "knowingly and intentionally" held an event "for the purpose of" drug use. It does not seem that the Eagles Lodge actions came anywhere close to that high legal standard.

Representatives from the DEA's chief counsel's office assured my staff that they shared my understanding of the law and that this interpretation of the statute was conveyed to all DEA field offices shortly after the bill was signed into law. Supplemental guidance was issued last week in a memo to field agents making clear that:

property owners not personally involved in illicit drug activity would not be violating the Act unless they knowingly and intentionally permitted on their property an event primarily for the purpose of drug use. Legitimate property owners and event promoters would not be violating the Act simply based upon or just because of illegal patron behavior.

**As Administrator, will you continue to abide by this interpretation of the Illicit Drug Anti-Proliferation Act?**

Yes. If confirmed as Administrator, I will honor all requirements of the statute, including specifically those elements addressing an owner or manager's state of mind. I appreciate that the Act's standards regarding "knowledge" and "intent" exist to protect those innocently involved, such as legitimate event promoters or sponsors, as well as managers and owners of locations where events may be held.



**Was the DEA legal guidance provided just to certain Agency personnel (e.g., Special Agents in Charge, Offices of Legal Counsel), or to all Agency staff? If it has not been provided to all staff, do you believe that providing this broad circulation would help ensure accurate interpretation and application of the law going forward? If it has been provided to all staff, please explain process by which it was so provided.**

I have been advised that DEA guidance has been made broadly available. To date, DEA has issued the following guidance on the statute: (1) On May 15, 2003, a memorandum from DEA's Chief Counsel, describing the IDAPA amendments to 21 U.S.C. § 856, was issued to all DEA divisions. This memorandum was also posted on DEA's internal website, making it readily available to all DEA personnel. (2) On June 17, 2003, the Acting Administrator issued a teletype to "DEA Worldwide," entitled "Specific Guidance for Utilization of the Illicit Drug Anti-Proliferation Act of 2003; Amendment to "Crackhouse" Statute, Title 21, U.S.C. 856." This teletype referenced the May 15, 2003, Chief Counsel memorandum noted above. It also provided DEA personnel additional legal and procedural guidance regarding use of this statute. (3) In an article dated June 20, 2003, DEA posted guidance on this statute on DEA's publicly available internet website, [www.dea.gov](http://www.dea.gov). This guidance is also available to DEA personnel via the website. (4) On July 3, 2003, DEA posted a synopsis of a recent Federal appellate court decision involving 21 U.S.C. § 856(a)(2), *McClure v. Ashcroft*, No. 02-30357, 2003 WL 21418097 (5<sup>th</sup> Cir. Jun. 20, 2003), on DEA's internal website. This is an illustration of the continuing efforts of DEA's Office of Chief Counsel to disseminate timely information on pertinent legal developments.

**How can you reassure people who may be skeptical of my legislation that it will not be enforced in a manner that has a chilling effect on free speech?**

I am mindful of the potential impact on First Amendment protections that may arise in the enforcement of this statute. I understand that DEA already has issued guidance to its personnel alerting them to the potential First Amendment implications of the statute, and directing close consultation with Headquarters senior management and agency legal counsel prior to any investigative or enforcement activity under the statute. DEA now requires an individual management and legal review of any proposed investigative or enforcement activity under the statute. In addition, the guidance directs DEA personnel to undergo similar Headquarters review prior to contacting the public or advising any person or organization that the statute may apply to a specific event.

As Administrator, I would continue to emphasize and enforce internal procedural safeguards to ensure that our mission is conducted in a manner that fully complies with First Amendment and other constitutional protections.

**Will Agents continue to have to contact DEA Headquarters before using the law in order to make sure that it is interpreted properly? Will this requirement to contact headquarters apply to informal situations such as the one in Billings, Montana or just to more formal matters such as initiating an investigation?**

I have been advised that current DEA policy requires close consultation with Headquarters senior management and agency legal counsel prior to any investigative or enforcement activity under the statute as well as prior to advising any person or organization that the statute may apply to a specific event. If confirmed as Administrator, I would insure adherence to the current guidelines under all applicable scenarios.

Senator Joseph R. Biden, Jr.  
Questions for the Record for Karen Tandy

**3. As you know, methamphetamine and other drugs have come to rural America. International trafficking organizations are working their way into small towns and rural areas --and rural America is completely unprepared to handle this problem.**

**Not only are there insufficient treatment beds for those who get hooked, but also as a report from The National Center on Addiction and Substance Abuse at Columbia University showed, many of these towns don't have enough people in their narcotics unit to conduct a single technical surveillance organization on one of these trafficking groups. Some of them can't even afford any drug enforcement training for their officers *at all*.**

**DEA has done a great job addressing this shortfall by training about 65,000 state and local cops each year at its training facility in Quantico, Virginia.**

**How do you envision the DEA helping rural areas and smaller towns deal with this in terms of training, task forces, etc.?**

Under my leadership, the DEA's State and Local Task Force Program would continue to be utilized as a "force multiplier" for federal, state, and local law enforcement agencies. In the 2004 Budget, DEA requested funding for \$3,950,000 in non-personnel funding for an additional 100 S&L Task Force Officers to help compensate for enforcement operations in outlying areas.

In addition to conducting investigations, the DEA would continue to focus on providing training to address the increasing problem of methamphetamine in rural areas. The DEA, in coordination with the Federal Law Enforcement Training Center (FLETC) in Glynco, Georgia, the Drug Law Enforcement School for Patrol Officers; the Drug Enforcement Training Program; the Train-the-Trainer School; and the Drug Task Force Supervisors' School, has displayed a sincere effort to aid in the education of our state and local counterparts. I understand that, in FY 2003, DEA anticipates training a total of roughly 1,100 students through FLETC's Small Town and Rural "STAR" rural law enforcement training programs.

I believe that it is important for DEA's State and Local Clandestine Laboratory Training program to continue to meet current needs for rural law enforcement training. As you know, it is often state and local police officers that first encounter clandestine laboratories, and who must ensure that these labs are investigated, dismantled, and disposed of in a safe and proper manner.

I understand that DEA provides law enforcement training to state and local police officers and sheriffs in rural areas of the country through the operation of the agency's 21 domestic field divisions and also provides training to our state and local law enforcement

counterparts through the two week Drug Unit Commanders Academy, the Narcotics Commander Leadership Program, and the Federal Law Enforcement Analysts Training "FLEAT" programs, both at the DEA Training Academy and across the United States.

If confirmed as Administrator, I pledge that DEA will continue its commitment to rural law enforcement agencies and will make available a variety of initiatives, programs, and training in support of this cooperative effort. Dismantling and disrupting international trafficking organizations, particularly those that infiltrate our rural communities with methamphetamine laboratories and distribution organizations, remain in the vanguard of the DEA mission.

Senator Joseph R. Biden, Jr.  
Questions for the Record for Karen Tandy

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4. Since 1986 the DEA has had a small demand reduction unit with one agent in each of the 22 field offices dedicated to prevention and education activities. Rather than providing funding for local prevention activities like most federal demand reduction programs, the Agents provide community leaders, parents and others with timely, accurate information about the local drug threat as well as provide support to local agencies working to prevent drug abuse.

As you know, the Illicit Drug Anti-Proliferation Act, which recently became law, authorizes DEA to hire a demand reduction coordinator in each state. This was a provision that I worked closely on with Asa Hutchinson because of the importance he placed on this issue.

**What do you think DEA's role should be in demand reduction activities in communities?**

Demand Reduction plays a critically important role as part of a balanced approach to reducing illegal drug use across the nation. Although DEA's Demand Reduction program represents less than one percent of its budget, DEA has a proud record of participation in the nation's efforts to reduce drug use. If I am confirmed, the agency's Demand Reduction role will continue in several key areas. Specifically, DEA Special Agents will continue to provide a credible law enforcement perspective and useful, first-hand knowledge of drug trends to DEA's counterpart agencies and coalitions whose core competencies are in education, treatment and prevention. The Special Agents perform a critical role by providing an enforcement view of the adverse consequences of drug trafficking on individual lives. In addition, DEA will participate in a strategically implemented Sanctions Based Demand Reduction initiative that will raise public awareness regarding the impact of drug trafficking on communities nationwide.

**Do you intend to place a demand reduction coordinator in each state?**

DEA fully supports the President's FY 2004 Budget. If I am confirmed, I would ensure that DEA's Demand Reduction Program receives all budgeted resources and administers its programs to achieve the maximum benefit in the Demand Reduction community. Under my leadership, this would include placing a Demand Reduction Coordinator in each state, if funded by the Congress.

**Senator Joseph R. Biden, Jr.**  
**Questions for the Record for Karen Tandy**

**5. A few years ago I worked with Sens. Hatch, Levin and Moynihan to pass the Drug Addiction Treatment Act to allow qualified doctors to dispense certain anti-addiction medications (including buprenorphine) from their offices rather than requiring patients to go to special clinics to get the medicine (as is the case with methadone and LAAM). At the time, some individuals at the DEA fought this bill rather vigorously because they were worried that the medication might be diverted. They were focused more on potential costs than the possible benefits.**

**Do you support the use of anti-addiction medications to treat drug addiction?**

I support expanding access to treatment services and increasing the quality of care received for opioid dependence. I have been advised that the challenge facing DEA, other law enforcement agencies, as well as the treatment community, is to provide effective treatment while preventing the abuse of the treatment drug itself.

I believe that the benefits of the therapeutic environment are enhanced by maintaining compliance with existing laws, whether treatment is provided via the traditional opioid treatment program or by the newly established office-based treatment options using buprenorphine products. However, treatment must go beyond just providing a drug; it must also include the development of job skills, counseling, and other associated services.

**Will the DEA fight any effort to move buprenorphine to a more stringent Schedule (under the CSA) without adequate cause?**

I understand that scheduling under the Controlled Substances Act (CSA) is a very rigid process involving both the DEA and the Department of Health and Human Services, that must be based on scientifically verified and legally defensible data that involves a formal rulemaking process with the opportunity for a hearing. Please be assured that, if I am confirmed as Administrator, the DEA will not initiate the rescheduling of buprenorphine (or any other substance) without adequate cause and consideration of all information.

**Senator Joseph R. Biden, Jr.**  
**Questions for the Record for Karen Tandy**

6. I have been working to develop legislation, building on my 1990 Anabolic Steroid Control Act, to schedule a number of the steroid precursors (including androstenedione, the substance that Mark McGuire was taking when he broke the single season home run record) that are currently legal and are often abused by teen athletes. A number of agents and other experts at DEA have been quite helpful, providing my office with technical assistance about some of the chemicals of concern.

**To what degree are you concerned about the abuse of so-called steroid precursors, substances which metabolize into testosterone and estrogen in the body and are only legal because of an unintended loophole in the 1990 law?**

I acknowledge that the abuse of anabolic steroids poses a significant health risk, particularly to our nation's young people. Consequently, I am very concerned about the proliferation of non-controlled steroids that are now available in the dietary supplement market.

I have been advised that more than 37 different steroids are now purported to be sold in dietary supplement products and that a significant majority of these products have not been examined for effectiveness and safety in humans.

Moreover, I understand that additional studies to determine the effects of steroids on muscle growth are required, and are currently underway. If confirmed as Administrator, I pledge the DEA's continuing investigative and technical assistance in addressing this issue.

**Would you support legislation to Schedule androstenedione and other such steroid precursors?**

Yes. I support balanced legislative efforts to streamline the process by which anabolic steroids are controlled under the CSA. I understand that the DEA has favored removing the requirement to prove that a steroid promotes muscle growth and modifying a provision in the CSA to prevent the potential automatic exclusion of dietary supplements containing controlled steroids from regulatory control.

**Senator Joseph R. Biden, Jr.**  
**Questions for the Record for Karen Tandy**

**In the past year, coca cultivation in Colombia has decreased by 15 percent and opium poppy cultivation has decreased by 25 percent. By contrast, cultivation increased in Peru and Bolivia, by 8 percent and 23 percent, respectively. This type of “balloon effect” is what a number of people feared when Plan Colombia was originally envisioned three years ago. What do you think we should be doing to bolster our efforts in Peru and Bolivia so this situation does not get worse?**

As you know, the US State Department is the lead agency in the eradication process. I have been advised that, according to DEA intelligence, there is no indication that recent coca production trends in Bolivia and Peru are directly due to the effects of eradication efforts under Plan Colombia.

I understand that, from 1997 through 2001, coca cultivation in Bolivia steadily decreased due to the unprecedented coca eradication program ordered by former Bolivian President Hugo Banzer as part of his “Plan Dignity” program. Under the current administration of President Gonzalo Sánchez de Lozada, Bolivian eradication efforts have slowed significantly due in great part to cocalero rioting and political unrest in the country.

I have been advised that the recent increase in Peru’s cultivation also can be attributed to slowing eradication efforts in 2002. Peru is also being affected by a cocalero movement to stop coca eradication. Because of cocalero protest in February and March of 2003, the Peruvian Government issued a presidential decree to suspend eradication efforts in most of the principal coca growing areas.

Although DEA has no active role in coordinating eradication efforts with the governments of Bolivia and Peru, if confirmed as Administrator, I would insure that DEA supports these efforts by supplying real-time intelligence relative to locations of coca cultivation areas. As always, DEA would continue to complement these eradication efforts through a comprehensive program of providing investigative assistance, training, intelligence, and institution building to our host-country counterparts.

**Senator Joseph R. Biden, Jr.  
Questions for the Record for Karen Tandy**

**8. Last month the Judiciary Committee held a hearing on narco-terrorism. During the hearing, the Committee heard a great deal of specific testimony about the amount of money that Colombian terrorist groups receive from the drug trade as well as evidence that Al Qaeda and Hezbollah are benefiting from drug proceeds, but none of the four Administration witnesses were able to quantify the nexus between fundamental Islamic groups, particularly Al Qaeda, and the drug trade. That raises the question of whether anyone in the Executive branch is able to quantify at this time how much money Islamic fundamentalist groups like Al Qaeda make from drug production, drug trafficking, or taxing the production or flow of drugs.**

**Given the excellent work that you have done at the Department of Justice on money laundering, do you believe that at this time anyone in the Executive Branch has a good estimate of how much money Islamic fundamentalist groups like Al Qaeda make from drug production, drug trafficking, or taxing the production or flow of drugs?**

**If so, what do you think is the extent of the link? If not, will you work to try to quantify this link?**

I have been advised that DEA receives periodic information indicating that Islamic fundamentalist groups may generate funds from drug trafficking activities; however, the agency has not received adequate information to quantify how much drug income is received by these elements. If confirmed as Administrator, I can assure you that DEA would continue to work to determine any link between illicit drugs and terrorist elements. This would include active coordination and information sharing with other agencies and international bodies at the headquarters and field levels.



Senator Joseph R. Biden, Jr.  
Questions for the Record for Karen Tandy

9. **Current law requires the DEA to limit the export of Schedule II controlled substances to the country of final destination; a company cannot ship U.S.-made product to a central warehouse facility abroad and then re-export the product to a third country. Some pharmaceutical companies have urged Congress to change the law, complaining that it requires them to make many more shipments, resulting in higher costs and an incentive to move their manufacturing plants abroad.**

**Do you believe that the current way of doing business is the only way to ensure that U.S. products do not get diverted? Would you be open to changing the law to create a new system that would allow responsible companies to re-export Schedule II controlled substances as long as the new system included proper safeguards to prevent diversion?**

One of the primary purposes of the Controlled Substances Act (CSA) is to prevent the diversion of controlled substances through a closed system of distribution while maintaining an adequate supply of medicines in the United States. A critical component of this system is the control of the importation and exportation of narcotic and psychotropic pharmaceuticals as required of signatories of the international treaties. These treaties established only the minimum standards to be adopted by all countries in a cooperative worldwide effort to prevent the diversion of such legitimately manufactured substances into illicit traffic. Controlled substances are most vulnerable to diversion while in international trade.

The CSA established strict control measures based upon prior U.S. experience. It requires Schedules I and II substances and narcotic substances in Schedules III and IV to be utilized exclusively for legitimate medical or scientific uses in the country of import. I understand that there is a re-export provision for U.S. exporters of Schedules III and IV psychotropic substances and Schedule V narcotic and psychotropic substances under certain conditions, if made known to DEA when the notice of planned exportation is filed. These substances have a lower abuse potential than the substances described above. I have been advised that the DEA, however, has seen very few U.S. companies utilize this provision. Therefore, I believe that the need to amend existing statutes is questionable when U.S. firms are not making use of existing re-export provisions. The CSA restriction on re-export is also supported by the Department of State, Department of Commerce, and the International Narcotics Control Board. Nonetheless, if confirmed as Administrator, I would be open to further consideration if facts were to show that an amendment is warranted, and that such action would not result in an increased risk of diversion of controlled substances.

Countries throughout the world recognize the United States as a leader in drug control efforts aimed at preventing the diversion of narcotic and psychotropic substances. The current U.S. re-export prohibition policy in existence since 1914, is consistent with the spirit of the 1961 Single Convention on Narcotic, which is to limit the movement of narcotics to only those countries that have a legitimate need for them. Consequently, I would want to ensure that any amendment to the CSA would not weaken controls so as to increase the possibility of diversion.

Senator Richard J. Durbin  
Questions for the Record for Karen Tandy

1. **In April, Congress enacted the Illicit Drug Anti-Proliferation Act (also known as the RAVE Act), which expands the federal "crack house statute" to more easily apply to outdoor and one-time events. On May 15, 2003, the DEA's Office of Chief Counsel issued guidance on how this law should be enforced. On May 30, 2003, this guidance was misinterpreted by a DEA Special Agent in Billings, Montana, which led to the cancellation of an event at the Eagles Lodge.**

**I understand that in response to this incident, the DEA has issued supplemental guidance that "makes clear that property owners not personally involved in illicit drug activity would not be violating the Act unless they knowingly and intentionally permitted on their property an event primarily for the purpose of drug use." (Letter of June 19, 2003 from William B. Simpkins, DEA Acting Administrator, to Senator Joseph Biden.) I understand that the supplemental guidance also establishes procedures within the DEA to obtain Headquarters review of proposed enforcement activity under the Act.**

**A. I first would like to commend the DEA for its response to the incident in Billings, Montana. Will you provide Congress with the revised DEA guidance on the enforcement policies of the Illicit Drug Anti-Proliferation Act?**

Please be assured that I share your appreciation for the importance of maintaining the public confidence with respect to the responsible implementation of this new law. I have been advised that, as a preliminary matter, on May 15, 2003, the DEA's Office of Chief Counsel issued guidance which was distributed to all DEA offices and posted on the agency's intranet. The guidance informed personnel that requirements of "knowledge" and "intent" were not changed by the Act. Accordingly, legitimate event promoters, such as bona fide managers of stadiums, arenas, performing arts centers, and licensed beverage facilities should therefore not be concerned that they will be prosecuted simply based upon or just because of illegal patron behavior.

I have been further advised that, on June 17, 2003, supplemental guidance which reiterated and expanded upon the initial guidance was distributed throughout the agency. The guidance made clear that property owners not personally involved in illicit drug activity would not be violating the Act unless they knowingly and intentionally permitted on their property an event primarily for the purpose of drug use. Consequently, legitimate property owners and event promoters would not be violating the Act simply based upon or just because of illegal patron behavior.

I understand that this guidance also establishes procedures within DEA to obtain Headquarters review of proposed enforcement activity under the Act, including approaching any private person or organization about possible application of the statute to a particular event or case. Should I be confirmed as Administrator, I would be steadfastly committed to insuring that all DEA activity under the Act complies with its terms and the First Amendment.

**B. Does the DEA and/or Department of Justice intend to issue formal regulations regarding the enforcement of this Act? If so, when? If not, why not?**

At this point, I am not aware of any plans by the Department of Justice to issue formal regulations regarding the enforcement of this Act. As for DEA, I have been advised that enforcement procedures are typically issued via internal policy statements, as has been done already in this case. To date, DEA has issued the following guidance on this amended statute: (1) On May 15, 2003 a memorandum from DEA's Chief Counsel, describing the IDAPA amendments to 21 U.S.C. § 856, was issued to all DEA divisions. This memorandum was also posted on DEA's internal website, making it readily available to all DEA personnel. (2) On June 17, 2003, the Acting Administrator issued a teletype to "DEA Worldwide," entitled "Specific Guidance for Utilization of the Illicit Drug Anti-Proliferation Act of 2003; Amendment to "Crackhouse" Statute, Title 21, U.S.C. 856." This teletype referenced the May 15, 2003 Chief Counsel memorandum noted above. It also provided DEA personnel additional legal and procedural guidance regarding use of this statute. (3) In an article dated June 20, 2003, DEA posted guidance on this statute on DEA's publicly available internet website, [www.dea.gov](http://www.dea.gov). This guidance is also available to DEA personnel via the website. (4) On July 3, 2003, DEA posted a synopsis of a recent Federal appellate court decision involving 21 U.S.C. § 856(a)(2), *McClure v. Ashcroft*, No. 02-30357, 2003 WL 21418097 (5<sup>th</sup> Cir. Jun. 20, 2003), on DEA's internal website

**C. Does the guidance ensure that property owners are allowed to engage in legal activities, including playing certain kinds of music and allowing people to dance with legal items, such as glow sticks?**

The current guidance requires a thorough review of each situation on a case-by-case basis. As in other types of investigations, DEA recognizes that lawful activity, such as playing certain types of music, or using lawfully possessed items such as glow sticks, cannot by themselves give rise to prosecution under the Act. On the other hand, it has long been recognized that actions or circumstances that are lawful or consistent with innocence when viewed separately, may give rise to reasonable suspicion of unlawful activity when viewed together in the context of a specific situation. *See, e.g., United States v. Arvizu*, 534 U.S. 266 (2002). Accordingly, I believe that DEA must consider the totality of circumstances in each case and how these circumstances apply to the law in question.

**D. Does the guidance contain any provisions regarding public safety measures, including the provision of bottled water, air-conditioned rooms, and paramedics on call? If so, what are those provisions? If not, would you be willing to supplement the guidance to clarify that such precautions are not evidence of "knowledge" or "intent" regarding drug use?**

DEA must consider all facts and circumstances in assessing each case. DEA requires an individual management and legal review of any proposed investigative or enforcement activity under the statute. In addition, the guidance directs DEA personnel to undergo similar Headquarters review prior to contacting the public or advising any person or organizations that the statute may apply to a specific event. In conducting this assessment, DEA recognizes that the public safety precautions referenced in your question cannot, standing alone, give rise to prosecution under the statute. However, also as noted above, otherwise innocent or lawful actions may, when considered together in the context of a particular situation, legitimately contribute to suspicion of unlawful activity.

**E. Would you be willing to develop guidance or regulations to create a legal "safe harbor" for property owners, under which owners could be guaranteed protection from prosecution if they undertook certain measures to deter drug use?**

Given the wide variety of circumstances under which this statute could apply, it is not feasible to provide meaningful universal regulations. Any such regulations would necessarily be so generic as to provide little guidance, and may potentially serve as a blueprint for actual violators to evade prosecution. Under current policy, DEA personnel must consult with Headquarters management officials and agency counsel before taking any enforcement or investigative action under the statute; likewise they must do so before even approaching any private person or organization about possible application of the statute to a particular event or case.

I believe that this proactive, case-specific review provides far more effective protection than would the issuance of generic, non-specific guidance or regulations.

Senator Richard J. Durbin  
Questions for the Record for Karen Tandy

2. **The California Compassionate Use Act (also known as Proposition 215) allows seriously ill people, who have a doctor's recommendation, to cultivate and use marijuana as a form of treatment. As permitted under this state proposition, the City of Oakland enacted a medicinal marijuana ordinance, and under the auspices of this ordinance, Ed Rosenthal grew marijuana to be sold for medicinal uses. In 2002, DEA agents raided Mr. Rosenthal's facility and arrested him for marijuana cultivation and conspiracy. Although Mr. Rosenthal was convicted of these charges, last month a federal judge sentenced him only to one day in prison and a fine of \$1,000.**

**I realize that marijuana is classified as a Schedule I drug and therefore the federal government does not recognize the medicinal benefits of marijuana. At the same time, according to California Attorney General Bill Lockyer, federal raids of medicinal marijuana providers such as Mr. Rosenthal began in 2001, despite the fact that the California state proposition passed in 1996.**

**A. In light of Mr. Rosenthal's sentence, do you believe the DEA's limited resources should be consumed on raids of medicinal marijuana providers? If so, what priority would you give such raids, in relation to other DEA enforcement activities?**

I am advised that Mr. Rosenthal is appealing his conviction. I therefore believe it would be inappropriate to comment on specifics relating to his case.

Regarding the larger question, in my view, DEA's priorities should reflect the need to encourage adherence to the law. As Justice Powell noted, writing for the Court in *Wayte v. United States*, 470 U.S. 598 (1985), it is not improper for the government to prosecute individuals who make a point of disobeying the law, and encouraging others to disobey it, even if the disobedience is said to be for reasons of conscience.

**B. Would you be willing to support a moratorium on such raids until Congress can hold hearings on this matter?**

If I am confirmed as Administrator of the DEA, it will be my duty to see to the uniform enforcement of federal law. I do not believe it would be consistent with that duty for me to support a moratorium on enforcement of this law, or any law, in selected areas of the country.

**C. Are you aware of information regarding the medicinal benefits of marijuana (for example: an editorial in the *New England Journal of Medicine* on July 30, 1997; the 1999 Institute of Medicine report "Marijuana and Medicine: Assessing the Science Base," authorized by the White House Office of National Drug Control Policy; and the 1988 ruling from the DEA's chief administrative law judge, Francis L. Young)? If not, would you be willing to review these publications?**

I am not personally familiar with the sources you cite discussing the putative "medicinal benefits of marijuana." However, I am advised that to date, no clinical studies have been submitted to the FDA that have demonstrated that smoked marijuana can be used safely and effectively as a medicine. I am also advised that the DEA has registered eight researchers to further examine the possible medicinal benefits of smoking marijuana.

Moreover, in the 1980's the National Cancer Institute and a pharmaceutical company studied THC, the active constituent of marijuana, as a medicine for the relief of nausea and vomiting associated with cancer chemotherapy. The FDA subsequently approved a product containing THC (Marinol) as a medicine. As a result, the DEA moved Marinol into Schedule II and ultimately into Schedule III of the CSA.

I would be willing to review the materials you cite should I be confirmed as DEA Administrator.

**D. Do you believe that marijuana has medicinal benefits? Upon what evidence do you base your opinion?**

As I have noted, the active ingredient in marijuana, THC, has been accepted as having medicinal value when processed into Marinol. Marijuana itself, however, has not been shown to have medical benefits; accordingly, I have no basis for believing that marijuana, and specifically smoking marijuana, has any such benefits.

**E. Would you support the creation of a special, well-balanced commission to evaluate the reclassification of marijuana from a Schedule I drug (considered to be potentially addictive and with no current medical use) to a Schedule II drug (potentially addictive but with some accepted medical use)?**

I believe that current law and judicial review provide adequate mechanisms for the balanced review of the appropriate scheduling of marijuana. This system has been in place for over thirty years. If such a commission is established, I will, if confirmed as Administrator, offer my full cooperation. My own view is that the present mechanisms for examining classification issues are sufficient.

Senator Dianne Feinstein  
Questions for the Record for Karen Tandy

Ms. Tandy, there has been some concern about the nature of DEA's activities in targeting medical marijuana users and distributors in California. In particular, some have complained about the use of excessively confrontational tactics in raiding what are argued to be peaceful homes or places of business. I understand that state law and federal law on this issue are in conflict, and that the Supreme Court has clearly ruled that federal law trumps state law on the drug issue. But I did want to ask a couple of questions about how you view DEA's role in this area, because it is a very sensitive issue in my state.

**QUESTION:** First, do you intend to continue DEA's current policy of aggressively targeting medical marijuana use in California? Why?

Marijuana is the most abused drug in the United States. More young people are now in treatment for marijuana dependency than for alcohol or for all other illegal drugs combined.<sup>1</sup> Marijuana use also presents a danger to others beyond the users themselves. A roadside study of reckless drivers who were not impaired by alcohol showed that 45% tested positive for marijuana.<sup>2</sup> As the U.S. Supreme Court has held, marijuana is a Schedule I Controlled Substance under the Controlled Substance Act, has no currently accepted medical use in treatment in the United States, and cannot be used outside of FDA approved, DEA-registered research. Thus, there is no basis under federal law to distinguish "medical" marijuana traffickers from marijuana traffickers in general. If confirmed as Administrator, I would insure that DEA is committed to enforcing the federal drug laws of our nation regardless of the drug in question or the location of the violation.

**QUESTION:** Would you support federal government research into the possibility of rescheduling marijuana under the law so that physicians could prescribe the drug for certain patients if medically appropriate?

I believe that current law and judicial review provide adequate mechanisms for the balanced review of the appropriate scheduling of marijuana. This system has been in place for over thirty years. I am also advised that the DEA has registered eight researchers to further examine whether there are any possible medicinal benefits of smoked marijuana. My own view is that the present mechanisms for examining classification issues are sufficient.

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<sup>1</sup> Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, *Treatment Episode Data Set*, 2000.

<sup>2</sup> Dan Brookoff, et al., *New England Journal of Medicine*, 331:518-522, 1994.

Senator Herb Kohl

Questions for the Record for Karen P. Tandy

1. **In testimony before the House Appropriations Subcommittee on Commerce, Justice, State and the Judiciary, the General Accounting Office (GAO) stated that the reorganization of the Federal Bureau of Investigation (FBI) in response to the threats of terror facing our nation has resulted in a dramatically decreased emphasis on drug crimes and their investigation. Specifically, the GAO found that “since September 11, 2001, about 40% of the positions allocated to FBI field offices’ drug program have been reallocated to counter-terrorism and counterintelligence priority areas.” Further, the GAO found that the number of new drug investigations has declined from 1,825 in FY00 to just 310 in the first half of FY03.**

**In light of the reduced emphasis at the FBI and its field offices on the investigation of drug crimes, what is the DEA doing to ensure that drug crimes are adequately pursued and investigated?**

With consideration given to the FBI reallocation of resources to counter-terrorism, the DEA will focus the bulk of its resources on Priority Drug Trafficking Organizations (PDTOs) – drug trafficking organizations having the most significant impact in America today at the national, regional and local levels. By targeting PDTOs in each domestic field division and dismantling the transportation, distribution, and financial networks that link them to international targets, we will disrupt the drug market, reduce availability and produce longer lasting results. As of February 2003, 81 percent of the organizations on the unified Consolidated Priority Organization Target (CPOT) list are also designated as DEA PDTO targets. DEA has over 100 separate investigations directed at or directly linked to the 53 CPOTs. An additional 125 DEA investigations have a secondary link to CPOT targets. At present, 35 percent of all PDTO investigations designated by DEA worldwide are “local impact” type investigations.

If I am confirmed as Administrator, I will make every effort to ensure the most effective use of DEA’s enforcement resources.

**Has the DEA increased staff in field offices around the country to maintain the function previously carried out by reallocated FBI field staff? Are current DEA resources sufficient to meet this increased need?**

In FY 2002, DEA conducted a review of its resource allocation and analyzed its investigative work hours based on an internal, intelligence-driven domestic threat assessment. Based on this assessment, DEA determined that an additional 300 Special Agents were required to sustain the nation’s offensive against illegal drugs in FY 2004.

Between the FY 2003 enacted appropriation, and the FY 2004 President’s budget request, if enacted, DEA will add 449 new agents along with funding to support another 100 State and local Task Force officers. DEA will also redirect 362 MET/RET agents to priority targets, and away from “street sweeps,” which have limited long-term value.



The President's FY 2004 budget takes significant steps toward addressing the gaps in drug enforcement identified by the GAO in its recent report on the FBI Reorganization. These increases will allow DEA to maximize its available resources with regard to the FBI's shifting priorities.

Even with the personnel changes after September 11, 2001, DEA has continued to conduct investigations that impact the Nation's drug availability. This is something I have repeatedly witnessed while collaborating with DEA through OCEETF. If confirmed as Administrator, I will make certain that significant drug investigations will continue to receive the attention and resources required to maximize the DEA's contribution to our nation's counterdrug strategy.

**Senator Herb Kohl**  
**Questions for the Record for Karen P. Tandy**

**2. In October of last year, I wrote to Administrator Hutchinson to underscore the growing need for drug enforcement activity in western Wisconsin and to request agency support for an internal proposal to open a DEA post of duty for two special agents in Eau Claire, Wisconsin. What is the status of this proposal?**

During the FY 2004 budget development process, the Department of Justice (DOJ) accepted recommendations from an independent Streamlining Review of many DOJ-wide functions. The crosscutting savings identified in this review impact the majority of components in DOJ, including DEA. Among the recommendations to achieve cost savings was the consolidation and collocation of DOJ facilities. Therefore, the President's FY 2004 budget requests a reduction in current rent funds for DEA and for many other DOJ components. If enacted, these reductions will impact many of DEA's smaller offices. Therefore, DEA has deferred action on all proposals for new domestic field offices, pending Congressional enactment of the President's FY 2004 budget.

If confirmed, I can assure you that I will continue to evaluate the most effective utilization of DEA resources across the country.

Senator Herb Kohl  
Questions for the Record for Karen P. Tandy

3. **In January 2002, a trafficking organization operating in several U.S. cities was found to be smuggling pseudoephedrine, a precursor to methamphetamine (meth), into the United States from Canada. Meth is a major problem in my home state of Wisconsin and throughout the Midwest. But what's even worse, the proceeds of that trafficking ring have been traced to Hezbollah and other terrorist groups operating in Yemen and Lebanon. In what ways has the DEA tightened its processes and procedures to stop the smuggling of illegal drugs or their precursors into the United States, in light of the link between drug trafficking and terrorism?**

The Northern Border of the United States has become increasingly vulnerable to Canadian pseudoephedrine which is destined for clandestine methamphetamine labs in the Midwest as well as "super-labs" in the Western United States. The DEA, in cooperation with our Canadian law enforcement counterparts, has conducted a number of initiatives that were directed against the Canadian corporate sources of supply of the pseudoephedrine that was being used in these labs. It is my understanding that direct links between the pseudoephedrine traffickers and terrorist organizations has not yet been fully established. Having been involved in numerous major drug trafficking organization cases, I can attest to DEA's desire to ensure the disruption and dismantling of *any* organization that might attempt to support terrorism through drug trafficking.

The DEA has an extremely close working relationship with the Royal Canadian Mounted Police (RCMP) and has conducted numerous joint investigations that are coordinated through our Ottawa Country Office. For example, the following two initiatives focused on precursor chemicals being illegally imported or smuggled into the United States:

On April 15, 2003, "Operation Northern Star," another joint DEA/Canadian investigation, resulted in the arrest of over 65 defendants, including six executives from three Canadian chemical companies. Over 34,000 pounds of pseudoephedrine were seized which could have produced approximately 20,000 pounds of methamphetamine.

Prior to January 9, 2003, Canada had no laws regulating the importation, distribution or exportation of pseudoephedrine, the primary precursor chemical used to manufacture methamphetamine. With DEA's assistance, the Canadian authorities developed new legislation which requires individuals who produce, import and export pseudoephedrine to have licenses and permits issued by the Canadian Health Ministry.

The DEA believes that these initiatives have been effective. A review of the statistics on Canadian pseudoephedrine tablets seized shows that the amount of tablets seized has decreased dramatically since January 2003. In 2002, there were over 22 million tablets seized. From the beginning of this year through May 31, 2003, only

12,000 tablets have been seized. These seizures have been identified as being Canadian in origin because of packaging, lot numbers, and labeling consistent with previous seizures of Canadian pseudoephedrine. I am told that the decrease in seizures may be due to a combination of factors; however, DEA believes that increased DEA enforcement efforts targeting Canadian pseudoephedrine and the implementation of the Canadian chemical regulations are the primary causes of the decrease.

As Administrator, I would pledge to build upon the close working relationship DEA already enjoys with the RCMP in order to have the methamphetamine precursor issue addressed on both sides of our Northern Border.

Senator Patrick J. Leahy  
Questions for the Record for Karen Tandy

1. **You were involved in negotiations over the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA") on behalf of the Justice Department. We reached agreement on a carefully balanced bill that granted the government new forfeiture powers in exchange for procedural reforms. The bill passed unanimously in both the House and Senate.**

**I am concerned that DOJ is seeking to nibble away at CAFRA's procedural reforms through legislation (some of which was proposed for inclusion in the PATRIOT Act, but rejected by Congress) and through proposed amendments to the Supplemental Rules. I refer specifically to proposed Supplemental Rule G, which would create a special set of procedural rules for civil forfeiture cases. It appears that many of the provisions in proposed Supplemental Rule G are in conflict with either the letter or the spirit of the CAFRA reforms. Indeed, some of the provisions were specifically rejected by Congress during the CAFRA negotiations three years ago. (A) Please describe your role, if any, in developing proposed Supplemental Rule G. (B) Having struck a balanced deal only three years ago in CAFRA, do you think it is appropriate for the government to try to roll back the procedural reforms it agreed to while keeping the expanded powers it obtained?**

I was involved with the original CAFRA legislation, a carefully crafted compromise, which I support. However, I have no personal knowledge of the proposed additions to the Supplemental Rules for Certain Admiralty and Maritime Claims, and have neither seen nor participated in the drafting of the proposal.

I believe government should support the rights of its citizens, while protecting them from criminal activity. If confirmed, I assure you that, as DEA Administrator, I would do nothing that would undercut the substantive and procedural protections contained in CAFRA.

Senator Patrick J. Leahy  
Questions for the Record for Karen Tandy

2. **Many of the proposed Rule G changes appear designed to give the government an unfair advantage over the claimant. For example, why should the government be permitted to challenge claimant's standing "at any time before trial" (section (7)(b)) while the claimant waives any jurisdictional challenge she fails to raise in her answer (section (5)(b))? How would you defend those two proposals, which apply strict waiver rules to claimants – who often appear *pro se* – but not to the government?**

Although I am not familiar with the details of Supplemental Rule G, I believe we must be vigilant in protecting the individual rights of all Americans while enforcing the law against criminals. I continue to support the CAFRA legislation.

3. **I am also concerned about DOJ's proposal to restrict who has standing to contest a civil forfeiture case. Proposed Rule G(5)(a)(i)(B) would discard what we agreed to in CAFRA (see 18 U.S.C. 983(d)(6)) and substitute a new, cramped definition of standing – one never embraced by Congress or the courts. Please explain what justifies these proposed changes to the law of standing.**

I am not familiar with the details of Supplemental Rule G. However, I believe we must be vigilant in protecting the individual rights of all Americans, while enforcing the law against criminals. I continue to support the CAFRA legislation.

4. **In 18 USC 983(f)(1)(A), CAFRA provides that a person with a possessory interest in the seized property may seek its release on hardship grounds. Yet, DOJ's proposed standing rule would exclude persons with a mere possessory interest in the property from contesting the forfeiture. I do not see how that can be reconciled with section 983(f). Is DOJ asking an appointed committee of jurists to overrule CAFRA in that respect?**

I am not familiar with the details of Supplemental Rule G. However, I believe we must be vigilant in protecting the individual rights of all Americans, while enforcing the law against criminals. I continue to support the CAFRA legislation.

Senator Patrick J. Leahy  
Questions for the Record for Karen Tandy

5. **CAFRA also has an important attorney fee provision, codified at 28 U.S.C. 2465(b)(1), which states that if the claimant "substantially prevails," the United States shall be liable for "reasonable attorney fees and other litigation costs reasonably incurred by the claimant." DOJ has taken the position in litigation that "reasonable attorney fees" should be limited to the fees that would have been awarded under the Equal Access to Justice Act. Is that what you think we meant by "reasonable attorney fees"?**

CAFRA makes the prevailing party in a civil forfeiture case eligible for "reasonable attorneys fees," but it did not define that term. In criminal forfeiture cases, the prevailing party is eligible for attorneys fees under the Equal Access to Justice Act. In the absence of any definition of "reasonable attorneys fees" in the civil statute, it makes sense to apply the analogous law and use the fee schedule in the Equal Access to Justice Act as the measure of the attorney fee award.

6. **What would you do as Administrator of the DEA to make sure that misconduct complaints are properly investigated by the DEA and that appropriate disciplinary action is taken in cases where misconduct is found?**

The DEA has rigorous and effective procedures in place to insure that misconduct complaints are fully investigated and that appropriate discipline is imposed where misconduct is found. I expect to maintain those procedures and enhance them whenever improvements are shown to be needed. I can assure you that I well understand that the DEA holds a public trust. If confirmed, I will make honoring that trust a top priority. I owe no less, not just to the citizens of our country, but to the thousands of men and women who serve the DEA and our nation with integrity, honor, and distinction.

Senator Patrick Leahy  
Questions for the Record for Karen Tandy

7. **My state has experienced an extraordinary increase in the incidence of heroin abuse, and of heroin-related crime. Heroin use has doubled over the last five years, and the average age of a heroin user in Vermont dropped from 27 to 17 during the 1990s. There were 53 overdose deaths in Vermont in 2002, many from heroin, and 47 in 2001. A number of my constituents have lost family members and friends who succumbed to addiction to heroin or other drugs, and I repeatedly hear from my constituents how heroin abuse is damaging the state and their lives. Law enforcement agencies in Vermont are performing valiantly in battling this wave, but they cannot do it alone. I know that the New England High Intensity Drug Trafficking Area (HIDTA) has provided invaluable assistance to the Vermont State Police in its efforts to prevent drugs from coming across the Canadian border and addressing the heroin problem within the state.**

**(A) Do you support increasing funding for HIDTAs, and for the New England HIDTA in particular, to combat this growing problem?**

I fully support funding of all High Intensity Drug Trafficking Area (HIDTA) elements, including the New England HIDTA, within the parameters of the President's Budget. The HIDTA concept is a proven law enforcement tool, and an important ally to the DEA's Burlington, Vermont Resident Office (BRO) which operates in the New England Field Division.

**(B) In addition to the problem of domestic heroin abuse, Vermont and other states along the Canadian border have seen an increase in trafficking. Recently, smugglers attempted to drop 250 pounds of marijuana in Vermont from a helicopter that had crossed into U.S. territory. What assistance can the DEA provide to improve our efforts to prevent cross-border trafficking?**

It is my understanding that there is a HIDTA Task Force group in the BRO, which is responsible for and participates in operations conducted at the United States/Canadian border. This arrangement allows DEA agents to be pre-positioned and ready to deploy in an effort to respond to the interdiction and seizure of illicit controlled substances that arise from border operations. Additionally, DEA agents are capable of furthering those seizures by conducting appropriate follow-up investigations to fully identify, prosecute and dismantle the drug trafficking organizations (DTOs) involved.

If confirmed as Administrator, I can assure you that DEA will also continue its extremely close working relationship with the Royal Canadian Mounted Police (RCMP) with whom it has conducted numerous joint investigations coordinated through DEA's Ottawa Country Office.

Senator Patrick Leahy  
Questions for the Record Karen Tandy

8. I continue to be concerned about the DEA's actions in states that have chosen to legalize marijuana for medicinal purposes. This is an issue I spoke to Asa Hutchinson about on numerous occasions, including at his confirmation hearing. It has been my view that although the Supreme Court has stated clearly that the Federal government has the right to enforce the Federal prohibition on marijuana in these states, it would be a wise exercise of discretion and resources for the DEA to focus its attention elsewhere. The apparent decision of the DEA and the Justice Department not to follow this advice has led to serious conflict between the Federal government and state and local governments, particularly in California. In San Jose, for example, Police Chief William Lansdowne pulled his officers from a joint task force with the DEA because he believed resources that should have been used to fight methamphetamine were being diverted to police medical marijuana users. In addition to San Jose, other California cities have directed their police to discontinue cooperating with the DEA, in whole or in part.

**(A) As head of the DEA, how will you take the opposition of local law enforcement into account as you decide where to focus DEA resources?**

I have been advised that, despite the marijuana legalization issue in the State of California, DEA continues to enjoy an excellent and productive working relationship with the Bureau of Narcotics Enforcement (BNE) and the majority of the local law enforcement agencies in California. If confirmed as DEA Administrator, I would be mindful of the need to maintain effective, cooperative working relationships with our state and local counterparts, and strive to continue to work closely with them in all types of investigations, including those involving marijuana.

**(B) Where will cracking down on medical marijuana fall on the DEA's priority list if you are confirmed?**

Marijuana is the most abused drug in the United States. More young people are now in treatment for marijuana dependency than for alcohol or for all other illegal drugs combined.<sup>1</sup> Marijuana use also presents a danger to others beyond the users themselves. A roadside study of reckless drivers who were not impaired by alcohol showed that 45% tested positive for marijuana.<sup>2</sup> As a Schedule I Controlled Substance under the Controlled Substance Act, marijuana has no currently accepted medical use in treatment in the United States, and

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<sup>1</sup> Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, *Treatment Episode Data Set*, 2000.

<sup>2</sup> Dan Brookoff, et al., *New England Journal of Medicine*, 331:518-522, 1994.



cannot be used outside of FDA approved, DEA-registered research. Thus, there is no basis under federal law to distinguish "medical" marijuana traffickers from marijuana traffickers in general. If confirmed as Administrator, I would insure that DEA is committed to enforcing the federal drug laws of our nation regardless of the drug in question or the location of the violation.

Senator Patrick Leahy  
Questions for the Record for Karen Tandy

9. **I have severe reservations about the usefulness and the effects of the numerous mandatory minimum sentences Congress has passed over the past few decades. Many Federal judges have complained openly about Congress' imposition of mandatory minimums. (A) Under what circumstances, if any, do you think mandatory minimums are helpful to law enforcement? (B) Are there mandatory minimum sentences under current law that you believe are excessive or unwise? (C) Do you think it would be appropriate for Congress to review the impact and effectiveness of existing mandatory minimums before imposing new ones?**

**A. Under what circumstances, if any, do you think mandatory minimums are helpful to law enforcement?**

I understand and appreciate the concerns that you and others have raised about mandatory minimum sentences for drug crimes and other serious offenses. Mandatory minimum sentences can appear to be a "one size fits all" punishment for individuals of varying levels of culpability and differing personal circumstances. However, based upon my experience as a Department of Justice attorney, I believe that the existing mandatory minimum sentences prescribed by Congress for federal drug crimes are ultimately just, beneficial to society, and helpful to law enforcement in a number of important ways. I am not in a position to comment about mandatory minimums for other types of serious crimes such as child pornography, so I will confine my comments to drug offenses.

First, they incapacitate criminals. They take drug dealers and those assisting them off the streets for a determinate period of time – and every day a dealer is in jail is a day he is not on the street corner outside a child's school.

Second, they deter. Specifically, they deter others who might be contemplating the "rewards" of life as a pusher. When a criminal knows that conviction means serious jail time, and that he is unlikely to get a "break" from the sentencing judge, the rewards of crime are likely to seem less appealing. I also believe that drug dealers and traffickers are well aware of these penalties. Here in the District of Columbia, for example, law enforcement agents have noticed a striking number of dealers who, when arrested, are carrying amounts of drugs just below the levels that trigger mandatory minimum sentences. That is not a coincidence.

Third, they promote equal treatment before the law. Mandatory minimum sentences let our citizens know that, for serious offenses, there is a safety net of accountability – a floor below which, except in truly exceptional and limited circumstances, no drug offender responsible for a certain amount of contraband can go.

Fourth, they send a message. They are a marker declaring that our country is serious about drug crime, and that criminal behavior that threatens the basic civil right of

law-abiding families to live in peace and safety should not be excused away.

Fifth, they are an enormously useful tool of federal law enforcement. Because the prosecutor can move to allow a sentence below the mandatory minimum to reward the defendant's substantial assistance in the investigation or prosecution of others involved in crime – often by providing leads and testimony – serious mandatory minimum sentences provide a strong incentive to help agents and United States Attorney's Offices break down complex criminal enterprises.

Sixth, they work. After the mandatory minimums enacted in the 1980's began to take effect in the early 1990's, the crime rate went down virtually every year for a decade. While there may be additional explanations for this phenomenon, I believe that the consistent, tough sentences that result from mandatory minimums played a significant role in reducing crime.

**B. Are there mandatory minimum sentences under current law that you believe are excessive or unwise?**

No, especially in light of the safety valve provisions found in 18 U.S.C. § 3553 (f), for non-violent first time offenders, who are not leaders or organizers. I respect the fact that Congress enacts laws with concern for the health and safety of the American people, while mindful of our citizens' concerns about drug problems. Should Congress see fit to review the effectiveness of mandatory minimum sentences, if confirmed, I pledge to provide whatever necessary information Congress requires.

**C. Do you think that it would be appropriate for Congress to review the impact and effectiveness of existing mandatory minimums before imposing new ones?**

Punishing criminal defendants is the gravest duty of any system of justice. Sound public policy therefore requires continual evaluation of the effectiveness and indeed the underlying fairness of the criminal penalties enacted by Congress and imposed by the federal courts.

Senator Patrick Leahy  
Questions for the Record for Karen Tandy

10. **A number of states that have reformed their asset forfeiture laws have found that State Police get around the reforms by turning their seizures over to federal law enforcement agencies, which keep 20 percent and give 80 percent back to the State Police. This allows the police to avoid state restrictions that earmark forfeiture proceeds to education or treatment, as well as more stringent burden of proof requirements. As head of the DEA, will you work to develop policies to prevent federal agencies from working with State Police to get around state forfeiture restrictions? What would these policies be?**

The Drug Enforcement Administration (DEA) routinely forfeits property seized exclusively through the efforts of state and local law enforcement agencies. At the request of the state or local agency, the DEA "adopts" the seizure and initiates administrative forfeiture proceedings against the property. The Federal Courts, including the Supreme Court, have long recognized this adoption authority, which Congress codified in the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185. As a matter of policy, the Department of Justice (DOJ) encourages the adoption process in order to immobilize criminal enterprises and enhance cooperation among federal, state, and local agencies. For Fiscal Year 2002, DEA forfeitures resulting from state or local seizures totaled approximately \$36.8 million or 14 percent of the value of all DEA forfeitures during that period.

The process, however, has not been without controversy, particularly in those jurisdictions seeking to use forfeiture proceeds for other purposes. In the past, this controversy usually concerned the local seizing agency's authority, under state law, to unilaterally transfer seized property to a federal agency for the purpose of federal forfeiture. In response, both the DOJ and the DEA implemented safeguards intended to ensure local agency compliance with state law.

Current DOJ policy discourages federal adoption of seizures resulting from an ongoing state criminal investigation where the defendants are being prosecuted in state court. One exception to this policy requires the appropriate state or local prosecuting official to decline to initiate forfeiture proceedings in state court. State law may also prohibit the transfer of property without the approval of the appropriate state official or state court. Absent such approval, the DEA will decline to adopt the seizure for federal forfeiture. In these situations, the DEA defers to local authorities, who are best qualified to interpret and enforce state law and ultimately control which local seizures are processed for federal forfeiture. Finally, during several different stages of the federal forfeiture process, support personnel, supervisory agents, and attorneys review all adoptions to ensure the transfer and subsequent forfeiture comport with Department policy and state law.

**Senator Patrick Leahy**  
**Questions for the Record for Karen Tandy**

11. **The days when drug abuse was a primarily urban problem are long behind us, and my state is a prime example. I know that methamphetamine has become a serious problem in many rural states in the West and Midwest. Do you think that the Federal Government's approach to the manufacture and distribution of illegal drugs needs to be modified in any way to account for the fact that drug use is an increasingly rural problem?**

As a result of demographic, transportation, and communication changes that have taken place over the past decade, there has been an increase in drug trafficking activity and abuse in rural areas of the country. If I am confirmed as Administrator, I will ensure that the DEA's domestic enforcement operations work closely with state and local law enforcement agencies to help combat drug related trafficking in local communities.

From my own personal knowledge, DEA is a lead participant in the OCDETF program throughout the country. As you know, these U.S. Attorney-led task forces promote cooperation among federal, state, and local agencies involved in drug enforcement investigations. The OCDETF program is vital to combating drug trafficking throughout America, including rural America. In addition, as Administrator, I would ensure that DEA continues to maintain a leading role in its state and local task force program and the HIDTA funded task force programs.

DEA's ability is, as is most government agencies, limited by budget and other constraints. If confirmed, I would be sensitive to the unique problems and needs of rural law enforcement authorities, and ensure that DEA continues to dedicate resources to those areas of the country that are most affected by drug trafficking and abuse.

Senator Russell D. Feingold  
Questions for Christopher Wray, Nominee to be Assistant Attorney General  
for the Criminal Division, U.S. Department of Justice

July 9, 2003

- (1) Please describe generally your role in the PENTTBOM investigation, including any involvement with the issue of detention and treatment of individuals held on immigration violations, their access to counsel and any other issue pertaining to the PENTTBOM investigation on which you were consulted or on which you worked.

As Principal Associate Deputy Attorney General, and thus a member of the senior management within the Justice Department, I have had substantial leadership and oversight responsibilities relating to all criminal investigations and prosecutions, including the PENTTBOM investigation. The PENTTBOM investigation into the attacks of September 11, 2001, and the preceding and ongoing activities of al-Qaeda, constitutes the largest and most broad-ranging criminal investigation in U.S. history, and has been our top priority. The planning and coordination of this massive undertaking have required a correspondingly massive dedication of leadership time and effort that defies summarization or quantification. Particularly in the immediate aftermath of the attacks, the senior Department management – as well as the thousands of dedicated lawyers, agents, and support staff within the Department – worked virtually around the clock under extreme pressure and in difficult conditions to organize and press forward with tracking down the perpetrators of these horrendous acts. While

answers to these questions represent the best of my recollection, the intense context in which many of these events occurred necessarily prevented careful commemoration.

Generally, with respect to the PENTTBOM investigation, my primary role as Principal Associate Deputy Attorney General involved consultation with members of the FBI, Criminal Division, U.S. Attorney's Offices and other components regarding particular criminal investigations and prosecutions. I also attended and participated in frequent briefings by the CIA and FBI regarding specific threats. Immigration matters, including policy issues regarding the detention of illegal aliens for immigration violations, were not part of my portfolio. Nor did I work with INS officials on detention issues or serve as a part of the "SIOC Working Group" described in the Inspector General's report.

- (2) The recent report by the Justice Department's Inspector General on the detention of immigrants during the investigation of 9/11 recounts several exchanges between you and Kathy Hawk Sawyer, then Director of the Bureau of Prisons:

Hawk Sawyer . . . told the OIG that she had conversations with David Laufman and Christopher Wray from the Office of the Deputy Attorney General, in which she was told to "not be in a hurry" to provide the September 11 detainees with access to communications – including legal and social calls or visits – as long as the BOP remained within the reasonable bounds of its lawful discretion. Hawk Sawyer emphasized that Department officials never instructed her to violate BOP policies, but rather to take the policies to their legal limit in order to give officials investigating the detainees time to "do their job."

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... Wray stated that when he contacted Hawk Sawyer about some specific criminal inmates connected to terrorism who were already in BOP custody at the time of the September 11 attacks, he discussed having these inmates placed under the most secure conditions possible. He stated that while he does not recall giving any specific instructions, he stated that the "spirit" of his comments was that the BOP should, within the bounds of the law, push as far toward security as they could. (Inspector General's report at 112-13.)

- (a) In your July 7, 2003 response to questions from Senator Leahy, you state that "the only conversations I recall having with Ms. Hawk Sawyer concerned individuals already convicted of terrorist offenses." Please describe each conversation you had with Ms. Hawk Sawyer concerning convicted terrorists or individuals held on criminal or immigration charges in connection with the PENTTBOM investigation, including approximate dates on which the conversations took place and whether other individuals participated in those communications.

**The only conversations I recall having with Ms. Hawk Sawyer concerned individuals who had already been convicted of terrorist offenses as of September 11, 2001. I do not recall having any conversations with her regarding individuals detained on immigration violations, or even regarding individuals detained (but not yet convicted) on criminal charges. As I recall, we discussed generally security concerns relating to convicted individuals already in BOP custody on September 11<sup>th</sup> and the importance of prioritizing security regarding those individuals, within the bounds of the law and BOP's own policies. Most of our discussions focused on specific inmates (already convicted; not detainees), although I believe we briefly discussed the convicted terrorists as a group as well. To the best of my**



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**recollection, our conversations occurred in the September 2001-December 2001 timeframe. I do not recall anyone else participating in the conversations I had with Ms. Hawk Sawyer.**

(b) In the course of those conversations with Ms. Hawk Sawyer, did you make any statements that would have clarified that your instructions pertained to convicted terrorists only, not to the individuals detained after September 11?

**I do not recall the precise words of the conversations I had with Ms. Hawk Sawyer, although I do believe it was clear from both the context and language of our conversations that we were discussing previously convicted terrorists only.**

(c) Approximately how many times did you provide instructions or advice, to Ms. Hawk Sawyer or other officials with the Bureau of Prisons, with respect to criminal defendants detained in the course of the PENTTBOM investigation?

**I do not recall providing any instructions or advice to Ms. Hawk Sawyer or other BOP officials regarding criminal defendants detained in the course of the PENTTBOM investigation. As I mentioned above, I only recall discussing previously convicted defendants who were already in BOP custody as of September 11, 2001.**

(c) Approximately how many times did you provide instructions or advice, to Ms. Hawk Sawyer or other officials within the Justice Department or its components, with respect to aliens detained on immigration charges in the course of the PENTTBOM investigation?

**I do not recall providing instructions or advice to Ms. Hawk Sawyer or other Justice Department officials regarding aliens detained on immigration violations in the course of the PENTTBOM investigation.**

- (d) Please describe each conversation you had with any other Justice Department official concerning the detention of aliens on immigration violations in connection with the PENTTBOM investigation. Please specify when each conversation took place, what prompted it, and to whom you spoke.

**Over the roughly 22 months that have elapsed since September 11<sup>th</sup>, I have had countless conversations with officials in the FBI, Criminal Division, U.S. Attorney's Offices, and other components regarding specific, individual PENTTBOM-related criminal defendants, targets, subjects, and witnesses, many of whom were detained on immigration violations. Likewise, in the course of threat briefings from intelligence and law enforcement officials, I have discussed individual subjects of terrorism investigations, many of whom were detained on immigration violations.**

- (e) Did you make any effort to distinguish among convicted terrorists, criminal defendants and immigration detainees in your instructions to other BOP officials?

**I do not recall the precise words of the conversations I had with BOP officials, although I do believe it was clear from both the context and language of our conversations that we were discussing convicted terrorists only.**

- (f) Other than discussing your instructions to Ms. Hawk Sawyer with the Inspector General, did you inform or advise other Justice officials about your

conversations with Ms. Hawk Sawyer and your instructions to her? If yes, whom did you inform, when did you inform them and what did you say?

**I do not recall whom, if anyone, at the Department of Justice I informed about my conversations with Ms. Hawk Sawyer at the time of those conversations or in the approximately year-and-a-half between that time and my interview by the Office of Inspector General. Since the publication of the Inspector General's report, I have described what I recall about those conversations to a number of colleagues at the Department, particularly in preparation for my confirmation hearing.**

(g) Please describe any conversations you had with Assistant Attorney General Michael Chertoff or his staff regarding the detention of criminals or immigration violators in connection with the PENTTBOM investigation.

**Over the roughly 22 months since September 11<sup>th</sup>, I have had countless conversations with Assistant Attorney General Michael Chertoff and other Criminal Division personnel regarding specific, individual PENTTBOM-related criminal defendants, targets, subjects, and witnesses, many of whom were detained on criminal charges or immigration violations. As I mentioned at the outset, it would be impossible for me to describe specific conversations in any detail.**

(3) (a) As concerns about the conditions of detention of September 11 detainees were raised by various public interest groups, the news media, and public officials, including a letter on October 31, 2001 from myself and several other Members of Congress and during the course of Senate Judiciary Committee hearings on November 28, December 4, and December 6, 2001, what steps, if any, did you take to ensure that immigration detainees were not subject to unduly harsh conditions or deprived of access to counsel?

While fighting the threat of terrorism is a paramount concern for the Department of Justice, that battle must, of course, be waged within the letter and the spirit of both the Constitution and our federal laws. As a former defense attorney, I have listened seriously to concerns about the treatment of immigration detainees, and remained alert to any potential abridgement of the constitutional rights of those affected by our efforts. If confirmed as Assistant Attorney General for the Criminal Division, I will continue to take such concerns seriously, and remain vigilant for any constitutional issues raised by the vitally important role criminal law enforcement continues to play in the war on terrorism.

As explained above, I do not recall discussing immigration detainees, or their conditions of confinement or access to counsel with BOP officials. Numerous other officials throughout the Department focused on immigration issues. I note, however, that the Inspector General's report indicates that Director Sawyer "*emphasized* that Department officials *never* instructed her to violated BOP policies, but rather to take the policies to their *legal* limit in order to give officials investigating the detainees time to 'do their job.'" [p.113 (emphases added)].

- (b) Please explain what role, if any, you played in preparing Mr. Chertoff for his appearance before the Senate Judiciary Committee on November 28, 2001, or in helping Assistant Attorney General Viet Dinh prepare for his testimony before the Committee on December 4, 2001, or in helping the Attorney General prepare for his appearance before the Committee on December 6, 2001.

**I do not recall participating in Assistant Attorney General Viet Dinh's preparation for his December 4, 2001 appearance before the Senate**

Judiciary Committee, nor in the Attorney General's preparation for his December 6, 2001 appearance. I recall being invited to participate in preparing Assistant Attorney General Michael Chertoff for his November 28, 2001 appearance, but I believe that time constraints ultimately interfered with my doing so.

- (3) The Justice Department has said it will inform the Inspector General on July 11 which of the recommendations in the Inspector General's report it is adopting. If confirmed, what measures, other than those suggested by the Inspector General's report, would you support to ensure that future investigations are fair and effective?

The Department generally, and I personally, learned a tremendous amount from the experience of responding to the horrific attacks on September 11, 2001, as well as from the critiques of that response by Members of Congress, the Inspector General, and others. If confirmed, I would apply that experience to our response to any future attacks -- attacks which we strive daily to prevent. We must plan for our general response while retaining the flexibility, within the bounds of the law, to craft our specific response based on the circumstances actually presented. In general, I believe we have learned three basic lessons in dealing with the issues presented in the Inspector General's report:

- (1) We need to devote more resources, if they are available, to completing the investigations on and "clearing" illegal aliens who are in custody based on their potential terrorism ties. Since 9/11, with the help of the Congress, the Federal Government -- and the Justice Department and FBI in particular -- have made great strides to expand available counterterrorism resources, particularly the number of specially trained agents, analysts, and attorneys.

- (2) We need to improve coordination among law enforcement, intelligence, and immigration agencies to improve information-sharing and avoid delays due to administrative issues. The USA PATRIOT Act and other post-9/11 measures have greatly improved our abilities in this area, and if confirmed, I will continue to work with my colleagues in law enforcement, intelligence, and homeland security to improve our formal and informal means of coordination.
- (3) We need to ensure that detainees are treated fairly and appropriately. Abuse of detainees is unacceptable, and this fact should always be emphasized in responding to future events.

The Department is preparing a written response to the Inspector General's recommendations. If confirmed, I would study those recommendations further to address the extent to which they address the three basic areas outlined above and whether additional measures can and should be put in place, recognizing again that we do not want to implement policies that would prevent us from responding effectively and immediately to the varied nature of the threats we face.

- (4) What involvement, if any, did you have in the decision to seek denial of bond in all cases involving September 11 detainees? Were you consulted at any point about this decision? If so, what was your view? When did you first become aware of the "no bond" policy?

I do not recall participating in any policy decision to seek the detention of all illegal aliens apprehended during the PENTTBOM investigation. I was aware of numerous specific instances in which an illegal alien was detained in the course of that investigation, but I do not recall any such across-the-board policy apart from reading of it in the Inspector General's report.

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- (5) What involvement, if any, did you have in the decision to delay removal of detainees with final removal orders and voluntary departure agreements? Were you consulted at any point about this decision? If so, what was your view? When did you first become aware of this policy?

**I do not recall participating in any policy decision to delay the removal of illegal aliens detained subject to final removal orders and voluntary departure agreements. I was aware of specific instances in which an illegal alien's removal was delayed until appropriate law enforcement and intelligence investigation had been completed, but I do not recall any such across-the-board policy apart from reading of it in the Inspector General's report.**

- (6) On June 23, 2003, Ali Saleh Kahlah al-Marri, a Qatari national indicted for credit card fraud and making false statements, was designated an enemy combatant and transferred to the control of the Department of Defense.

- (a) What involvement, if any, did you have in the decision to classify al-Marri as an enemy combatant?

**The decision to designate someone as an enemy combatant is not a decision made by the Department of Justice. As a member of the Department of Justice's senior leadership, however, I was involved in reviewing the issues presented by the al-Marri matter and providing legal advice on those issues to the decisionmakers.**

- (b) At any point, were you consulted by other Justice Department or Defense Department employees about the decision, or asked to provide them with information regarding al-Marri or the issue of enemy combatants generally?

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**As I mentioned above, I was involved in reviewing the issues presented by the al-Marri matter and providing my legal advice on those issues to the decisionmakers. Again, however, the decision to designate someone as an enemy combatant is not made by the Department of Justice.**

(c) When did you first become aware that there was a possibility that al-Marri might be classified as an enemy combatant, or that he had been so classified?

**As part of our information-sharing activities and as we continually evaluate how best to protect national security, Justice Department officials periodically discuss (both internally and with other agencies) persons who have terrorist connections. Some such person may qualify as enemy combatants. I am sometimes involved in those discussions. As information was developed over time regarding al-Marri's connections with terrorist activity and, in particular, with other al-Qaeda operatives, he became a subject of these discussions. I learned of the President's formal determination to transfer al-Marri to the control of the Defense Department as an enemy combatant just after that determination was made on June 23.**

(7) On June 25, 2003, the *New York Times* cited "administration officials" as saying that the decision to classify al-Marri as an enemy combatant "was intended in part to try to cull more information from him." The article continued, "By declaring Mr. al-Marri an enemy combatant, the administration also sends a message to other terrorist suspects now in the criminal system about what could happen if they do not cooperate with investigators, officials said." A senior F.B.I. official reportedly said of other terrorism suspects, "If I were in their shoes, I'd take a message from this."

(a) If these reports are accurate, a clear message is being sent to defendants in terrorism-related cases: unless the defendant fully cooperates with investigators, relinquishing his or her Fifth Amendment right not to disclose potentially



incriminating information, he or she may face imprisonment for life without trial, without access to an attorney, and without communication with the outside world. This seems to undermine fundamental constitutional rights, including the right to a jury trial. Even if the Justice Department does not explicitly use the threat of enemy combatant classification to coerce cooperation, the possibility of "switching tracks" will give all terrorism defendants, guilty or innocent, reason to believe that insisting on their right to a jury trial could lead to a loss of their constitutional rights as criminal defendants. Does this result concern you?

**As the Attorney General has said, each case is reviewed on an ongoing basis to determine how best to protect the American people from additional terrorist attacks, which is our top priority. Prosecuting terrorists in the criminal system, and detaining them as enemy combatants, are different legal processes with different advantages and disadvantages, which may change in relation to a particular terrorist over time, particularly as new information is developed. Within the criminal justice system, some terrorists may not cooperate and may go to trial on criminal charges (e.g., the recent Detroit convictions); others may cooperate and plead guilty to criminal charges (e.g., Lyman Faris); the President may determine that others shall be held as enemy combatants without ever being charged criminally (e.g., Jose Padilla); and that others may be charged criminally and later transferred to be held as enemy combatants (e.g., al-Marri).**

I am confident that we would have prevailed with our criminal charges against al-Marri and ultimately would have obtained a conviction and substantial sentence. However, based in part on recently obtained intelligence from other detained al-Qaeda operatives, on June 23, 2003, the President determined that al-Marri is an enemy combatant and should be transferred to the control of the Department of Defense. This action was determined to provide the best way to protect national security by taking an al-Qaeda

**operative out of action until the end of the war against al-Qaeda, and also to provide the best opportunity for gathering intelligence against the enemy. I fully support that result.**

(b) As a former prosecutor, you have seen that the plea bargaining process gives defendants an enormous incentive to cooperate with investigators, and can lead defendants to produce valuable information that might otherwise not have been obtained. Cooperation by terror suspects can be vital to the prevention of future terrorist attacks. Now that al-Marri has been classified as an enemy combatant, and faces indefinite detention without charge, however, what incentive exists for him to cooperate with investigators?

**Both as a former prosecutor and as a former defense attorney, I do indeed believe that the plea bargaining process in the criminal system provides powerful incentives to defendants to plead guilty and to provide valuable information, and we have seen that belief borne out in a number of terrorism cases both before and after 9/11. Plea bargaining is not, however, the only means by which we obtain valuable intelligence from terrorists. Just as skillful agents often obtain critical information through interrogation of criminal suspects even before arrest, questioning of enemy combatants can be very effective in obtaining intelligence to prevent future attacks. In addition, as a non-U.S. citizen, al-Marri is potentially eligible for trial by military commission under the President's November 2001 Military Order.**

Senator Edward M. Kennedy

1. The Assistant Attorney General in charge of the Criminal Division is responsible for formulating criminal law enforcement policy and advising the Attorney General, Congress, and the White House on matters of criminal law. You have substantially less experience as a lawyer and a prosecutor than the ten most recent persons to hold this position. Why do you believe you are qualified to serve as Assistant Attorney General?

**I welcome the opportunity to explain why, if confirmed, I would bring the right experience, integrity, judgment, temperament and perspective to lead the Criminal Division. I have had the fairly unique experiences of seeing — and understanding well — the Department’s criminal enforcement efforts from three important vantage points: as a defense lawyer, as a career prosecutor on the front lines in a U.S. Attorney’s Office, and as part of the Department’s senior leadership for the past two years, spanning the September 11<sup>th</sup> attacks and their aftermath.**

**During my years as an Assistant United States Attorney, I personally prosecuted a wide variety of federal criminal cases, including such offenses as securities fraud and public corruption, gun trafficking, murder-for-hire, racketeering and narcotics, kidnaping, immigration, counterfeiting, church arson, and many more. I have handled criminal cases through all stages of the process, from grand jury investigations, to jury and bench trials, sentencing, and appeals.**

**As Principal Associate Deputy Attorney General, I have had substantial leadership and oversight responsibilities relating to the Criminal Division and the U.S. Attorney’s Offices before, during, and after the September 11<sup>th</sup> terrorist attacks. From that position, I have seen closely nearly all of the major issues confronting the Criminal Division and the U.S. Attorney’s Offices during this particularly critical and unprecedented stage in their history. For well over a year, I have been attending and participating in daily threat briefings by the FBI and CIA with the Attorney General, Deputy Attorney General, and FBI Director. As Principal Associate Deputy Attorney General, I have had involvement in strategic and tactical decisions in nearly every significant terrorism case or investigation handled by the Department since September 11<sup>th</sup>, from the Eastern District of Virginia to the Southern District of New York, from Buffalo to Portland, Seattle, Chicago, Detroit, and others. I have had the privilege of developing excellent, personal working relationships with most of the current 93 U.S. Attorneys, the current leadership of the Criminal Division itself, the current heads of the other Main Justice components, the current leadership of the FBI, ATF, DEA, SEC and other key law enforcement agencies.**

**I have also held significant management responsibilities while Principal Associate Deputy Attorney General. I have served as the Department’s representative on the President’s Management Council, working with the Office of Management and Budget and chief operating officers from other Cabinet agencies in the implementation of the President’s management initiatives. I have also borne significant responsibility for the Department’s own Strategic Management Council, for the implementation of most cross-cutting management initiatives in the**

Department, and for the Department's overall budget of approximately \$23 billion and more than 100,000 employees.

Finally, my experience as a defense attorney before joining the Department would provide me with another valuable perspective if confirmed as head of the Criminal Division. As a former defense attorney representing clients facing either Department investigation or prosecution, I understand well both the power entrusted to law enforcement and the importance of using it wisely and appropriately.

2. According to the recent report on the September 11 detainees by the Justice Department's Office of Inspector General, you called Bureau of Prisons Director Kathleen Hawk Sawyer soon after the attacks. As the report states:

Hawk Sawyer . . . told the OIG that she had conversations with David Laufman and Christopher Wray from the Office of the Deputy Attorney General, in which she was told to "not be in a hurry" to provide the September 11 detainees with access to communications – including legal and social calls or visits – as long as the BOP remained within the reasonable bounds of its lawful discretion. Hawk Sawyer emphasized that Department officials never instructed her to violate BOP policies, but rather to take the policies to their legal limit in order to give officials investigating the detainees time to "do their job."

David Laufman confirmed the substance of Hawk Sawyer's account, but you told the OIG that you could not recall "giving any specific instructions" regarding the September 11 detainees, and that the "spirit" of your comments "was that the BOP should, within the bounds of the law, push as far toward security as they could."

- A. Do you have any further recollection regarding your conversations with Hawk Sawyer? Please describe exactly what you remember about these conversations.

**The relevant passage of the Inspector General's report is slightly ambiguous and would benefit from clarification in a number of respects. First, I do not recall having any three-way conversations with then-Director Hawk Sawyer and David Laufman, then the Deputy Attorney General's chief of staff. Rather, I had a handful of conversations with Ms. Hawk Sawyer myself, and I believe that Mr. Laufman separately did so as well. Second, and more importantly, the only conversations I recall having with Ms. Hawk Sawyer concerned individuals already convicted of terrorist offenses – "specific criminal inmates," to use the language of the Inspector General's report (p. 113) – not aliens being detained on administrative immigration charges in connection with the September 11 investigation, on whom the report is focused. Third, I do not recall ever using the phrase "not to be in a hurry" myself in speaking with Ms. Hawk Sawyer, nor do I ever recall her using that phrase with me even in the limited context of our conversations – again, convicted terrorists – much less in the context of immigration detainees. Moreover, as the Inspector General's report explains, "Hawk Sawyer emphasized that Department officials *never* instructed her to violate BOP**

policies, but rather to take their policies to their *legal* limit in order to give officials investigating the detainees time to ‘do their job.’” (Emphasis added.) The report is accurate to the extent that it was clearly understood that the BOP was to exercise discretion within the law and BOP policy.

- B. Do you agree or disagree with Hawk Sawyer’s characterization that you told her to “not be in a hurry” to provide the detainees with access to communications, including access to legal counsel?

As explained above, I do not recall ever using the phrase “not to be in a hurry” myself in speaking with Ms. Hawk Sawyer, nor do I ever recall her using that phrase with me even in the limited context of our conversations – again, convicted terrorists – much less in the context of immigration detainees. I do agree with the Inspector General’s report that it was clear that BOP was to emphasize security only in compliance with the law and its own policies.

- C. Who gave you the authority to direct Hawk Sawyer to “push as far toward security” as the Bureau of Prisons could? Please list the name of every official who was involved in making this policy decision or giving you the authority to so instruct Hawk Sawyer. Please describe to the fullest extent of your knowledge the chain of command that was involved in making this decision.

As explained above, the only conversations I recall having with Ms. Hawk Sawyer on this subject concerned convicted terrorists already in BOP custody on September 11<sup>th</sup>, not immigration detainees. Even in this limited context, as the Inspector General’s report explains, it was clear that BOP was to prioritize security “*within the bounds of the law*” and was “*never instructed [] to violate BOP policies.*” (Emphasis added.) At the time of the conversations, I was concerned about the risk that convicted terrorists posed to BOP personnel, to other inmates, and to the public generally, especially in the immediate aftermath of the September 11<sup>th</sup> attacks. At the time, I was aware of the ongoing investigation which has since resulted in the indictment of members of Sheikh Abdel-Rahman’s legal team, including his lawyer, Lynne Stewart, and interpreter, Mohammed Yousry, charging a conspiracy involving violations of the applicable BOP special administrative measures and material support to a terrorist organization. I was also aware of a then-recent incident in which two alleged al Qaeda operatives, Mamdouh Mahmud Salim and Khalfan Khamis Mohamed, had attacked Officer Louis Pepe in the high security unit of a New York-area BOP facility. Both individuals were at the time being held on pending charges in connection with their involvement in the al Qaeda terrorist network. During the course of the attack, hot sauce was sprayed into Officer Pepe’s face and a sharpened hair comb was stabbed into his left eye. The comb penetrated Officer Pepe’s brain, causing brain damage and the loss of his eye. Officer Pepe’s keys were taken from him and his radio was disabled. During a subsequent search, authorities found a note which indicated that the two were planning a hostage taking. Salim has since

pled guilty to conspiring to commit murder of a federal officer and attempted murder of a federal officer and faces a maximum sentence of life imprisonment. Mohamed was convicted for his role in the East Africa Embassy bombings and sentenced to life imprisonment. These concerns, and others, convinced me that BOP should prioritize security within its facilities – again, with respect to convicted terrorists already in BOP custody, and always within the bounds of the law and BOP’s own policies. I do not specifically recall seeking authorization or a decision from other Department officials regarding these communications to BOP.

- D. When and how did you first learn about the “communications blackout” that affected September 11 detainees in BOP facilities?

Again, the only conversations I recall having with Ms. Hawk Sawyer regarding such matters concerned criminally convicted terrorists already in custody on September 11<sup>th</sup>, not immigration detainees. To the best of my recollection, I did not learn of any BOP “communications blackout” affecting such detainees until reading of it in the OIG report itself.

- E. The OIG questioned “the justification for a total communications blackout on all these individuals, particularly for the length of time that it was imposed,” and stated that the telephone limitations imposed on the detainees “further hindered the detainees’ ability to obtain legal assistance, which posed a significant problem since the majority of the detainees entered the MDC without counsel.” What is your response to the OIG’s criticism?

It is my understanding that the BOP initially imposed certain limitations on communications based in part on security risks encountered in the immediate aftermath of the September 11 attacks. The difficulties encountered by aliens detained in the Metropolitan Detention Center in Brooklyn (MDC-Brooklyn) were a result of various factors, including: aliens in removal proceedings have the right to counsel but must obtain such counsel on their own (unlike criminal defendants, who have the right to appointed counsel at U.S. government expense); difficulty in obtaining an accurate list of free legal services; the initial use of a category generally used to protect witnesses, which made it difficult for their attorneys to locate them; and many attorneys were located near Ground Zero and were, therefore, unreachable due to disruptions in utilities. Having the benefit of the Inspector General’s report, I believe that there are steps that the BOP can take to improve the situation. In fact, the BOP first initiated those improvements following interim recommendations made by the Inspector General in July 2002.

3. The Inspector General found that officials at the Metropolitan Detention Center in Brooklyn did not follow the BOP's inmate security-risk assessment procedures for determining where to house the September 11 detainees. Instead, officials relied on the F.B.I.'s assessment that the detainees generally were "of high interest" to its ongoing investigation, and automatically placed them in the Detention Center's most restrictive housing unit, the Administrative Maximum Special Housing Unit. In this unit, the detainees were allowed to make only one "social" telephone call per month, and only one legal telephone call per week. At all times outside their cells, even during non-contact visits with attorneys or family members, the detainees were restrained in handcuffs and leg irons. No contact visitation was allowed. Lights were kept on in the inmates' cells 24 hours a day, causing the detainees to experience lack of sleep, exhaustion, depression, panic attacks, and reduced eyesight. The detainees remained in these harsh and restrictive housing conditions until the F.B.I. notified officials that they had been cleared. The monthly reassessment hearings required by the Bureau's own rules were not held, and the F.B.I. failed to give its clearance process sufficient priority. It took the F.B.I. an average of 107 days to clear detainees of any connection to terrorism.
- A. The OIG concluded that the detainees were exposed to unnecessarily severe conditions of confinement, and were improperly hindered from obtaining and consulting with legal counsel. Do you agree or disagree with these conclusions? Please explain.

**I believe that improvements can be made with regard to both conditions of confinement and communications with counsel. I would note, however, that the BOP was facing very real security concerns at the time, and took certain measures to protect BOP personnel, the detainees, the public, and national security.**

- B. Having directed the Bureau of Prisons to "push as far toward security as they could," what responsibility do you take for the unnecessarily severe conditions of confinement and lack of access to counsel that the detainees experienced?

**As explained above, I do not recall any direct discussions with BOP related to the conditions of confinement of the aliens who were being detained on administrative immigration charges. The Inspector General's report does not address issues about which I was concerned at the time: individuals already convicted of terrorism-related crimes and the security concerns implicated by those particular inmates in the aftermath of the September 11<sup>th</sup> attacks. Even in that limited context, however, I believe it was clear that BOP should only prioritize security "within the bounds of the law" and was "never instructed [] to violate BOP policies." (OIG report, p.113) (emphasis added).**

4. You served on the Attorney General's Review Committee on Capital Cases in 2001. As you know, Attorney General Ashcroft has repeatedly rejected the recommendations by U.S. Attorneys not to seek the death penalty. On several occasions, prosecutors have been forced to seek the death penalty against defendants who were willing to plead guilty in return for lengthy terms of imprisonment, including life sentences, in order to avoid the death penalty. Under what circumstances do you believe it is appropriate for the Attorney General to overrule local U.S. Attorneys and require them to seek the death penalty?

**The Department is committed to the consistent, even-handed, and fair application of federal death penalty laws nationwide. To do this, the Department does not rely solely on the recommendations of local United States Attorneys. Instead, the Department has a longstanding internal protocol that is designed to ensure equal and fair treatment for all defendants. Under the protocol, each potential death penalty case is reviewed in the first instance by career prosecutors on the Attorney General's Review Committee on Capital Cases. The recommendation of the committee and the decision of the Attorney General are based on the facts of the offense, the strength of the admissible evidence, the background, including criminal record, of the offender, and the applicable aggravating and mitigating factors.**

**Although the United States Attorney's recommendation is afforded great weight, absent a compelling prosecutorial consideration, equally culpable defendants, who have similar backgrounds and criminal histories and who have committed comparable crimes, are likely to face the same potential sentence regardless of where the crime occurs. This protocol results in the most just treatment of defendants, and ensures that defendants from a particular jurisdiction are not treated unduly harshly or too lightly. The rationale for this uniform treatment, of course, is that the laws of the United States apply with equal force regardless of where the offense occurs and regardless of local sentiment or opinion.**

5. In January 2003, Attorney General Ashcroft ordered federal prosecutors in New York to seek the death penalty for defendant Jairo Zapata – even though the prosecutors had negotiated an agreement in which Zapata would testify against others in a Colombian drug ring in exchange for a sentence of life imprisonment. One former prosecutor, Jim Walden, said it was “a remarkably bad decision” that will “likely result in fewer murders being solved because fewer defendants will choose to cooperate.” Do you have any concerns about the Attorney General ordering local federal prosecutors to seek the death penalty in cases when such a decision would clearly limit their ability to investigate and prosecute violent crimes?

**While I cannot comment on the details of the Department's deliberations in a specific case, in my experience, we benefit greatly when criminal defendants accept responsibility and agree to provide substantial assistance to the government by helping the government charge more serious offenders. In fact, information provided by defendants has allowed us to go after some of the most serious criminals in the country, and has been critical, for example, in most of our prosecutions of the leadership of criminal organizations. I have used cooperating witnesses many times**



throughout my career, and I would continue to support their appropriate use if confirmed as Assistant Attorney General.

That being said, the mere fact that a defendant wants to cooperate with the government does not automatically mean that the defendant deserves a lesser sentence. For example, it may be inappropriate to enter into a plea agreement with a principal actor in a murder when there is already more than sufficient independent evidence to obtain the necessary convictions. Similarly, although a defendant professes to “cooperate” with the government, it is soon evident that the defendant is not being fully truthful with the government, and that his or her cooperation is effectively useless.

6. It was recently reported that federal prosecutors have failed to persuade the jury to impose the death penalty in 15 of the last 16 trials in which they sought it. During this Administration, only five death sentences have been imposed in 34 federal capital trials. Why do you believe the Justice Department is losing so many death penalty cases?

As discussed in my previous answers, the Department is committed to the consistent and fair application of the federal death penalty statutes without regard to the location of the offense or the trial. The consistent and fair enforcement of federal death penalty law may result in capital trials in non-death penalty states before juries less receptive to capital punishment.

I have not observed any dramatic change in the rate at which death sentences are returned in authorized capital prosecutions. What has changed is the number of authorized capital prosecutions going to trial. In June 2001, the Department amended its internal protocol to require that the prosecuting district obtain the approval of the Attorney General before entering into a plea agreement eliminating a potential death sentence, just as the district is required to do to seek the death penalty in the first instance. A decision to seek the death penalty should represent an actual assessment that it is an appropriate sentence. Since the prospect of a capital prosecution should not be used to induce a plea, there is no general presumption that a life sentence will substitute for a death sentence. Accordingly, withdrawal of the notice of intent to seek the death penalty generally requires a change in the circumstances favoring capital prosecution. In contrast, under the previously applicable protocol, the prosecuting district retained the discretion to enter into a plea agreement even after a decision had been reached to proceed with a capital prosecution.

7. Please describe in full detail what role, if any, you had in developing or supporting the changes to federal sentencing law contained in the so-called "Feeney Amendment" to the AMBER Alert bill. Please state whether you were involved in drafting the letter sent by the Justice Department to Senator Hatch on April 4, 2003, expressing the Department's "strong support for Congressman Feeney's amendment to the House version of S.151."

**Although I became generally aware that sentencing legislation of the sort reflected in the Feeney Amendment was under consideration shortly before its adoption, I did not personally participate in its development. Nor did I participate in drafting the Department's April 4, 2003 letter to Senator Hatch.**

8. The Feeney Amendment imposes burdensome new record-keeping and reporting requirements on federal judges, and requires the Sentencing Commission to disclose confidential court records to the House and Senate Judiciary Committees upon request. It also requires the Attorney General to establish what some have called a "judicial blacklist," by informing Congress whenever a district judge departs downward from the guidelines. Chief Justice Rehnquist has criticized these provisions as potentially amounting "to an unwarranted and ill-considered effort to intimidate individual judges in the performance of their judicial duties," and cautioned that they should not be used to "trench upon judicial independence." Do you agree with the Chief Justice's concerns about these provisions? If you are confirmed as head of the Criminal Division, what steps will you take to protect the independence of federal judges?

**I agree with the Chief Justice that any effort to use the PROTECT Act reporting provisions to "intimidate individual judges" or to "trench upon judicial independence" would be wrong. Although I am not intimately familiar with these provisions, I do not believe that they were intended to be used in that manner either by the Department or by the Congress, but were intended to reinforce the principle of the original Sentencing Reform Act of 1984 that decisions to depart from the Guidelines (either upward or downward) should be accompanied by a detailed explanation of the court's reasons. See S. Rep. 98-473 at 115 ("[T]he judge is required to state specific reasons for the sentence outside the guideline. Because sentencing judges retain the flexibility of sentencing outside the guideline, it is inevitable that some of the sentences . . . will appear to be too severe or too lenient.") As the Chief Justice stated in the speech that you quote, "[t]here can be no doubt that collecting information about how the sentencing guidelines, including downward departure, are applied in practice could aid Congress in making decisions about whether to legislate on these issues." (Remarks of the Chief Justice, Federal Judges Ass'n Board of Directors Meeting, May 5, 2003). If confirmed as Assistant Attorney General, I would strive to ensure that the information the Department obtains pursuant to the PROTECT Act is used to inform the Department's legitimate role in policy-making and recommending legislation to Congress, and not as a tool to police the decisions of individual judges.**

9. On June 24, 2003, Judge John S. Martin Jr., a Bush I appointee with a conservative record on criminal issues, announced that he was retiring from the federal bench because he “no longer want[s] to be part of our unjust criminal justice system.” He cited the Feeney Amendment as “Congress’s most recent assault on judicial independence” and “an effort to intimidate judges.” Judge Martin wrote, “Every sentence imposed affects a human life and, in most cases, the lives of several innocent family members who suffer as a result of a defendant’s incarceration. For a judge to be deprived of the ability to consider all of the factors that go into formulating a just sentence is completely at odds with the sentencing philosophy that has been a hallmark of the American system of justice.” Do you agree or disagree with Judge Martin’s comments? Do you believe that the Feeney Amendment allows judges to consider all of the factors that go into formulating a just sentence?

**I know that Judge Martin is a respected member of the federal bench in the Southern District of New York and I regret his evident belief that the criminal justice system is “unjust.” I respectfully disagree with that aspect of his comments. I believe that the Feeney Amendment, along with the entire system of determinate federal sentencing that Congress implemented in the Sentencing Reform Act of 1984, does allow judges to consider all of the factors that go into formulating a just sentence, but within the parameters set out generally by Congress and specifically by the United States Sentencing Commission. To quote the Chief Justice’s recent comments again, “Congress establishes the rules to be applied in sentencing . . . [and] [j]udges apply those rules to individual cases.” I agree with that principle.**

10. For years, civil rights groups and sentencing experts have been concerned about the substantial sentencing disparities that result from the different federal mandatory minimum sentences for crack cocaine and powder cocaine trafficking offenses. For example, five years imprisonment is mandated for both (1) 500 grams of powder cocaine (worth about \$40,000 on the street), and (2) 5 grams of crack (worth about \$500). Because African Americans comprise 84 percent of those convicted on crack cocaine charges, but only 31 percent of those convicted of powder cocaine charges, the lower threshold for crack cocaine has the effect of disproportionately punishing African-American defendants.

In March 2001, the Administration announced that it will oppose any reduction in drug sentences, including those in a bill introduced by Senator Sessions and Senator Hatch. The Administration acknowledges that actual sentences for crack cocaine are more than five times longer than sentences for equivalent amounts of powder cocaine, but argued that any reduction in penalties would “send the wrong message” on drugs. Do you agree that any effort to lower drug sentences must be opposed because it will “send the wrong message”? Isn’t it the responsibility of the government not only to “send the right message” on drugs, but also ensure equal justice for all Americans? If you are confirmed, what steps will you take to address this problem?

**The Department of Justice is committed to ensuring that the laws of the United States are enforced in a just, non-discriminatory manner. I am aware that federal sentencing policy with respect to cocaine powder and cocaine base (“crack”) has been controversial, because a given quantity of crack incurs the same mandatory**

minimum sentence as a larger quantity of cocaine powder, and because many defendants whose offenses involve crack are African-American.

It is my understanding that after extensive study and internal consultation and deliberation, including career prosecutors and agents, the Department determined that current federal penalties for cocaine offenses are appropriate and just. To the extent that any change in the federal cocaine penalty levels may be warranted due to perceived disparity, the Department believes the differential should be lessened by increasing the relative penalties for powder cocaine.

If I am confirmed as Assistant Attorney General, I would be open to considering different viewpoints, from within and outside the Department, and I would welcome additional information bearing on the important and sometimes controversial issues surrounding federal sentencing, including the crack/powder issue.

Senator Richard J. Durbin

1. In my home of state of Illinois, gun trafficking is a large problem. In fact, almost 47% of the crime guns traced in Illinois were originally bought in another state. This is the ninth highest out-of-state crime gun rate in the nation. However, during the three-year period between October 1, 1999 and September 30, 2002, federal prosecutors filed only 16 gun trafficking cases in Illinois. According to a recent report by Americans for Gun Safety, the lack of enforcement for these crimes is a nationwide problem. Although the overall number of federal prosecutions has increased under President Bush, 94 percent of the increase is due to aggressive enforcement of federal laws regarding the prosecutions of felons and other prohibited buyers in possession or buying a firearm and the use of a firearm in cases of drug trafficking or other violent felonies.
  - A. Although I appreciate the strides the Department of Justice has taken with respect to these two federal firearm laws, as Assistant Attorney General for the Criminal Division, how would you promote the prosecution of the remaining 20 major federal firearm laws, and in particular those regarding gun trafficking?

**Investigating and prosecuting gun traffickers has been, and will remain, a top priority for the Justice Department. During my tenure in the Deputy Attorney General's office, I devoted a significant portion of my time to the Department Project Safe Neighborhoods initiative, which is designed to reduce gun violence across America. Project Safe Neighborhoods combines vigorous federal law enforcement with state and local partnerships to ensure that gun crimes are prosecuted in the appropriate venues. If confirmed as Assistant Attorney General, I would seek to ensure that the Criminal Division continues to play an important role in prosecuting gun crime and developing policy, including reviewing existing statutes and penalties for gun trafficking and working to coordinate the investigation and prosecution of interstate trafficking crimes.**

**To ensure effective law enforcement, prosecutorial decisions regarding gun crimes must be made on a case-by-case basis in accordance with the strategies developed by U.S. Attorney's offices and federal, state, and local law enforcement officials. The charging decision in each gun trafficking case includes an evaluation of which federal statute or statutes best apply to the evidence, as well as what penalties will result upon conviction. Therefore, in some cases criminal conduct that constitutes or includes gun trafficking may be prosecuted under other statutes; those cases may not be reported as gun trafficking convictions or considered as such by persons later evaluating reported data. For example, a gun trafficker who can also be prosecuted under the felon-in-possession statute in some cases would face a stiffer penalty. Moreover, given limited resources, the federal government cannot prosecute every violation of the federal firearms laws; therefore, prosecutors**

focus on the most serious and dangerous offenders such as those with previous felony convictions or who engage in violence or drug trafficking. Accordingly, the Department has made a concerted effort to focus its attention and resources on those offenders, and the statutes applicable to them.

If confirmed as Assistant Attorney General of the Criminal Division, I would encourage federal prosecutors to use whatever federal firearms laws are appropriate to each case, would result in the most significant sentence, and have the highest likelihood of removing violent offenders from our communities. I am convinced that Project Safe Neighborhoods will continue to produce vigorous and effective enforcement of federal firearms laws.

- B. Do you believe there are sufficient resources to prosecute all 22 major federal firearm laws? If not, specifically which resources should be increased?

As reflected in its Project Safe Neighborhoods initiative, prosecuting and convicting violent firearms offenders is one of the Department's top priorities. At the same time, we are mindful of our obligation to manage our resources wisely and continue to do more with less. For this reason, the Department has made a concerted effort not only to focus our prosecutorial resources on the most serious and dangerous offenders of our gun laws, but also to help and encourage our state and local counterparts to strengthen their own efforts.

It is my understanding that for FY 2004, the Department is requesting additional resources to support its violent crime related programs. We believe that the 2004 request, if fully funded, will enable us to meet the Department's goals. The Department is also benefitting from the extraordinary expertise and resources brought to the federal enforcement of gun crimes by ATF, which became part of the Department in January 2003.

- C. I understand that many prosecutors believe penalties for gun trafficking are insufficient. Therefore, Senator Schumer and I have introduced the Gun Trafficking Penalties Enhancement Act of 2003 (S. 1243) to increase the penalties for four of the five gun trafficking offenses, by doubling the maximum sentence to 20 years and setting the minimum sentence for all four offenses at 33-41 months. This bill also would provide for possible prosecution for these four offenses under the RICO statute. Would you support this bill? Why or why not?

It is my understanding that the Department has not yet taken a formal position on your bill. Let me assure you that if confirmed as Assistant Attorney General, I would be committed to ensuring that gun traffickers receive appropriate penalties for their serious criminal violations. Indeed, during my tenure as an Assistant United States Attorney, I personally

prosecuted a number of gun trafficking cases (obtaining convictions both through guilty pleas and, in two cases, by jury verdict) in which defendants had illegally purchased guns in Georgia and transported them to cities in other states.

Moreover, consistent with your legislation's premise, the Department is currently considering whether penalties in this area are rigorous enough. In February 2003, the Attorney General directed the Criminal Division to "review the experience under existing Federal Sentencing Guidelines for firearms trafficking cases and to make appropriate recommendations for seeking an increase in the Guidelines." The Attorney General's directive makes clear that certain current penalties may be inadequate, and that the punishment for traffickers should be sufficient to deliver a strong deterrent message. The Criminal Division, in consultation with other interested components in the Department, is currently developing its recommendation to the Attorney General in response to that directive.

- D. What other steps can Congress take to assist the Department of Justice in enforcing federal firearms laws, and in particular, those regarding gun trafficking?

During my time in the Deputy Attorney General's office, I was continually grateful to Congress for the support it provided in our efforts to combat illegal gun trafficking and other serious gun crimes. We depend on this partnership to focus the public's attention on critical law enforcement issues, and we are thankful for the continued funding that the Congress provides, especially for the Project Safe Neighborhoods initiative. Of course, as you know, the problems of gun violence and gun trafficking are very difficult ones, and do not submit to easy answers. If confirmed as Assistant Attorney General, I would welcome the opportunity to work with you and other Members of Congress to find new and creative ways to enhance our progress in reducing gun violence in America, and to keep our families and communities safe.

2. In your position in the Deputy Attorney General's office, you have overseen the Justice Department's war on terrorism from the prosecution side. Let me ask you about what I view as one of the most basic rights of our legal system – the constitutional right to counsel. In the wake of the recent 40<sup>th</sup> anniversary of the case *Gideon v. Wainwright*, some commentators have criticized the Justice Department for its breach of *Gideon* principles. Jose Padilla and Yaser Esam Hamdi, two U.S. citizens, are being detained by the U.S. government as “enemy combatants” and denied access to counsel.
- A. How can you reconcile *Gideon* with the Justice Department's position that Mr. Padilla and Mr. Hamdi are not entitled to access to counsel?

The current war – which unfortunately has included acts of war carried out on our own soil, and acts against our Nation carried out by United States citizens – has raised complicated and challenging legal issues. The Attorney General has repeatedly reminded the Department's prosecutors and agents that their efforts in this war must remain within the bounds of the Constitution. Therefore, in analyzing complex issues such as those raised by the detention of enemy combatants, officials within the Department of Justice have relied on the expert advice of attorneys within the Office of Legal Counsel, the Office of the Solicitor General, and other components. My involvement in prosecuting the war on terrorism has been informed by this advice and analysis.

*Gideon* was a criminal case, and its holding was based on the Sixth Amendment, which applies only to criminal cases. The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right \* \* \* to have the assistance of counsel for his defence.” There are no criminal charges pending against Padilla or Hamdi, and therefore the right-to-counsel guarantee of the Sixth Amendment does not apply to them.

I would note, however, that both Padilla and Hamdi have received the benefit of court-appointed counsel for the purpose of seeking habeas review of the legality of their detentions, and these counsel have vigorously contested the right of the government to detain them as enemy combatants. In the case of Hamdi, the United States Court of Appeals for the Fourth Circuit has already upheld the legality of his detention, notwithstanding his access-of-counsel claims. *Hamdi v. Rumsfeld*, 316 F.3d 450 (Jan. 8, 2003). Litigation pertaining to Padilla's detention – and his right to consult with counsel – is ongoing.



- B. When is it appropriate to deny the right to counsel to U.S. citizens?

As a former defense attorney, I have a special appreciation for the importance of a criminal defendant's right to counsel, and agree that, where such a right exists, it must, of course, be honored. As the Administration has argued in the Padilla and Hamdi cases, however, a United States citizen detained as an enemy combatant enjoys no such right. The rights the Constitution affords persons in the criminal justice system simply do not apply in the context of detention of enemy combatants. The Sixth Amendment does not provide a right to counsel to enemy combatants because it applies only after the formal initiation of criminal charges. See *Texas v. Cobb*, 532 U.S. 162, 167–68 (2001) (the Sixth Amendment right to counsel “does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information or arraignment”) (internal quotation marks omitted); cf. *Ex parte Toscano*, 208 F. 938, 940 (S.D. Cal. 1913) (Sixth Amendment has no application to internment of belligerent forces because such detention “in no way relates to a criminal prosecution”). Similarly, the Fifth Amendment's Self-Incrimination Clause provides a trial right to criminal defendants and the right to counsel that the Supreme Court has inferred under that Clause is designed to protect a criminal defendant's rights at trial. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (violation of Self Incrimination Clause “occurs only at trial”). There is also no Due Process Clause right for enemy combatants to have access to counsel. Indeed, the United States military has captured and detained enemy combatants during the course of virtually every major conflict in the Nation's history and, so far as I know, it has never even been suggested that such prisoners have a right of access to counsel to challenge their detention. Counsel has been provided when those combatants have been prosecuted for war crimes or violating other military regulations.

An enemy combatant does not have a general right of access to counsel under the laws of war either. The President has determined that members of the Taliban and the *al Qaeda* terrorist network do not qualify for status as prisoners of war entitled to the rights and privileges of the Geneva Convention on the Treatment of Prisoners of War (“GPW”). See *United States v. Lindh*, 212 F. Supp. 2d 541, 557-558 (E.D. Va. 2002) (“On February 7, 2002, the White House announced the President's decision, as Commander in Chief, that the Taliban militia were unlawful combatants pursuant to GPW and general principles of international law, and, therefore, they were not entitled to POW status under the Geneva Conventions.”); White House Fact Sheet, Status of Detainees at Guantanamo, Feb. 7, 2002 ([www.whitehouse.gov/news/releases/2002/02/20020207-13](http://www.whitehouse.gov/news/releases/2002/02/20020207-13)). Even if the protections of GPW did apply, the Geneva Convention clearly permits the

detention of members of enemy forces *without* access to counsel. The Convention requires the detaining power to provide counsel only when a prisoner is *charged* with a war crime or violation of disciplinary regulations during his period of confinement. *See* GPW art. 105. It does not require a detaining power to provide access to counsel for any prisoner of war who is detained.

3. I voted for the USA Patriot Act but am concerned that it may have gone too far. It was introduced and passed at a time when the nation was gripped with fear.
- A. Do you believe that the USA Patriot Act sunset provision was advisable? Do you think it should be eliminated?

The Department is very grateful for the law enforcement tools provided by Congress in the USA Patriot Act that have allowed us to take strong measures to enhance the security of this Nation. I believe that until terrorism has itself “sunset,” these invaluable legal tools should remain in place. At the same time, however, I also recognize the importance of Congress’s oversight role regarding the Department’s use of these authorities. If confirmed, I look forward to working with Congress on these important issues.

- B. Did the USA Patriot Act provide the Justice Department with everything it needed to fight the war on terrorism most effectively? If not, what more do you believe is needed?

The USA Patriot Act provided the Department of Justice with many important resources for fighting terrorism – including integrating law enforcement and intelligence capabilities and extending to the war on terrorism a number of tools previously used to combat organized crime and drug dealers. However, as recent indictments have shown, terrorism is still a real threat to our nation, and fighting it remains the first priority of the Department of Justice and the Criminal Division. Recently, the Attorney General highlighted several areas where changes to the current law would allow the Department of Justice to more effectively carry out its mission. These included applying to terrorism offenses the presumption against pretrial release that applies to many other crimes; clarifying that training with or enlisting in terrorist organizations constitutes criminal material support; and establishing a clear authority under which terrorism hoaxes can be prosecuted. If confirmed to lead the Criminal Division, I would seek to use all current legal tools to fight terrorism, while also welcoming any further assistance provided by Congress.

- C. In implementing the USA Patriot Act, how has the Justice Department safeguarded our civil liberties?

**While fighting the threat of terrorism is a paramount concern for the Department of Justice, protecting the civil liberties enjoyed by all Americans is an equally important priority. It is these rights that make this country great and worth fighting for. Since September 11, 2001, the President and the Attorney General have ensured that America's civil liberties are preserved by acting within the letter and the spirit of both the Constitution and our federal laws. The courts have clearly recognized these efforts by upholding the vast majority of Department actions that have been litigated. If confirmed, I would reaffirm to the Criminal Division and to those in the field the importance of preserving our civil liberties while carrying out the vital business of the Division.**

4. In the state of Illinois, 13 people on death row were released between 1987 and 2000 after they were found to be innocent. Four of the 13 were represented by counsel who were later disbarred or suspended from the practice.

- A. Do you believe that indigent criminal defendants in the United States have meaningful access to counsel?

**Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668 (1984); see also *Wiggins v. Smith*, 2003 WL 21467222, \_\_\_ U.S. \_\_\_ (June 26, 2003) (reversing a death sentence because counsel failed to properly investigate "powerful" mitigating evidence that defendant had been severely abused and neglected as a child). The mechanisms for identifying and appointing qualified counsel for indigent criminal defendants vary from jurisdiction to jurisdiction, and from state to federal. Without question, the representation afforded indigent criminal defendants has on occasion been inadequate, but I believe these instances represent the rare exception rather than the norm.**

**It is important not to let the rare exception distort an objective evaluation of existing practices. Personally, I have been impressed with the quality of representation afforded defendants in federal court under 18 U.S.C. § 3006A. Both as a member of the defense bar and as a federal prosecutor, I had the highest respect for the court-appointed defense counsel in federal criminal cases in Atlanta, including a number of homicide cases. Federal capital defendants are entitled to the assistance of two counsel, of whom at least one must be learned in the law applicable to capital cases. See 18 U.S.C. § 3005. Additional requirements for capital counsel are also found in 21 U.S.C. § 848(q).**

I am not in a position to comment specifically on the quality of legal representation in state courts. Based on news reports, it is my understanding that in the wake of extensive publicity concerning the death penalty, many, if not most, states have recently taken steps to enhance the quality of representation generally, and that afforded capital defendants specifically.

- B. How would you assess the quality of legal representation provided to indigent criminal defendants?

Although I have not had the opportunity to conduct a broad review of representation provided to indigent defendants, again, I have been personally impressed with the quality of representation afforded defendants in federal court under 18 U.S.C. § 3006A. Again, I am not in a position to comment specifically on the quality of legal representation in state courts. Based on news reports, it is my understanding, as I mentioned previously, that many, if not most, states have recently taken steps to enhance the quality of representation generally, and that afforded capital defendants specifically.

- C. As AAG for the Criminal Division, what steps would you take to assure that all defendants received competent counsel?

If confirmed as Assistant Attorney General, I would not be involved in the selection or retention of counsel for particular cases in federal court. However, as the Supreme Court reiterated in *Wiggins*, this is an issue of substantial importance, and must be given adequate attention. If confirmed, I would instruct Criminal Division attorneys that if they become aware that defense counsel is not competent, they should bring it to the attention of their supervisors immediately, so that we can let the presiding judge know of our concern, and enable the judge to take appropriate action.

5. Many members of the Federalist Society believe that Congress has limited authority to pass legislation. In recent federalism cases, the Supreme Court has struck down 28 laws in the past 6 years, an extremely high number by historical standards. As a member of the Federalist Society, do you believe that Congress has gone too far in passing legislation? If so, please provide examples of federal criminal laws with which you would be reluctant to prosecute.

If confirmed as the Assistant Attorney General for the Criminal Division, I would be responsible for fully enforcing the federal criminal laws as enacted by Congress and interpreted by the courts. I am firmly committed to doing so.

Responses to Questions for Christopher A. Wray  
Nominee to be Assistant Attorney General  
of the Criminal Division, U.S. Department of Justice

Senator Patrick Leahy, Ranking Minority Member

1. Mr. Wray, you have had a meteoric career. After essentially four years as an assistant attorney general in a local U.S. attorney's office, you are being nominated to head the Criminal Division for the United States Department of Justice. I know how Senator Sessions and other Senators on both sides of the aisle have tended to value trial experience for nominations. When I was chairman we did proceed to confirm a number of relatively young and inexperienced nominees sent to us by President Bush. We confirmed J. Strom Thurmond, Jr., to the United States Attorney for the District of South Carolina and David Bunning to be a United States District Court Judge for Kentucky, for example. The only information we have about your experience we got about a week ago when you submitted a questionnaire to the Committee. In that questionnaire you note that you tried 8 jury cases to a verdict. In one or two you were the sole counsel— apparently in what you describe as the "Platinum Printing" case and in the Miller counterfeiting and murder-for-hire case.

Previous appointments to this important post included Mike Chertoff, who had been the U.S. Attorney in New Jersey; Bob Mueller, who had 12 years as an Assistant U.S. Attorney, including 6 as the first assistant in Boston and a stint as Acting U.S. Attorney; Ed Dennis, who had been a U.S. Attorney for 5 years in Philadelphia, an Assistant U.S. Attorney for 5 years, and Chief of the Narcotics Section of the Criminal Division for 3 years; Lowell Jensen, who had been a District Attorney for 12 years and in the DA's office for 26 before he was named.

I was a young man when the people of Chittendon County elected me State's Attorney so I want to be fair to you and to give the President every benefit of the doubt when it comes to his executive branch nominations. I wish Republicans had treated President Clinton's nominees that way. I want to give you an opportunity to expound on how your trial experience qualifies you to head the Criminal Division of the United States Department of Justice and direct and supervise the thousands of prosecutorial decisions and important policies that have to be made by that Assistant Attorney General.

**I welcome the opportunity to explain why, if confirmed, I would bring the right experience, integrity, judgment, temperament and perspective to lead the Criminal Division. I have had the fairly unique experiences of seeing — and understanding well — the Department's criminal enforcement efforts from three important vantage points: as a defense lawyer, as a career prosecutor on the front lines in a U.S. Attorney's Office, and as part of the Department's senior leadership for the past two years, spanning the September 11<sup>th</sup> attacks and their aftermath.**

**During my years as an Assistant United States Attorney, I personally prosecuted a**

wide variety of federal criminal cases, including such offenses as securities fraud and public corruption, gun trafficking, murder-for-hire, racketeering and narcotics, kidnaping, immigration, counterfeiting, church arson, and many more. I have handled criminal cases through all stages of the process, from grand jury investigations, to jury and bench trials, sentencing, and appeals.

As Principal Associate Deputy Attorney General, I have had substantial leadership and oversight responsibilities relating to the Criminal Division and the U.S. Attorney's Offices before, during, and after the September 11<sup>th</sup> terrorist attacks. From that position, I have seen closely nearly all of the major issues confronting the Criminal Division and the U.S. Attorney's Offices during this particularly critical and unprecedented stage in their history. For well over a year, I have been attending and participating in daily threat briefings by the FBI and CIA with the Attorney General, Deputy Attorney General, and FBI Director. As Principal Associate Deputy Attorney General, I have had involvement in strategic and tactical decisions in nearly every significant terrorism case or investigation handled by the Department since September 11<sup>th</sup>, from the Eastern District of Virginia to the Southern District of New York, from Buffalo to Portland, Seattle, Chicago, Detroit, and others. I have had the privilege of developing excellent, personal working relationships with most of the current 93 U.S. Attorneys, the current leadership of the Criminal Division itself, the current heads of the other Main Justice components, the current leadership of the FBI, ATF, DEA, SEC and other key law enforcement agencies.

I have also held significant management responsibilities while Principal Associate Deputy Attorney General. I have served as the Department's representative on the President's Management Council, working with the Office of Management and Budget and chief operating officers from other Cabinet agencies in the implementation of the President's management initiatives. I have also borne significant responsibility for the Department's own Strategic Management Council, for the implementation of most cross-cutting management initiatives in the Department, and for the Department's overall budget of approximately \$23 billion and more than 100,000 employees.

Finally, my experience as a defense attorney before joining the Department would provide me with another valuable perspective if confirmed as head of the Criminal Division. As a former defense attorney representing clients facing either Department investigation or prosecution, I understand well both the power entrusted to law enforcement and the importance of using it wisely and appropriately.

2. There have been reports in the media that senior level, experienced prosecutors with the Department are being marginalized in favor of political appointees with views more in line with the politics of this Administration. Despite precedent to the contrary, the Administration has refused to investigate these allegations. What views do you have on the role of career prosecutors within the Department of Justice and the U.S. Attorney's Offices? Will you pledge to investigate these allegations if they are made to your office?

**Career prosecutors form the backbone of the Department. They provide institutional knowledge, judgment and valued experience. I have a special appreciation for their role since I myself served as a career prosecutor in the U.S. Attorney's Office in Atlanta from 1997 to 2001. During my service in the Deputy Attorney General's Office, I relied heavily on the advice and counsel of career prosecutors and, if confirmed, I would continue to do so. In my view, it would be shortsighted not to look to their leadership and expertise.**

With respect to the Criminal Division in particular, as you know, a reorganization of the Division occurred under the leadership of Assistant Attorney General Michael Chertoff. That reorganization responded to the Attorney General's post-September 11 directive for the Justice Department to focus its resources on top law enforcement priorities, including the war on terrorism and corporate fraud. The changes also placed a renewed emphasis on litigation. Some personnel changes occurred within the Division, but to my knowledge no experienced prosecutors were "marginalized in favor of political appointees." Indeed, each of the Criminal Division's 19 sections and offices continues to be managed by experienced career prosecutors. I understand that Division officials briefed your staff last year regarding the reorganization and personnel changes. If confirmed, I would be happy to review any specific allegations that have come to your attention, and take any appropriate action in response.

3. Upon graduation from law school, you clerked for Federal appeals court judge Michael Luttig. According to the Nation, Judge Luttig only hires law clerks who belong to the Federalist Society or have "comparable conservative credentials." Are you or were you a member of the Federalist Society or any similar special interest group? What would you say are your "conservative credentials?"

**I am unfamiliar with the article you quote, but I believe that Judge Luttig hired me based on my qualifications, such as my academic record at Yale Law School and Yale College, and my leadership position on the *Yale Law Journal*. I became a member of the Federalist Society during my first year in law school, in approximately 1990, and have maintained my membership since that time.**

4. In the recent Inspector General report concerning the Administration's treatment of aliens detained in connection with the 9/11 investigation, you were quoted as telling the BOP "not to be in a hurry" to provide 9/11 detainees with access to communications, including legal calls and visits. (A) Is this accurate? (B) After you offered this advice, a "communications blackout" was imposed on the detainees, during which time they were unable to obtain or consult with counsel. To your knowledge, did the instructions you gave to BOP cause this blackout? (C) The Inspector General's report goes on to describe numerous ways in which the right to counsel of the 9/11 detainees was "severely limited," including attorneys being incorrectly informed that their clients were not at the facility. Do you approve of the BOP's conduct in this regard? If not, how do you think it should have been different?

(A) The relevant passage of the Inspector General's report is slightly ambiguous and would benefit from clarification in a number of respects. First, I do not recall having any three-way conversations with then-Director Hawk Sawyer and David Laufman, then the Deputy Attorney General's chief of staff. Rather, I had a handful of conversations with Ms. Hawk Sawyer myself, and I believe that Mr. Laufman separately did so as well. Second, and more importantly, the only conversations I recall having with Ms. Hawk Sawyer concerned individuals already convicted of terrorist offenses – "specific *criminal* inmates," to use the language of the Inspector General's report (p. 113) – *not* aliens being detained on administrative immigration charges in connection with the September 11 investigation, on whom the report is focused. Third, I do not recall ever using the phrase "not to be in a hurry" myself in speaking with Ms. Hawk Sawyer, nor do I ever recall her using that phrase with me even in the limited context of our conversations – again, convicted terrorists – much less in the context of immigration detainees. Moreover, as the Inspector General's report explains, "Hawk Sawyer *emphasized* that Department officials *never* instructed her to violate BOP policies, but rather to take their policies to their *legal* limit in order to give officials investigating the detainees time to 'do their job.'" (Emphasis added.) The report is accurate to the extent that it was clearly understood that the BOP was to exercise discretion within the law and BOP policy.

(B) Again, the only conversations I recall having with Ms. Hawk Sawyer regarding such matters concerned criminally convicted terrorists already in custody on 9/11, not immigration detainees. To my knowledge, any BOP limitations on communications with aliens detained on immigration charges were not imposed based on any instructions of mine.

(C) It is my understanding that the difficulties encountered by aliens detained in the Metropolitan Detention Center in Brooklyn (MDC-Brooklyn) were a result of various factors, including: aliens in removal proceedings have the right to counsel but must obtain such counsel on their own (unlike criminal defendants who have the right to appointed counsel at U.S. government expense); difficulty in obtaining an



accurate list of free legal services; the initial use of a category generally used to protect witnesses, which made it difficult for their attorneys to locate them; and many attorneys were located near Ground Zero and were, therefore, unreachable due to disruptions in utilities. Having the benefit of the Inspector General's report, I believe that there are steps that the BOP can take to improve the situation. In fact, the BOP first initiated those improvements following interim recommendations made by the Inspector General in July 2002.

5. In a memorandum opinion dated February 20, 2003, the Office of Legal Counsel ("OLC") advised the Deputy Attorney General regarding limitations on the INS's detention authority. Among other things, OLC concluded that it is permissible for the Attorney General to take more than the 90-day removal period to remove an alien even when it would be within the Attorney General's power to effect the removal within 90 days, provided the delay in removal is related to effectuating immigration laws and policies, including investigating whether and to what extent an alien has terrorist connections. Do you agree OLC's conclusion on this point and if so, please explain your reasoning.

**The Office of Legal Counsel (OLC) is the Department of Justice component that considers and sets forth the Department's definitive legal position; OLC opinions are binding on the Department and the Executive Branch. Although I have not conducted independent research on the issue addressed in the February 2003 OLC opinion entitled "Limitations on the Detention Authority of the Immigration and Naturalization Service," I am generally familiar with the substance of the opinion and agree with OLC's analysis.**

6. We can all agree that gun violence poses significant problems in our society. What are your views on firearms licensing and recordkeeping, and how will that translate into prosecution priorities within the Criminal Division?

**During my tenure in the Deputy Attorney General's office, I devoted a significant portion of my time to the Department of Justice's Project Safe Neighborhoods initiative, which is designed to reduce gun violence across America. Project Safe Neighborhoods combines vigorous federal law enforcement with state and local partnerships to ensure that gun crimes are prosecuted in the appropriate venues. If confirmed as Assistant Attorney General for the Criminal Division, Project Safe Neighborhoods and the reduction of gun violence in America would remain one of my top priorities. With respect to prosecuting defendants for violations of existing firearms licensing and record keeping violations, the Criminal Division helps enforce those existing laws. In making prosecutorial decisions in this context, we are guided by the principle that federal and state law enforcement should work cooperatively to prosecute violent offenders and the most serious firearms crimes in the most appropriate jurisdictions.**

7. In January, the General Accounting Office reported that, in fiscal year 2002, three-fourths of all so-called "terrorism convictions" by the Justice Department were misclassified in that they were not terrorism convictions at all. Similarly, in the first 2 months of this year, the Justice Department claimed to have filed terrorism charges against 56 people, although again at least 41 of the 56 had nothing to do with terrorism -- a fact the line prosecutors acknowledged. What steps will you take to ensure proper reporting and accountability of the cases being prosecuted in our federal courts?

**The Department is committed to accurate reporting of, and accountability for, cases prosecuted in federal court. This reporting ensures, for example, that Congress is able to provide adequate oversight of the Department's activities, and ensures that the Department has adequate resources. To the extent that the GAO report identified various weaknesses in the current system, the Department is committed to taking every reasonable step to ensure that proper reclassification is completed and that future data entries are complete and accurate.**

The Executive Office of United States Attorneys (EOUSA) oversees the collection of case reporting data from the U.S. Attorney's Offices around the country, and is responsible for reviewing and classifying the data submitted. I understand that EOUSA is working to ensure that case classification and conviction data entered into the case tracking system by the various United States Attorney's offices is supervised and validated. For example, EOUSA has amplified classification codes to better reflect post 9/11 case loads, and it has also sent several directives to the U.S. Attorney's Offices to ensure that data submitted is accurate. Although I have not been directly involved in this process, it is my understanding that these steps have already improved the data collection points. If confirmed as Assistant Attorney General, I would work with EOUSA to ensure that the reporting methods continue to improve, and would seek to ensure that any submission by the Criminal Division of information is accurate and timely.

With respect to any concerns that the Department is inaccurately classifying terrorism-related matters, I should note that the GAO report acknowledges on page 13 that 127 of the "misclassified" cases in fact fell under new anti-terrorism case categories. Only five of the 288 cases the GAO cited, or less than two percent, were unrelated to terrorism or our anti-terrorism efforts.

8. If confirmed as Chief of the Criminal Division, you will be responsible for the Capital Case Unit, which advises the Attorney General on all Federal death-eligible cases. What experience have you had in the prosecution of capital crimes?

**As an Assistant United States Attorney, I personally prosecuted two death-eligible cases as well as a third murder which would have been death eligible if it had occurred after the effective date of the 1994 legislation expanding the availability of the federal death penalty. Ultimately, the death penalty was not sought in any of my three cases.**

**In addition, I served personally on the Attorney General's Review Committee on Capital Cases while Associate Deputy Attorney General in 2001. Since my appointment as Principal Associate Deputy Attorney General, I have continued to monitor the Department's capital case review process, and have reviewed most of the death-eligible cases that have come through that process — though less closely than when I was actually on the committee. In those roles, I have worked closely with both the Capital Case Unit itself as well as the U.S. Attorneys submitting death-eligible cases for review.**

9. In February 2003, Attorney General Ashcroft ordered prosecutors in the Eastern District of New York to seek the death penalty against defendant Jairo Zapata, even though he had agreed to cooperate with the government and testify against others. As a former prosecutor, I was concerned that the Attorney General's insistence on seeking the death penalty against Zapata could impair the government's ability to convict other violent criminals. What are your views about the death penalty when a defendant accepts responsibility and agrees to provide substantial assistance to the government in the prosecution of other, more serious offenders?

**While I cannot comment on the details of the Department's deliberations in a specific case, in my experience, we benefit greatly when criminal defendants accept responsibility and agree to provide substantial assistance to the government by helping the government charge more serious offenders. In fact, information provided by defendants has allowed us to go after some of the most serious criminals in the country, and has been critical, for example, in most of our prosecutions of the leadership of criminal organizations. I have used cooperating witnesses many times throughout my career, and I would continue to support their appropriate use if confirmed as Assistant Attorney General.**

**That being said, the mere fact that a defendant wants to cooperate with the government does not automatically mean that the defendant deserves a lesser sentence. For example, it may be inappropriate to enter into a plea agreement with a principal actor in a murder when there is already more than sufficient independent evidence to obtain the necessary convictions. In other cases, although a defendant professes to "cooperate" with the government, it is soon evident that the defendant is not being fully truthful with the government, and that his or her cooperation is effectively useless.**

Written Questions for Select Nominees from June 25, 2003 Confirmation Hearing  
Sen. Richard J. Durbin  
July 2, 2003

Responses of Earl Leroy Yeakel III (Nominee to be U.S. District Court Judge in Texas)

1. According to your Senate questionnaire, you are a member of the Federalist Society. Do you agree with the following passage from the Federalist Society's statement of purpose? If you do agree with this statement, please explain the basis for your belief. If you do not, please explain why you are a member of the organization.

*"Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law."*

I am a member of the Austin Lawyers Chapter of the Federalist Society. The chapter conducts luncheon meetings on a sporadic basis, presenting speakers of interest to those who practice at least some federal law. The chapter has presented as speakers federal and state judges, the chief judge of the United States Court of Federal Claims, a debate between the chief justice of the Texas Supreme Court and a practicing attorney on the topic of elected versus appointed judges, and law professors, both liberal and conservative, for example. I find this exchange of ideas both interesting and stimulating. The chapter does not and has not endorsed political candidates or taken any role in any political campaign. It might best be termed "a debating society." With regard to the specific statement, I can only draw upon my experiences with the law schools at the Universities of Texas and Virginia, with which I have maintained a relationship, and our local attorneys, and therefore disagree with the overall breadth of the statement.

2. According to its mission statement, one of the goals of the Federalist Society is "*reordering priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law.*"

A. Do you believe that certain priorities need to be reordered? If so, which ones?

I do not know to what priorities the statement is referring. It is not and has not been a goal of the Austin Lawyers Chapter to attempt reordering of any priorities. I am comfortable with the legal system's existing priorities.

- B. On which traditional values should there be a premium, and why?

**All societal values should be equally respected in the eyes of the law.**

- C. Do you believe that the Supreme Court's recent decision in *Lawrence v. Texas*, striking down the sodomy law in your home state, is consistent with the pursuit of "traditional values" as you define them?

**If confirmed, I will adhere at all times to the precedents of the Supreme Court and the Fifth Circuit Court of Appeals. This includes cases in which a statute of my home state has been found lacking. A respect for the rule of law is the most traditional of values.**

3. Please indicate how long you have been a member of the Federalist Society and whether you have given any speeches to Federalist Society audiences. If you have given such speeches, please describe in general terms the themes of your remarks.

**I have been a member of the Austin Chapter of the Federalist Society for approximately four and one-half years. During that period I have given one luncheon talk to the chapter. The topic concerned the current state of the law of sovereign immunity in Texas with regard to the law of contracts. It was a greatly distilled version of the thesis I had written on the subject while pursuing a masters of law degree at the University of Virginia Law School, a copy of which has been provided.**

SUBMISSIONS FOR THE RECORD



EMORY

Office of the General Counsel  
Representing Emory University  
and Emory Healthcare

June 23, 2003

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

The Honorable Patrick Leahy  
Ranking Member, Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Re: Chris Wray; Nominee for Assistant Attorney General, Criminal Division,  
Department of Justice

Dear Senator Hatch and Senator Leahy:

After President Bush nominated Chris Wray, I phoned Chris with my congratulations and an offer to lend my full and unqualified support during the confirmation process. With his confirmation hearing scheduled for this week, I write now, enthusiastically, to provide that support.

When I served as the Presidentially-appointed United States Attorney in Atlanta during President Clinton's Administration, I already knew Chris as a shooting star in the legal community. He and I had worked closely together on a case in private practice and he immediately impressed me with his legal acumen, sound judgment, and effectiveness. I urged him to apply as an Assistant United States Attorney, and was honored to hire him when he did.

As a federal prosecutor, Chris continued to distinguish himself in the justice community. Federal, state and local law enforcement agents all highly respected him, judges told me of his exceptional performance in court, and defense attorneys consistently viewed him as tough but fair. His judgment was always sound and balanced. And, refreshingly, despite Chris' stellar academic record and professional accomplishments, he has at all times remained down to earth.

Since Chris's days as a federal prosecutor, I have taken particular pride in following his career at the Justice Department. Not surprisingly, I have heard glowing reports from those I know in the Department. Indeed, his experience as the Principal Associate Deputy Attorney

Emory University  
401 Administration Building  
Atlanta, GA 30322  
*An equal opportunity, affirmative action university*

Tel 404-727-6011  
Fax 404-727-6098

June 23, 2003  
Re: Chris Wray  
Page 2

General assisting the Deputy in overseeing the operations of the Department, coupled with his experience in the U.S. Attorney's Office trying cases and overseeing investigations, makes Chris an ideal candidate to head the Criminal Division. As you know, the importance of appreciating both the Main Justice and the "Field" perspectives on criminal prosecutions and policies cannot be overstated.

After Chris's nomination, I read one article questioning his age, 36, and had to smile. When I was nominated as United States Attorney at the same age, I was asked about my youth. I noted at the time that the Senator who recommended me, Sam Nunn, was only 34 when elected to the U.S. Senate. While I am certainly no Sam Nunn, I observed then and have appreciated more since that age is of course relative. The older I get, the younger everyone under 40 seems to become.

Chris Wray is extraordinary and will make an extraordinary Assistant Attorney General. I assume he will have an easy go of the confirmation process, but please feel free to contact me if you or your colleagues have any questions at all. As I said, Chris has my full, unqualified, and enthusiastic support.

Sincerely,



Kent B. Alexander  
Senior Vice President and General Counsel



**Judiciary Committee**  
**Introduction of Karen P. Tandy**  
**Nominee: Administrator, Drug Enforcement Administration**  
**June 25, 2003, 2:00 pm, SD-215**

Mr. Chairman and members of the Committee, I am pleased to support the nomination of Ms. Karen P. Tandy to serve as the Administrator of the Drug Enforcement Administration. Ms. Tandy is an exceptional nominee for this important position. It is also worth noting that, when confirmed, Ms. Tandy will be the first woman to ever fill the role as chief drug czar in the United States.

As a father of three young children, I am greatly disturbed by the rate of drug use by our nation's youth. The spread of drugs concerns parents across Virginia and the United States—in urban, rural and suburban areas. One of government's most fundamental responsibilities is to protect law-abiding citizens. We must build upon earlier successes and focus our efforts against one of the chief causes of violent crime in the, the scourge of illegal drugs. Our nation's crime and drug problems warrant an all-out effort on the federal, State and local level to prevent the devastating effects drugs have on our children and on our society.

Ms. Tandy is well qualified to serve as the chief drug enforcement officer in the United States. Ms. Tandy already has extensive experience with the U.S. Drug Enforcement Administration, as well as with the National Drug Intelligence Center and the White House Office of National Drug Control Policy. Ms. Tandy currently serves as the Associate Deputy Attorney General and Director of the Organized Crime Drug Enforcement Task Forces. In her capacity as Associate Deputy Attorney General, she is responsible for oversight of the Drug Enforcement Administration (DEA) and National Drug Intelligence Center. As an advisor to the Deputy Attorney General and Attorney General on drugs, money laundering and forfeiture issues, Ms. Tandy is responsible for developing national drug enforcement policy and strategies.

Between 1990 and 1999, Ms. Tandy served in a variety of positions in the Criminal Division of the Department of Justice, supervising the Department's drug and forfeiture litigation. Prior to 1990, Ms. Tandy was an Assistant United States Attorney in the Eastern District of Virginia. While working in the Eastern District of Virginia, Ms. Tandy took a lead role in a three-year investigation that ultimately broke up a drug ring that had distributed 300 tons of marijuana and hashish valued at more than \$100 million. Ms. Tandy also served as an Assistant U.S. Attorney in the Western District of Washington, handling the prosecution of violent crime and complex drug, money laundering and forfeiture cases.



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Ms. Tandy, a native of Ft. Worth, Texas, is a graduate of Texas Tech University and a 1977 graduate of the Texas Tech Law School.

Mr. Chairman, members of the Committee, it is my sincere pleasure to speak on behalf of this exceptional nominee, and I recommend her swift approval by this Committee.

06/18/03 10:10 FAX

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COPY



Association of Former Federal Narcotics Agents  
 P. O. Box 77303  
 Washington, D. C. 20054-7303

March 24, 2003

The Hon. Orrin G. Hatch  
 Chairman  
 United States Senate  
 Committee on the Judiciary  
 224 Dirksen Senate Office Building  
 Washington, DC 20510

Re: Nomination of Deputy Associate Attorney General Karen P. Tandy for the position of Administrator of the Drug Enforcement Administration

Dear Chairman Hatch:

On behalf of the members of the Association of Former Federal Narcotics Agents (AFFNA), I am pleased and honored to communicate to you our highest personal regards and appreciation for the outstanding support that you have always provided to the federal law enforcement community and, in particular, to the men and women of the Drug Enforcement Administration (DEA).

Our organization is comprised of about a thousand former and retired special agents and employees of the DEA and its predecessor agencies. We remain loyal to our lifelong commitment to end the scourge of drug abuse and many of us continue to work closely with our active duty colleagues in federal and local law enforcement in support of that goal.

Given the above, I am happy to inform you that the AFFNA Board of Directors overwhelmingly approves of the recent nomination by President George W. Bush of Deputy Associate Attorney General Karen P. Tandy to be Administrator of the DEA. Ms. Tandy, we believe, has an exceptional resume of service to America, is well-respected among the nation's law enforcement community, and is well-deserving of this important assignment.

As Deputy Associate Attorney General, Ms. Tandy presided over the Justice Department's Organized Crime Drug Enforcement Task Force (OCDETF) program, perhaps one of the most innovative and effective anti-crime forces ever devised. In its two decades of operation, the OCDETF program has served as a template for a number of similar federal-state-local law enforcement partnerships.

06/18/03 10:10 FAX

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Page two....

As a retired DEA management official and a former field manager (Special Agent in Charge) of several divisions, I personally can attest to the effectiveness of the OCDETF program in addressing major drug crimes. I have been advised that under Ms. Tandy's direction and leadership this program achieved some of its greatest accomplishments. For all of the above reasons, and more, I and the members of AFFNA are very pleased to inform you and your colleagues on the Committee of our enthusiastic support for Ms. Tandy's nomination as DEA Administrator.

Best personal wishes.

Sincerely,

John J. Coleman  
President

**KING & SPALDING LLP**

191 Peachtree Street  
Atlanta, Georgia 30303-1763  
www.kslaw.com

Griffin B. Bell  
Senior Partner  
Direct Dial: 404/572-4879  
Direct Fax: 404/572-5143  
gbell@kslaw.com

June 24, 2003

VIA FAX AND U.S. MAIL

Honorable Orrin G. Hatch  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Re: Christopher A. Wray

Dear Mr. Chairman:

Christopher Wray is currently before your Judiciary Committee as President Bush's nominee to be head of the Criminal Division at the Department of Justice to succeed Michael Chertoff, who has been nominated to the U.S. Court of Appeals for the Third Circuit.

Chris joined our firm in 1993 upon his graduation from Yale law school. He had a fine record at Yale and was Executive Editor of *The Yale Law Journal*. His undergraduate degree was also from Yale and he graduated *cum laude*. Chris grew up in the New York City area, but his wife happens to be from Atlanta. They now have two young children and are living in Washington.

Chris was with us for four years and then was appointed an Assistant United States Attorney in Atlanta so that he could get experience as a prosecutor. He was transferred to the Department of Justice at the beginning of the current Bush Administration and became -- and still is -- the principal Deputy to the Deputy Attorney General, who, as you know, is Larry Thompson, also of Atlanta.

When Chris was at our firm, we considered him to be a rising star, and his record since then has proven that our judgment was correct. Although some might question his youthfulness as a reflection of inexperience, I can vouch that Chris has a maturity in judgment well beyond his years. I feel certain that he will do a superb job for our country as the Assistant Attorney General for the Criminal Division, and my hope is that your Committee will approve Chris Wray's nomination for the position.

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Honorable Orrin G. Hatch  
June 24, 2003  
Page 2

With thanks and good wishes.

Yours sincerely,

  
Griffin B. Bell

GBB/bk  
Enclosure  
cc: Honorable Patrick Leahy  
(Ranking Minority Member)

**Senator Maria Cantwell  
Introduction of Lonny Suko,  
Nominee to the Federal District Court for the Eastern District of Washington**

Mr. Chairman, Senator Leahy:

It is a pleasure to be back before the Judiciary Committee today, particularly for the purpose of introducing an excellent nominee to the Federal District Court for Eastern Washington.

Lonny Suko is extremely well qualified to be a federal district judge. He has been a full time federal magistrate judge in Yakima, Washington since 1995. And before that he was a part time magistrate judge from 1971 until 1991. We welcome him here today with a combined 28 years of experience on the federal bench. It seems like it's about time we elevated him to the full status of District Court Judge!

As you have already heard from Senator Murray, Lonny Suko is also a product of the Washington State Judicial Selection Committee. The selection committee process was negotiated between the White House, Senator Murray, and myself. Six qualified members of the legal community in eastern Washington selected by our local Members of Congress and by Senator Murray and myself put in long hours interviewing and selecting three qualified candidates to send to the President. It was with pleasure that we learned that the White House agreed with my judgment and the judgment of Senator Murray that Lonny Suko was the most qualified candidate for this position.

Prior to his full-time work as a U.S. Magistrate Judge, Lonny Suko was also a partner in the firm of Lyon, Weigand & Suko, where his career in private practice involved extensive representation of plaintiffs and defendants in civil litigation as well as extensive mediation experience. Though he has lived in Yakima for the past

thirty years, Mr. Suko has connections throughout Eastern Washington. He is originally from Spokane, graduated Phi Beta Kappa from Washington State University in Pullman and started his legal career as a clerk to Judge Charles L. Powell, who was then the Chief Judge of the Eastern District of Washington in Spokane.

Mr. Chairman, as you continue to confront challenges in the nominations process, I ask you to keep in mind the excellent process we now have working in Washington state. The selection committee provides opportunity for real consultation with Senators and yields highly qualified consensus candidates, such as the nominee before us today.





Alfred P. Carlton, Jr.  
President

AMERICAN BAR ASSOCIATION

750 North Lake Shore Drive  
Chicago, Illinois 60611  
(312) 988-5109  
FAX: (312) 988-5100  
E-mail: abapresident@abanet.org

June 24, 2003

The Honorable John Edwards  
United States Senate  
225 Dirksen Senate Office Building  
Washington, DC 20510

Dear John:

I enclose the rating letter of the ABA Standing Committee on Federal Judiciary on Allyson K. Duncan, nominated by President Bush for a seat on the Fourth Circuit Court of Appeals. I thoroughly agree with the unanimous "well qualified" rating, the highest given by the Committee.

I have worked closely with her as a partner in the same law firm and have seen her performance as the President-Elect and now President of the North Carolina Bar Association and have every confidence she will be a superb federal judge.

I trust all goes well with you and look forward to crossing paths with you soon.

Sincerely

A. P. Carlton, Jr.



AMERICAN BAR ASSOCIATION

Standing Committee on Federal Judiciary  
740 Fifteenth Street, NW  
Washington, DC 20005-1022  
Telephone: (202) 662-1765  
Facsimile: (202) 662-1762

- CHAIR  
Carol E. Dinkins  
2300 First City Tower  
1001 Fannin Street  
Houston, TX 77002-6760
- FIRST CIRCUIT  
Stephen L. Tobet  
381 Middle Street  
Portsmouth, NH 03802-1377
- SECOND CIRCUIT  
George S. Frantz  
Suite 2200  
1133 Avenue of the Americas  
New York, NY 10036-6710
- THIRD CIRCUIT  
Charise R. Little  
1735 Market Street, 5th Floor  
Philadelphia, PA 19103-7599
- FOURTH CIRCUIT  
E. Osborne Avenue, Jr.  
201 North Tryon Street  
Charlotte, NC 28202-1247
- FIFTH CIRCUIT  
Judy Perry Hardnett  
1100 Poydras Square, 30th Floor  
New Orleans, LA 70163-3000
- SIXTH CIRCUIT  
David C. Weiner  
3300 BP Tower  
200 Public Square  
Cleveland, OH 44114-2301
- SEVENTH CIRCUIT  
Hugh E. Reynolds, Jr.  
201 N. Illinois Street  
Suite 1000  
Indianapolis, IN 46244-0961
- EIGHTH CIRCUIT  
Dorion D. Dodson  
911 Washington Avenue  
7th Floor  
St. Louis, MO 63101-1243
- NINTH CIRCUIT  
Jane H. Barrett  
1999 Avenue of the Stars  
4th Floor  
Los Angeles, CA 90067-6022
- TENTH CIRCUIT  
C. Timothy Hopkins  
428 Park Avenue  
Post Office Box 51219  
Kalo Palis, ID 83405-1219
- ELEVENTH CIRCUIT  
Judy H. Moore  
1800 Mid-America Tower  
20 N. Broadway Avenue  
Oklahoma City, OK 73101-6273
- D.C. CIRCUIT  
Harold T. Daniel, Jr.  
Suite 2000  
1201 West Peachtree Street NW  
Atlanta, GA 30309-3400
- FEDERAL CIRCUIT  
Pamela A. Brennan  
11th Floor  
1828 L Street, NW  
Washington, DC 20036-5109
- BOARD OF GOVERNORS  
LIAISON  
Shelia Stocum Hollis  
1647 K Street, NW  
Suite 700  
Washington, DC 20006-1606
- LIAISON  
Carolyn B. Lewis  
Suite 600  
601 Thirtieth Street, NW  
Washington, DC 20005-3877
- STAFF LIAISON  
Robert D. Evans  
Dorise A. Cardman  
740 Fifteenth Street, NW  
Washington, DC 20005-1022  
IRDS: 202-662-1765  
IRAF: 202-662-1761

Please respond to:  
**Carol E. Dinkins**  
**Vinson & Elkins L.L.P.**  
2300 First City Tower  
1001 Fannin Street  
Houston, Texas 77002-6760  
Direct: 713-758-2528  
E-mail: [cdinkins@velaw.com](mailto:cdinkins@velaw.com)

June 16, 2003

**BY FACSIMILE AND MAIL**

The Honorable Orrin G. Hatch  
Chairman  
Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Re: **Allyson Kay Duncan**  
**United States Court of Appeals, Fourth Circuit**

Dear Senator Hatch:

By this letter we transmit for your consideration this Committee's evaluation pertaining to the nomination of Allyson Kay Duncan as Judge of the United States Court of Appeals for the Fourth Circuit.

It is a pleasure to report that, as a result of our investigation, the Committee is of the unanimous opinion that Allyson Kay Duncan is Well Qualified for appointment as Judge of the United States Court of Appeals for the Fourth Circuit.

A copy of this letter has been sent to Ms. Duncan for her information.

Yours very truly,

*Carol E. Dinkins*  
Carol E. Dinkins  
Chair

CED/caj  
1237821\_1.DOC/965759\_1.DOC  
cc: Allyson Kay Duncan, Esq.  
Honorable Alberto R. Gonzales  
Daniel J. Bryant, Esq.  
ABA Standing Committee on Federal Judiciary  
Robert D. Evans, Esq.

08/18/03 10:09 FAX

004/010



## Community Anti-Drug Coalitions of America

901 NORTH PITT STREET, SUITE 300 • ALEXANDRIA, VIRGINIA 22314  
 (703) 706-0560, FAX (703) 706-0565  
 www.CADCA.org

June 17, 2003

The Honorable Orrin G. Hatch  
 United States Senate  
 Senate Judiciary Committee  
 224 Dirksen Senate Office Building  
 Washington, DC 20510

Dear Mr. Chairman:

On behalf of Community Anti-Drug Coalitions of America (CADCA) and our more than 5,000 coalition members, we would like to express our strong support for Ms. Keren Tandy's speedy confirmation as the Administrator of the Drug Enforcement Administration (DEA). Throughout Ms. Tandy's decades of public service, she has demonstrated the highest degree of dedication and passion for combating our country's illegal drug problems.

The DEA is the lead national organization coordinating law enforcement efforts around the nation to control illegal substances. Ms. Tandy understands the full range of drug control issues and would bring a wealth of invaluable senior level executive, policy development and leadership experience to the job of Administrator of the DEA. Ms. Tandy has always impressed us not only for her hard work and dedication, but also for her incredible ability to forge relationships across the supply and demand split of our field. Ms. Tandy is universally respected as a professional and also a person with great wisdom and integrity. She truly exemplifies the finest qualities of a public servant – outstanding leadership and managerial skills, the ability to listen to differing points of view and most importantly she understands the human aspect of the substance abuse problem in our country.

CADCA looks forward to working alongside the DEA and Ms. Tandy to build safe, healthy and drug-free communities throughout America. Therefore, we respectfully urge you, Mr. Chairman to support Ms. Tandy's nomination and hold a confirmation hearing as soon as possible.

Sincerely,

Arthur T. Dean  
 Major General, U.S. Army, Retired  
 Chairman and CEO

Sue R. Thau  
 Public Policy Consultant

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CADCA: Building Drug-Free Communities

**TESTIMONY OF U.S. SENATOR JOHN CORNYN**

**BEFORE THE UNITED STATES SENATE  
COMMITTEE ON THE JUDICIARY**

**Nomination of Earl Leroy Yeakel to be  
U.S. District Judge for the Western District of Texas**

Wednesday, June 25, 2003, 2 p.m.  
Dirksen Senate Office Building Room 215

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Thank you for calling this hearing, Mr. Chairman, and for providing me with the opportunity to testify on behalf of a great judge and a great Texan. It is my great pleasure this afternoon to introduce Justice Earl "Lee" Yeakel, nominated to be United States District Judge for the Western District of Texas.

Justice Yeakel is an outstanding nominee with a fine legal mind and fair judicial disposition. He enjoys the respect of jurists and lawyers from across the state of Texas. The *Austin American-Statesman* has opined that "[h]e would be an excellent choice by training, background and temperament," and I couldn't agree more with those sentiments. I am firmly of the belief that, if confirmed, Justice Yeakel would be a welcome addition to the Western District of Texas.

For the past five years, Justice Yeakel has served on the Third District Court of Appeals in Austin, Texas. That court hears both civil and criminal appeals from twenty-four counties in central Texas.

Before his appointment to that court, Justice Yeakel engaged in the private practice of law for twenty-nine years, aside from a two and a half year engagement as a 2nd Lieutenant in the United States Marine Corps.

He graduated from the University of Texas Law School in 1969. In 2001, he earned a Master of Laws degree in Judicial Process from the University of Virginia School of Law. That is a fantastic educational program for judges, one that is especially close to my heart, because I too attended and graduated from that program.

In addition to his legal excellence, Justice Yeakel is a civic leader who is active in his community. He is a member of the Episcopal Church of the Good Shepherd in Austin, the Board of Advisers of the Longhorn Foundation, Leadership Austin, and the President of the Rotary Club of Austin. He sits on the boards of directors of the West Austin Little League, the West Austin Youth Association, and the Committee for Wild Basin Wilderness.

Justice Yeakel is a fair-minded judge who is committed to the principle that judges interpret and not make law. I strongly support his nomination and I hope that the committee will give him every consideration.

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06/23/03 10:05 FAX

SENT BY: LGI;

7037806870;

JUN-20-03 3:20PM;

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PAGE 2/2



TEACHING KIDS TO RESIST DRUGS & VIOLENCE

P.O. Box 512090 Los Angeles, California 90051-0090 (800) 223-DARE

June 20, 2003

The Honorable Orrin Hatch  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

The Honorable Patrick Leahy  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Chairman Hatch & Ranking Member Leahy,

I understand that Karen Tandy has been nominated to serve as the Administrator of the Drug Enforcement Administration. As the Senate considers Ms Tandy's nomination, I would ask that you take note of the important role that she has played in supporting drug control activities, including drug prevention efforts, over the last twenty five years. With this in mind, on behalf of D.A.R.E. America and the thousands of DARE officers throughout the United States, I would like to wholeheartedly support Karen Tandy's nomination.

Originally an Assistant U.S. Attorney in the Eastern District of Virginia and the Western District of Washington, where she served among other things as the Chief of the Narcotics Section, Karen Tandy has been at the forefront of the drug control issue for decades. In her work with the Department of Justice as Deputy Chief for Special Operations, and most recently as the Director of OCDETF, Karen has always made an effort to work closely with State and local law enforcement including drug prevention and education efforts like D.A.R.E. This dedication to a balanced approach on drug abuse is a perspective that will serve her well at the DEA.

Karen Tandy's dedication and knowledge have given her the support of law enforcement across the nation. Likewise, her honesty and integrity have earned her the respect and trust of the criminal justice community. Taken together, I cannot imagine an individual better suited for the challenges of Administrator. Therefore, as the head of D.A.R.E. America and on behalf of the officers, students and communities we serve, I would hope that you will give Karen Tandy your full consideration for DEA Administrator.

Sincerely,  
  
Glenn Levant  
President & Founding Director

cc: Sen. Graham  
Sen. Biden

**DRUG ABUSE RESISTANCE EDUCATION**



U.S. Department of Justice

United States Attorney  
Northern District of Georgia

Suite 600 Richard Russell Building Telephone (404)581-6000  
75 Spring Street, S.W. Fax (404)581-6181  
Atlanta, Georgia 30303

VIA TELEFAX &  
FIRST CLASS MAIL

June 19, 2003

The Honorable Saxby Chambliss  
United States Senator  
416 Russell Senate Office Building  
Washington, DC 20510

Dear Senator Chambliss:

Since assuming my duties as United States Attorney in November 2001, I have served as the Core City Attorney for the Southeast Region Organized Crime Drug Enforcement Task Forces (OCDETF). In that position, I have worked closely with Karen Tandy, the President's nominee to serve as the Administrator of the Drug Enforcement Administration.

I understand Karen will appear before the Senate Judiciary Committee next week. As you consider her nomination, I wanted to give you my perspective on the role Karen has played in developing the current drug enforcement strategy in our country. She is a skilled strategic thinker and visionary leader who is uniquely qualified to head the DEA.

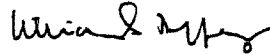
In any given month I talk to, or meet with, Karen on OCDETF matters on a variety of occasions. As a result, I have watched her set a new course for federal drug law enforcement. She was faced with a formidable challenge as she tried to redirect us from a policy that encouraged a large number of prosecutions to one which strategically targets major drug organizations. The task before her was to change the direction and culture of an embedded program. Aware that federal law enforcement is uniquely capable of conducting international and national investigations and prosecutions, Karen has been steadfast in her belief the federal enforcement focus in the drug area must be on disrupting and dismantling major drug organizations. With great resolve, she has guided the country's drug enforcement policy in this new direction. She has done so by strong advocacy and by developing realistic and concrete program guidelines all calculated to achieve the objectives of the new OCDETF. She also put into place

accountability systems that require us in the field to stay focused on this mission and to be held responsible for achieving the objectives we have set. At each step she asked for our input and when someone had a better idea she incorporated it. Through this process she created a partnership, not a headquarters devised and mandated program. The challenge to change thinking and cultures in the enforcement community was, and still is, significant. But in the short interval of two years, Karen has headed us in a new direction which already has enhanced the complexity, efficiency and results in federal drug investigations.

Karen has been able to do this because she is the most effective leader with whom I have worked in a federal program. I think that largely results from her passion to serve the public by reducing the importation of drugs into our country. But she also has a rare set of leadership skills. Having charted this new enforcement course, I have watched her with unwavering determination to build support for this program in the law enforcement community. The result is consensus on the direction she has set.

The President has nominated the best person in the country to lead the DEA. As you consider her nomination, if I may provide any further information about her leadership of OCDETF or her abilities as a leader please let me know.

Sincerely,



WILLIAM S. DUFFEY, JR.  
UNITED STATES ATTORNEY

REMARKS BY  
SENATOR JOHN EDWARDS  
REGARDING NOMINATION OF  
ALLYSON DUNCAN TO  
THE UNITED STATES COURT OF APPEALS  
AND  
LOUISE WOOD FLANAGAN TO THE  
U.S. DISTRICT COURT FOR  
THE EASTERN DISTRICT OF NORTH CAROLINA  
FOR THE FOURTH CIRCUIT  
JUNE 25, 2003

Mr. Chairman. Under ordinary circumstances, a hearing like this would not draw a lot of attention. We have a consensus nominee . . . she enjoys the support of both Senators from her state . . . and her nomination is supported by leaders in both political parties. Under ordinary circumstances, this hearing would hardly be noticed.

But Mr. Chairman, this is no ordinary event for the people of North Carolina. In fact, it is an important and historic milestone for our state – and even a cause for celebration.

The last time a North Carolina Judge joined the 4<sup>th</sup> Circuit Court of Appeals was 23 years ago, when Sam Ervin III was confirmed. North Carolina is the only State in the Union with no judges on a federal appellate court. And we have the longest-standing vacancy in the federal appeals court system.

In fact, in the entire 112-year history of the 4<sup>th</sup> Circuit, North Carolina has had only six judges. Compare that with our neighbor, Virginia, which has five current judges on the court.

So you see Mr. Chairman, this hearing is a special occasion for us. And I am very proud to be able to introduce Allyson Duncan -- a nominee who will restore the voice of North Carolina to an important federal court -- and break a logjam which has damaged our state for too many years.

This historic development is the result of a new approach which I hope will be a model for the future. In this case, President Bush reached out to Senator Dole and me before he made his decision – he consulted with us – he sought our advice. And in making his decision, the President selected a nominee who represents the mainstream of our state.

I commend the President for consulting with us and for making an excellent nomination. If he takes this approach to future judicial nominations – including nominations to the Supreme Court – we have a real opportunity to find common ground in the search for excellence on the federal bench.



I also want to commend my colleague from North Carolina. From her very first days in office, Sen. Dole and I have pledged that we would work together on behalf of the people of North Carolina. This hearing is a demonstration of that commitment, and I commend her as well.

Mr. Chairman, it is a great pleasure to welcome Allyson Duncan and to introduce her to the Judiciary Committee.

Allyson Duncan was born in Durham, North Carolina. Her father was superintendent of buildings and grounds for NC Central University. Her mother was a law librarian and instructor. She went to Hampton University, graduating first in her class in 1972. She went on to Duke University Law School in 1975, where she was an Earl Warren Scholar. She then clerked for Judge Julia Cooper Mack of the D.C. Court of Appeals.

Following her clerkship, Judge Duncan worked for the Equal Employment Opportunity Commission from 1978 to 1986. After leaving the EEOC, she served as a professor of law at North Carolina Central University from 1986 to 1990. She co-authored a textbook on North Carolina appellate practice and wrote numerous articles on employment discrimination and constitutional law. In 1990, Governor Jim Martin appointed Judge Duncan to serve the remainder of an unexpired term on the North Carolina Court of Appeals. She was the first African American woman to serve on that court.

Although she was on the court only a short time – one year – she left an impressive record. Her decisions reflect a close attention to issues of procedural fairness. In multiple instances, she dissented from a majority opinion when she felt the other judges paid insufficient attention to procedural problems. In fact, the North Carolina Supreme Court not once, but twice reversed a Court of Appeals panel on the basis of the analysis in her dissenting opinion.

Following the election the following year – which didn't go quite the way she wanted – Judge Duncan was appointed to the North Carolina Utilities Commission. As a commissioner, she testified before Congress, wrote articles for legal publications, and spoke throughout North Carolina and across the country on electricity matters. In 1998, she left the Commission to become a partner at the Kilpatrick Stockton law firm.

That's Allyson Duncan on paper. But as impressive as her resume is, even more telling is her stellar reputation throughout the North Carolina legal community. I have heard from folks all over the state who can't say enough about Allyson Duncan. The respect she has earned from her colleagues is evident in her recent election as president of the North Carolina Bar Association, the first African American and only the third woman to hold this position. She was sworn in just last weekend, the oath administered by Judge Roger Gregory.

What people keep telling me is that this is a woman of extraordinary intellect and skill, who loves the law, strives for justice and never allows politics to interfere with her commitment to fairness and equality.

Judge Duncan's friends and colleagues across a broad political spectrum attest to her excellence. For example, I received a letter from Dr. Evelyn Brooks Higginbotham, a distinguished scholar and Professor of History and African American Studies at Harvard University and widow of Leon Higginbotham, the esteemed former Chief Judge of the Third Circuit. Dr. Higginbotham wrote,

"I speak with full confidence of her integrity and ability. She is a person of principle and compassion. I have never known anyone more committed to high personal standards. She believes in and exhibits thoroughness, unselfishness, sharp intellect, vision, and kindness to others. She is wide-ranging in and passionate about her interests – from the law to Duke basketball to dogs. My late husband Judge A. Leon Higginbotham, Jr., a staunch Democrat, had the greatest respect and affection for Allyson, a staunch Republican. It is a testimony to both of them that they got along so well. He tremendously admired her mind and her tenacity, often praising her legal skills and overall intellectual abilities."

Anyone who knew Judge Higginbotham knows that that is high praise indeed.

I am so proud to welcome Allyson Duncan and her lovely family here today. She makes us all proud.

Mr. Chairman, when the Senate confirms Allyson Duncan – which I hope will happen soon – her confirmation will mark a number of "firsts." She will be the first North Carolinian to join the 4<sup>th</sup> Circuit in over 20 years; she will be the first African American woman to serve on that distinguished court. And most important, I hope she will be the first in a series of bipartisan, consensus judicial nominations from our State.

\*\*\*\*

Mr. Chairman, I also would like point out that we have another distinguished North Carolinian before the Committee today. Louise Wood Flanagan is the nominee for the U.S. District Court for the Eastern District of North Carolina. Like Allyson Duncan, Judge Flanagan brings a record of excellence and achievement and I am happy to support her nomination.

Judge Wood is currently a U.S. Magistrate Judge in the Eastern District of North Carolina. A native of Richmond, Virginia, she's a Phi Beta Kappa graduate of Wake Forest University, where she earned a bachelor of arts degree, magna cum laude, in 1984. After earning her law degree at the University of Virginia School of Law, she clerked for the Honorable Malcolm J. Howard, United States District Judge for the Eastern District of North Carolina. After practicing in Washington, DC with the firm of Sonnenschien, Nath and Rosenthal, she returned to North Carolina and joined Ward and Smith, becoming a partner in 1994.

In 1995, Judge Flanagan was selected as a U.S. Magistrate Judge. In North Carolina, that's more than a notion. Magistrate judges are selected by the District Judges upon the recommendation of a merit selection panel composed primarily of attorneys practicing in the district. Her selection is further demonstration of her outstanding reputation in the North Carolina legal community.

Since becoming a Magistrate, Judge Flanagan has performed with excellence and commitment and is a real credit to the North Carolina Bar and the legal profession in general.

Judge Flanagan's family, her husband Michael Flanagan and her daughter Kate, are here today. I'd like to ask them to stand and be recognized. Missing from this family portrait is Judge Flanagan's 5-year-old little girl, Anna Louise, whom her parents, for their own peace of mind, decided not bring to this proceeding. As the father of a 5-year-old daughter, I fully understand. But Anna Louise is here in spirit.

Judge Flanagan, we look forward to hearing from you today, Judge Flanagan. I believe you'll be a fine judge for the Eastern District of North Carolina.

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P. 02/03

002



CHUCK CANTERBURY  
NATIONAL PRESIDENT

**GRAND LODGE  
FRATERNAL ORDER OF POLICE®**

309 Massachusetts Ave., N. E.  
Washington, DC 20002  
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JAMES O. PASCO, JR.  
EXECUTIVE DIRECTOR

24 June 2003

The Honorable Orrin G. Hatch  
Chairman, Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Mr. Chairman,

I am writing to advise you of the strong support of the Fraternal Order of Police for the nomination of Christopher A. Wray to be the next Assistant Attorney General for the Criminal Division at the U.S. Department of Justice.

Currently, Mr. Wray is the Principal Associate Deputy Attorney General at the Department, with his primary focus being on the issues and operations of the Federal Bureau of Investigation (FBI), the Criminal Division and the U.S. Attorneys' Offices. He is also responsible for counter-terrorism coordination and is the Department's representative on Project Safe Neighborhoods, the Administration's gun violation reduction initiative that the F.O.P. is proud to support.

Mr. Wray began his public service career in 1997 as an Assistant U.S. Attorney in Atlanta, Georgia. He successfully prosecuted numerous Federal cases and earned the respect and admiration of the Georgia law enforcement community by virtue of his dedication and skill as a prosecutor.

It is our understanding that there are those who are concerned that Mr. Wray is too young to fill this important post. The F.O.P. disagrees, noting that some of the Senate's best legislators began their careers at an even younger age. Age is not the issue—ability, knowledge and experience are the factors to be considered. On all these points, Christopher Wray has demonstrated that has the potential to be an outstanding Assistant Attorney General for the Criminal Division, and we urge the Judiciary Committee to expeditiously approve his nomination.

If I can provide any further recommendations for Mr. Wray, please do not hesitate to contact me or Executive Director Jim Pasco in my Washington office.

Sincerely,

  
Chuck Canterbury  
National President

08/18/03 10:09 FAX

002/010

STEVE YOUNG  
PRESIDENT

**GRAND LODGE  
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800 Massachusetts Ave., N.E.  
Washington, DC 20002  
Phone 202-647-8192 • Fax 202-547-8192

JAMES D. PASCO, JR.  
EXECUTIVE DIRECTOR

23 December 2002

Mr. Clay Johnson  
Office of Presidential Personnel  
The White House  
1500 Pennsylvania Avenue, NW  
Washington, DC 20502

Dear Mr. Johnson:

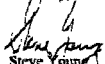
I am writing on behalf of the membership of the Fraternal Order of Police to strongly recommend the nomination of Karen F. Tandy for the position of Administrator of the Drug Enforcement Administration (DEA).

Ms. Tandy currently serves as Associate Deputy Attorney General and Director of the Organized Crime Drug Enforcement Task Forces (OCDETF), and is responsible for oversight of the DEA and the National Drug Intelligence Center. In her capacity as Director of OCDETF, Ms. Tandy is responsible for managing a program comprised of more than 2,200 Federal agents, 500 Federal prosecutors, and various State and local law enforcement task forces across the country.

Ms. Tandy will also bring a wealth of experience in fighting crime and drugs to the position of DEA Administrator. She has served in a variety of positions within the Criminal Division of the Department of Justice, including Chief of the Litigation Unit in the Asset Forfeiture Office, Deputy Chief of the Narcotic and Dangerous Drug Section, and as Deputy Chief at the Special Operations Division. She is also familiar with the prosecution side of the law enforcement mission, serving as Assistant United States Attorney in the Eastern District of Virginia and the Western District of Washington, and responsible for handling complex drug, money laundering, and forfeiture cases.

On behalf of the more than 300,000 members of the Fraternal Order of Police, I again offer our strong support for the nomination of Karen Tandy to this important position. Please do not hesitate to contact me, or Executive Director Jim Pasco, through our Washington office if we may be of any further assistance.

Sincerely,

  
Steve Young  
National President

08/18/03 10:10 FAX

006/010

December 16, 2002

The Honorable George W. Bush  
President of the United States  
1600 Pennsylvania Ave., NW  
Washington, DC 20500

Dear President Bush:

It is my pleasure to endorse Karen P. Tandy, Esq. as Administrator of the Drug Enforcement Administration (DEA). I have known Ms. Tandy for many years, and have every confidence in her ability not just to succeed, but also to thrive in this important post.

Ms. Tandy's experience and education make her an excellent candidate to lead the DEA. As Associate Deputy Attorney General, she already oversees the Drug Enforcement Administration and the National Drug Intelligence Center. She has vast experience in developing national drug enforcement policies and strategies, and has worked extensively with Congress and the Office of Management and Budget on a variety of issues.

A graduate of Texas Tech University and Texas Tech Law School, Ms. Tandy's exemplary work has earned her a number of awards and commendations, such as the Attorney General's Award for Distinguished Service and the Department of Justice Award for Extraordinary Achievement.

I can think of no better person to serve as Administrator of the DEA at the beginning of the 21<sup>st</sup> century and to carry out the agency's mission to "enforce the controlled substances laws and regulations of the United States" than Karen P. Tandy. That is what she already has done throughout her distinguished career, and that is what she would continue to do at the DEA.

Thank you for your attention to this matter. If you have any questions, or would like to speak to me further about Ms. Tandy's qualifications, please feel free to call me at 202-289-4805.

Sincerely,

Michael G. Griffin  
Executive Director, *County Executives of America*



News Release  
**JUDICIARY COMMITTEE**

*United States Senate • Senator Orrin Hatch, Chairman*

June 25, 2003

Contact: Margarita Tapia, 202/224-5225

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

**KAREN P. TANDY**  
**FOR ADMINISTRATOR OF THE DRUG ENFORCEMENT ADMINISTRATION**  
And  
**CHRISTOPHER WRAY**  
**FOR ASSISTANT ATTORNEY GENERAL OF THE CRIMINAL DIVISION**

I would now like to turn to our final panel today to consider the nominations of Karen Tandy for Administrator of the Drug Enforcement Administration, and Christopher Wray for Assistant Attorney General for the Criminal Division. Good afternoon and welcome to both of you.

I want to congratulate both of you for being chosen by President Bush. It is a true pleasure to have before the Committee two nominees who have so much experience in the areas for which they are being nominated. Your impressive backgrounds and past government service make me confident that you will be great assets to the DEA and the Department of Justice, this Committee and the American people.

With the recent confirmation of the former head of the Criminal Division, Michael Chertoff, to the Third Circuit Court of Appeals, it is important for the Committee to review Mr. Wray's nomination and act quickly to ensure that the Justice Department's important work on criminal matters, including terrorism, cyber-crime, drug trafficking, violent crime, and other critical issues, continues with as little disruption as possible. The stakes in this area are simply too high to leave this essential position unfilled for any significant length of time.

Equally important to me is the fact that the leadership post at the DEA and several senior positions below the Administrator are currently vacant. For that reason, and given the importance of maintaining our nation's drug enforcement efforts, I am hopeful we can review and act quickly on Ms. Tandy's nomination.

Of course, I am not suggesting that we shirk our duties to review carefully these nominations, but I am asking Members to be mindful of the circumstances in which we are acting and to work together to move these important nominations as quickly as possible.

Now, I want to make a few remarks on each of the nominees. First, let me turn to Karen Tandy. It goes without saying that the Administrator of the DEA plays a critical role in protecting our communities from the dangers of drugs. I would also note that, once confirmed, she will be the first woman to serve as Administrator of the DEA.

Ms. Tandy has gained substantial experience in this area during her impressive 25-year career with the Department of Justice. From 1979 to 1990, she was an Assistant U.S. Attorney in the Eastern District of Virginia and Western District of Washington. From 1990 until today, Ms. Tandy has served in the Justice Department's Asset Forfeiture Section and Narcotics and Dangerous Drugs Section, culminating in her most recent position as Associate Deputy Attorney General and Director of the Organized Crime and Drug Enforcement Task Forces. In that position, she has reinvigorated and refocused the OCEDTF program to target the most significant drug traffickers who threaten our communities.

Since Ms. Tandy took over as Director at OCEDTF, multi-jurisdiction investigations have increased from 9 percent to 84 percent, the number of drug-related financial investigations increased from 16 to 59 percent and the deposits to the Justice Department's Asset Forfeiture Fund have increased by approximately \$30 million in just two years. With such an impressive career in public service, I am confident that Ms. Tandy is someone who can lead the DEA in its important mission.

Christopher Wray is another well-qualified candidate and is nominated to lead the Justice Department's Criminal Division. After graduating from the Yale Law School, he was a law clerk for Judge J. Michael Luttig on the Fourth Circuit Court of Appeals. In 1993, Mr. Wray joined the law firm of King & Spalding, and left in 1997 to become an Assistant U.S. Attorney in Atlanta, Georgia. As a federal prosecutor from 1997 to 2001, he handled a number of significant cases involving public corruption, church arsons, RICO, narcotics trafficking and other important federal prosecutions.

In 2001, Mr. Wray became Associate Deputy Attorney General for the U.S. Department of Justice, and shortly thereafter was promoted to his current position as Principal Associate Deputy Attorney General. In that position, he has distinguished himself through his leadership role in the Deputy Attorney General's Office by overseeing the Criminal Division, the 94 U.S. Attorney's Offices operating across our Nation, and the FBI. He has devoted significant attention to counter-terrorism coordination, the President's Corporate Fraud Task Force and Project Safe Neighborhoods, the Administration's gun violence reduction initiative.

Let me take a moment to highlight three important letters the Committee has received in support of Mr. Wray's nomination.

First, in a letter dated June 24, 2003, Griffin Bell, former Attorney General and partner at King & Spalding states, "When Chris [Wray] was at our firm, we considered him to be a rising star, and his record since then has proven that our judgment was correct. Although some might question his youthfulness as a reflection of inexperience, I can vouch that Chris has a maturity in judgment well beyond his years. I feel certain that he will do a superb job for our country as the Assistant Attorney General for the Criminal Division."



Second, in a letter dated June 23, 2003, Kent Alexander, a former U.S. Attorney for the Northern District of Georgia in Atlanta under the Clinton Administration, states that he “enthusiastically” supports Mr. Wray’s nomination, citing Mr. Wray’s “legal acumen, sound judgment and effectiveness.” Mr. Alexander explains that Mr. Wray’s judgment was “always sound and balanced.”

Third, in a letter dated June 23, 2003, Mary Jo White, former United States Attorney for the Southern District of New York from June 1993 to January 2002, states that she “had the privilege of working personally with Mr. Wray, in his capacity as Principal Associate Deputy Attorney General, on a variety of issues, including on counterterrorism matters involving Al Qaeda and Osama bin Laden. In my view, Christopher Wray would be an outstanding Assistant Attorney General who would bring intelligence, experience, and exceptional judgment to this important position at a particularly critical time for our nation and the criminal justice system.”

I agree wholeheartedly with Mr. Bell, Ms. White and Mr. Alexander’s assessment: Mr. Wray is to be commended for his experience, his successes and his efforts in protecting our country from deadly terrorist attacks, bringing to justice corporate scammers who have ripped off the American public, and for promoting aggressive enforcement of federal gun laws to reduce gun violence in our communities. Mr. Wray’s experience shows that he has the qualifications, and the ability to lead the Criminal Division in the Justice Department.

I am hopeful that the Committee will favorably act on these two well-qualified nominees and that the Senate will confirm them quickly.

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News Release  
**JUDICIARY COMMITTEE**

*United States Senate • Senator Orrin Hatch, Chairman*

June 25, 2003

Contact: Margarita Tapia, 202/224-5225

**Statement of Chairman Orrin G. Hatch  
Before the United States Senate Committee on the Judiciary  
Hearing on the nominations of**

**Allyson K. Duncan to be U.S. Circuit Judge for the Fourth Circuit,  
Robert C. Brack to be U.S. District Judge for the District of New Mexico,  
Samuel Der-Yeghiayan to be U.S. District Judge for the Northern District of Illinois,  
Louise W. Flanagan to be U.S. District Judge for the Eastern District of North Carolina,  
Lonny R. Suko to be U.S. District Judge for the Eastern District of Washington, and  
Earl Leroy Yeakel III to be U.S. District Judge for the Western District of Texas**

Today the Committee is considering six very well qualified nominees for the federal bench. These nominees enjoy bi-partisan support, and I am pleased to have them before the Committee this afternoon for a hearing.

Before we turn to the panel of Senators patiently waiting here to introduce our nominees, I would like to say a bit about each nominee.

Our circuit nominee, **Allyson Duncan**, is a true pioneer. She was the first African-American woman appointed to the North Carolina Court of Appeals, *and* the first African-American woman to serve on the North Carolina Utilities Commission. Upon her confirmation by the Senate, she will achieve yet another first, this time as the first African-American woman to serve on the Fourth Circuit. Both Senator Dole and Senator Edwards are here to express their strong endorsement of Judge Duncan, and I join them in urging our colleagues to support her historic nomination.

Judge Duncan graduated first in her class at Hampton University, and then attended Duke University Law School. There she earned the distinction of appointment as an Earl Warren Legal Scholar, which includes a scholarship awarded to African-American law students demonstrating leadership and an interest in public service. Judge Duncan has undoubtedly lived up to the promise she showed as a law student when she was awarded this scholarship.

After law school, she clerked for Judge Julia Cooper Mack on the District of Columbia Court of Appeals, and then joined the Equal Employment Opportunity Commission in 1978. Judge Duncan held several positions at the EEOC, starting as an appellate attorney, serving as the assistant to the Chairman, and ultimately becoming acting legal counsel.

Judge Duncan left the EEOC in 1986 for a teaching post at North Carolina Central University School of Law, where she taught property, employment discrimination, labor law, and appellate advocacy. In recognition of her outstanding skills, she was named Teacher of the Year in 1989.

Judge Duncan left her teaching post in 1990 when she was appointed to the North Carolina Court of Appeals as an associate judge. She served in that capacity for one year, leaving the bench when she was appointed to the North Carolina Utilities Commission, where she was responsible for telecommunications, natural gas, and water regulations. She served as a commissioner until 1998, when she entered private practice with the law firm of Kilpatrick Stockton. She is currently a partner at this prestigious law firm specializing in energy law.

I have no doubt that the Fourth Circuit will benefit greatly from Judge Duncan's ascension to the federal appellate bench, and I look forward to her swift confirmation.

We have five district nominees on our agenda, all of whom are presently serving as state or federal judges.

Our first district court nominee, **Robert Brack**, has been nominated for the District of New Mexico. After graduating from New Mexico School of Law, Judge Brack began working as a trial attorney in the private sector, first as a staff attorney at the law firm of Teddy L. Hartley and later as a sole practitioner. His practice consisted primarily of general civil litigation in which he represented local individuals and businesses. As an attorney, Judge Brack was routinely appointed to represent indigent respondents in abuse and neglect cases. He also regularly provided legal assistance pro bono to his church, local charities, and other disadvantaged clients. In 1997, he was appointed to the New Mexico Ninth Judicial District Court. In 1998, he was elected to the same court to fill the chief judgeship. Judge Brack comes to us with strong support from the New Mexico legal community and we are happy to have him before us today.

Our nominee for the Northern District of Illinois, **Samuel Der-Yeghiayan**, is another remarkable candidate. Judge Der-Yeghiayan has contributed much to the legal community over his 25 year career, especially in the area of immigration law. Upon graduation from Franklin Pierce Law Center, Judge Der-Yeghiayan joined the U.S. Department of Justice as a trial attorney with the Immigration and Naturalization Service. He was then promoted to District Counsel for the INS in Chicago. In 2000, he became an immigration judge with the Department of Justice Executive Office for Immigration Review. Judge Der-Yeghiayan has devoted a substantial amount of time to pro bono work by educating congressional staff, state attorneys, bar associations, and law enforcement agents on immigration issues. As a judge, he also provides training to pro bono immigration attorneys.

Judge **Louise Wood Flanagan** is our nominee for the Eastern District of North Carolina. After earning her law degree from the University of Virginia School of Law in 1988, she served as law clerk for Judge Malcolm Howard on the very court to which she has been nominated. In 1990, she joined the North Carolina law firm of Ward and Smith, where she handled complex commercial litigation. She estimates that she has litigated approximately 300 cases in state,

federal, and bankruptcy court. Since 1995, Judge Flanagan has served as a federal magistrate judge.

**Lonny Suko**, our nominee for the Eastern District of Washington, has been part of the Washington state legal community for over three decades. After graduating from law school in 1968, Judge Suko clerked for Eastern District Judge Charles Powell. In 1969, he joined the Lyon Law Offices, where he litigated civil matters. In 1971, he was appointed as a part-time federal magistrate judge, a position he held while practicing law full-time until 1991. In 1995, Judge Suko ascended to the bench once again when he was appointed as a full-time federal magistrate judge. He thus brings to the federal bench approximately 28 years of judicial experience. Despite his demanding professional career, Judge Suko has served on the boards of the Washington Education Foundation, the Washington State University Foundation, and the Advisory Board to the College of Liberal Arts at Washington State University

Our final nominee, **Earl Yeakel III**, has been nominated for the Western District of Texas and has extensive litigation experience. Long before ascending to the Texas Court of Appeals bench, he worked for the Austin law firm of Mitchell, Gilbert & McLean while attending the University of Texas School of Law. Upon graduation, he remained at the firm as an associate counsel, participating in a broad range of litigation-related work. Five years later, Justice Yeakel started his own firm, where he remained until his departure in 1982. In the sixteen years that followed, he served as either an associate or partner in three prominent Austin law firms, litigating both civil and criminal matters at the trial and appellate levels in state and federal courts. In 1998, Judge Yeakel joined the Texas Court of Appeals, where he currently serves with distinction.

I am pleased to welcome these nominees to the Committee today, and I commend the President on selecting them to serve on our federal courts. I look forward to hearing their testimony.

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DEPARTMENT OF AFRO-AMERICAN STUDIES

Barker Center • 12 Quincy Street • Cambridge, Massachusetts 02138-3879

Tel. 617.495.4113 Fax. 617.496.2871

June 23, 2003

Senator John Edwards  
225 Dirksen  
Washington, DC 20410

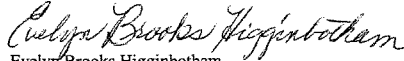
Dear Senator Edwards:

I am pleased to give my wholehearted endorsement of Allyson Duncan's nomination to the United States Court of Appeals for the Fourth Circuit. I have known Allyson Duncan for many decades. In the mid-1970s we both lived in Rochester, New York—Allyson in her first job after law school and I in a Ph.D program in History at the University of Rochester. In the late 1970s and early 1980s job opportunities brought each of us to Washington, D.C., which was home for me and a second home for Allyson since Washington is the home of Allyson's mother's sister. Allyson's aunt was both my high school history teacher and my mother's good friend. I give this personal detail to emphasize our friendship and family ties over the years. I have followed Allyson's career and am knowledgeable of her accomplishments as a law student, law clerk, teacher, lawyer in a variety of capacities, utility commissioner, and most recently president of the North Carolina Bar.

I speak with full confidence of her integrity and ability. She is a person of principle and compassion. I have never known anyone more committed to high personal standards. She believes in and exhibits thoroughness, unselfishness, sharp intellect, vision, and kindness to others. She is wide-ranging in and passionate about her interests—from the law to Duke basketball to dogs. My late husband Judge A. Leon Higginbotham, Jr., a staunch Democrat, had the greatest respect and affection for Allyson, a staunch Republican. It is a testimony to both of them that they got along so well. He tremendously admired her mind and her tenacity, often praising her legal skills and overall intellectual abilities.

It is a great joy for me to know of Allyson's hearing before the Judiciary Committee, and I do not doubt that the Committee's good judgment will result in her appointment.

Sincerely,

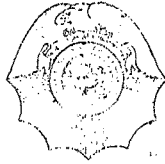


Evelyn Brooks Higginbotham  
Professor of History and African American Studies

APR-03-2003 THU 03:02 PM

FAX NO.

P. 02



**INTERNATIONAL UNION  
OF POLICE ASSOCIATIONS  
AFL-CIO**

*THE ONLY UNION FOR LAW ENFORCEMENT OFFICERS*

SAM A. CABRAL  
*International President*  
DENNIS J. SLOCUMB  
*International Executive Vice President*  
*Legislative Liaison*  
RICHARD A. ESTES  
*International Secretary-Treasurer*

•••••

April 1, 2003

Senator Orrin Hatch  
Chairman Judiciary Committee  
104 Hard Senate Office Building  
Washington, D.C. 20510

Re: Nomination of Ms. Karen P. Tandy

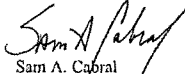
Dear Senator Hatch:

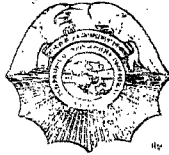
On behalf of the International Union of Police Associations, AFL-CIO (IUPA) I am proud to add our name to those who are supporting the nomination of Karen Tandy to be the Administrator of Drug Enforcement, Department of Justice.

Ms. Tandy's unique and extensive experience in both the prosecution and investigative supervision of criminal cases including organized crime and narcotics organizations has prepared her for this challenging position. She has served as the Litigation Chief in the Asset Forfeiture Office and the Deputy Chief for Narcotics and Dangerous Drugs. She is currently serving as the Associate Deputy Attorney General and Director of the Organized Crime Drug Enforcement Task Force (OCDEF).

I am certain your committee will be as impressed with Ms. Tandy's background, dedication, and wealth of experience as I am. I urge you to confirm her much deserved appointment and make full use of her extensive talents.

Respectfully,

  
Sam A. Cabral  
International President



**INTERNATIONAL UNION  
OF POLICE ASSOCIATIONS  
AFL-CIO**

*THE ONLY UNION FOR LAW ENFORCEMENT OFFICERS*

**SAM A. CABRAL**  
*International President*

**DENNIS J. SLOCUMB**  
*International Executive Vice President  
Legislative Liaison*

**RICHARD A. ESTES**  
*International Secretary-Treasurer*

June 24, 2003

Senator Orrin G. Hatch, Chairman  
Senate Judiciary Committee  
United States Senate

Dear Senator Hatch:


On behalf of the International Union of Police Associations, IUPA representing more than 110,000 active duty full time law enforcement officers from across the nation, I am writing you in support of the confirmation of Mr. Christopher Wray to be Assistant Attorney General, Criminal Division, Department of Justice.

After graduation from Yale Law School, Mr. Wray was in private practice until 1997, when he joined the United States Attorney's Office, Atlanta, Georgia. He successfully prosecuted a variety of federal felonies including crimes of violence, white collar crime, racketeering, narcotics, and counterfeiting cases. He also worked in the offices forfeiture division, and the crisis response team. He came to Washington, D.C. in 2001 and has acted in the capacity of the Principal Associate Deputy Attorney General, and the Deputy Attorney General. He has provided leadership and coordination with the FBI, DOJ, and the Administrations Management Council.

He has been on the front lines of the Department of Justice during the most volatile and critical times in recent memory. He has proven himself again and again, and has gained not only the trust of his own department, but of the agencies with whom DOJ interacts.

I think his demonstrated record of dedication, judgement and integrity will serve him, the Department of Justice, and most importantly, the residents of this great nation. I urge his confirmation.

Very Respectfully,

  
Sam A. Cabral  
President

**Statement of Senator Patrick Leahy,  
Senate Judiciary Committee  
Nominations Hearing  
June 24, 2003**

Today the Committee will hold the first hearing on a nomination to the 4<sup>th</sup> Circuit from North Carolina in 23 years as well as hear from a nominee to the District Court for the Eastern District of North Carolina. I want to thank Senator Edwards for his efforts to resolve the impasse that has stalled so many nominees from North Carolina. His reward will be the service that Judge Allyson Duncan will soon be providing to the people of North Carolina as a member of the United States Court of Appeals for the Fourth Circuit. Just by being included at this hearing today she has already achieved something that Judge James Beaty, Judge James Wynn and Judge Rich Leonard could not during the many years their nominations to the Fourth Circuit were pending before this Committee from 1995 through 2001.

The minority was willing to proceed with the North Carolina nominees at this time. Instead, the Committee is taking advantage of this circumstance to add a large mix of judicial nominees and recent executive branch nominees. Indeed, today the Committee proceeds with an additional “double” hearing on presidential nominees. That is unfortunate because it will interfere with the Committee’s ability to give due consideration to each of the nominees. Unfortunately, many of the other nominees were scheduled at a time when many Senators who are interested cannot be present and in conflict with another simultaneous hearing of this Committee.

We have bent over backwards trying to be accommodating to this Administration. The Senate has already confirmed 132 of this President’s judicial nominees, including 26 circuit court nominees. That stands in sharp contrast to the treatment of President Clinton’s nominees by a Republican-controlled Senate from 1995 through 2001 when judicial vacancies on the federal courts were so much higher. At this point in his presidency, President Bush has appointed more circuit court judges than his father or President Clinton or President Reagan.

This is already the 12th hearing the Republican majority has held for this President’s judicial nominees this year, including 13 circuit court nominees. This, too, stands in sharp contrast to the way President Clinton’s nominees were treated by the Republican majority. I recall that, during the entire year of 1996, when vacancies were higher and growing, this Committee held only six hearings all year and those hearings included only five circuit court nominees. Neither of the two highly qualified nominees to the Fourth Circuit from North Carolina were considered. That 1996 session not a single judge was confirmed to the circuit courts—not one. In all of 1997, the Committee only had nine hearings all year and included only nine circuit court nominees and continued to pass over the nomination of Judge James Beaty.



During the entire year of 1999, only seven hearings were held on judicial nominees and this Committee did not hold the first judicial nominations hearing that year until June 16. This year is also the third year of a presidential term like 1999 but, by contrast, this Committee already held 11 hearings this year by the time Senator Hatch held his first hearing in 1999. During the entire year of 2000, only eight judicial nominations hearings were held. This year, with a Republican in the White House, the Senate Republican majority has gone from second gear -- the restrained pace it had said was required for Clinton nominees -- to overdrive for the most controversial of President Bush's nominees.

A good way to see how much faster Republicans are processing judicial nominations for a Republican president is to compare where we are in June of this year to June of any year during the last Democratic administration when the Republicans controlled the Senate. Over the last six and one-half years of Republican control under President Clinton, the Republicans held four judicial nominations hearings, on average, by June 25, and had considered about four circuit court nominees, on average, by this time. On this day, in 1995, only five hearings had been held for judicial nominations; in 1996, only three hearings; in 1997, only three hearings; in 1998, only about half as many as this year -- seven hearings; in 1999, only one hearing; and in 2000, only six judicial nominations hearings were held by June 25. Today, we participate in our 12th hearing this year. Republicans have moved two to four times more quickly for President Bush's circuit court nominees than for President Clinton's, yet vacancies in the courts stand at half of what they were during many of those years.

The number of judicial vacancies has gone down from the 110 we inherited when Democrats assumed the Senate majority in the summer of 2001 to the lowest level it has been in 13 years. While I was Chairman I was able to cut it from 110 to 60, despite dozens of new vacancies that occurred during that time. I recall that Senator Hatch said in September of 1997 that 103 vacancies (during the Clinton Administration) did not constitute a "vacancy crisis." He also repeatedly stated that 67 vacancies meant "full employment" on the federal courts. We now stand at 45 vacancies for the entire federal judicial system. We also have more active federal judges on the federal bench than at any time in our history and significantly more federal judges when senior judges are included.

As I have noted throughout the last three years, the Senate is able to move expeditiously when we have consensus nominees. Unfortunately, far too many of this President's nominees have records that raise serious concerns about whether they will be fair judges to all parties on all issues.

The Committee today also begins its consideration of a young man nominated to be the head of the Criminal Division of the U.S. Department of Justice and the Administrator of the DEA. These are extremely important executive positions. I look forward to learning more about Mr. Wray's background, experience and plans for the Criminal Division and to hearing from Ms. Tandy. I look forward to their testimony and to their answers to our questions.

#####



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Office of the President**

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Las Vegas Metro  
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Metro Toronto  
Montreal  
Ottawa-Carleton  
Winnipeg

June 11, 2003

The Honorable Orrin G. Hatch  
United States Senator  
104 Hart Office Building  
Washington, DC 20510

Dear Senator Hatch:

The purpose of this letter is to provide the committee with pertinent information about President Bush's nominee, Ms. Karen P. Tandy, to Administrator of the Drug Enforcement Administration.

Major Cities Chiefs (MCC) is an organization comprised of 59 of the chief law enforcement executives representing the largest jurisdictions in the United States and Canada. Our members provide primary law enforcement services to several million people.

The members of our organization are very familiar and quite knowledgeable about Ms. Karen Tandy. Her background and experience in dealing with local law enforcement issues, particularly asset forfeiture, will be of great benefit to the Drug Enforcement Administration and to local law enforcement. Ms. Tandy has participated regularly in our meetings and has always been open to ideas and suggestions from our members.

As an organization, MCC does not formally endorse nominees or candidates, however, the record and reputation of Ms. Tandy is one that we feel compelled to share with the committee. In addition, many of our members have expressed personal support for Ms. Tandy and will be providing you with their individual letters of recommendation.

Please feel free to contact me if you have any questions (602) 262-7000.

Sincerely,

  
Harold L. Hurt  
Phoenix Police Chief  
MCC President

C: Members of Judiciary Committee



## Major County Sheriffs' Association

1450 Duke Street, Suite 207, Alexandria, Virginia 22314

### President

Kevin Beary  
Sheriff of Orange County  
P.O. Box 1440  
2500 W. Colonial Drive  
Orlando, FL 32816  
(407) 254-7018  
(407) 254-7014 (fax)  
Kevin.beary@ocfl.net

June 17, 2003

### Vice President

Margo Frazier  
Sheriff of Travis County  
1710 Lavaca Street  
Austin, TX 78767  
(512) 473-9788  
(512) 473-9722 (fax)  
margo.frazier@tsa.texas.gov

Senator Oren Hatch  
Chairman  
Judiciary Committee  
United States Senate  
Washington, DC 20510

### Secretary

James A. Kames  
Sheriff of Franklin County  
369 South High Street  
2nd Floor  
Columbus, Ohio 43215-4555  
(614) 462-4211  
(614) 462-3739 (fax)  
emvice@ca.franklin.oh.us

Dear Senator Hatch:

Recently, President Bush nominated Ms. Karen P. Tandy to be Administrator of the Drug Enforcement Agency. The Major County Sheriffs' Association, which is composed of elected sheriffs representing the most populated counties in the United States, strongly supports her nomination.

Ms. Tandy has demonstrated through her many years of work as a Federal Prosecutor in both the Eastern District of Virginia and the Western District of Washington and as an executive in the Department of Justice an appreciation and understanding of the complex issues confronting drug enforcement. Further, she has a long history of working successfully with her state and local law enforcement partners.

We hope that there is a quick confirmation of Ms. Tandy.

Sincerely,

Sheriff Kevin Beary  
President  
Major County Sheriffs Association

### Past President

Patrick D. McGowan  
Sheriff of Hennepin County  
Cassette Room 6  
350 South Fifth Street  
Minneapolis, MN 55415  
(612) 348-3740  
(612) 348-4208 (fax)  
Patrick.mcgowan@co.hennepin.mn.us

### Executive Director

Joseph R. Wolfinger  
The Alexandria Group of MPRs  
1201 East Abingdon Drive, Suite 425  
Alexandria, VA 22314  
(703) 694-7114  
jrwolfinger@mpri.virginia.com

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08/18/03 10:10 FAX

009/010

June 9, 2003

The Honorable Orrin Hatch  
United States Senate  
Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Chairman Hatch:

I am writing on behalf of the forty (40) State Narcotic Officers' Associations and more than 60,000 narcotic officers represented by the National Narcotic Officers' Associations' Coalition (NNOAC), to strongly urge the confirmation of Ms. Karen P. Tandy as Administrator of the Drug Enforcement Administration. Our Coalition has had the privilege and pleasure of working closely with Ms. Tandy in her capacity as an Associate Deputy Attorney General and Director of the Organized Crime Drug Enforcement Task Forces (OCDETF). She has impressed us with the depth and breadth of her knowledge on narcotic enforcement issues, which she has learned during her 24 years of service with the United States Department of Justice. Ms. Tandy's background as a career prosecutor, as the Chief of the Litigation Unit in the Asset Forfeiture Office, and now as an Associate Deputy Attorney General, has made her uniquely qualified for this critically important position.

As you know, the Drug Enforcement Administration (DEA) leads our nation's drug law enforcement efforts throughout the United States and from offices located around the globe. The DEA is one of the world's premiere law enforcement agencies and, because of the threat that drug trafficking poses to the security of our nation, it deserves leadership of the highest quality. If confirmed, Karen Tandy would bring that leadership to the DEA and help it grow and prosper in this ever-changing world. Ms.

1001

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010/010

Tandy's reputation as a prosecutor, manager and executive, and the experience that she would bring to the position, not only in drug enforcement but in dealing with the complexities of managing large programs and budgets would make her a tremendous asset to the men and women who serve in the DEA and to the citizens that they protect.

I have personally had the opportunity to work closely with Ms. Tandy and know her to be a person of unquestioned integrity with a tireless work ethic, and a deep sense of commitment to drug enforcement and the safety of all Americans. The 60,000 members from the National Narcotic Officers' Associations' Coalition (NNOAC) can think of no one more qualified to lead our nation's drug enforcement efforts than Ms. Karen P. Tandy. We would urge the Senate Judiciary Committee to confirm her nomination as quickly as possible.

Should you require further information or if you have questions of me, please feel free to contact me at [rbrooks@nca-hita.net](mailto:rbrooks@nca-hita.net) or by telephone at (415) 436-8199. Thank you for your consideration of our views and I look forward to working with you and your staff on other matters regarding drug policy and public safety.

Sincerely

Ronald E. Brooks  
President



NATIONAL TROOPERS COALITION

Casey Perry, *Chairman*  
2099 Ironwood Drive  
Green Bay, WI 54304-1972  
Office/Fax: 800-232-1392  
Cell: 920-360-3612  
cperry@new.ttc.com

Brad Card, *Legislative Liaison*  
412 First Street, SE  
Washington, DC 20003  
Office: 202-484-4864  
Fax: 202-484-0189  
Cell: 202-549-6120  
brad.card@dotkogroup.com

Michael F. Canning, *Director*  
Government Relations Office  
12 Francis Street  
Annapolis, MD 21401  
Office: 410-269-4237  
Cell: 410-370-9800  
Fax: 410-269-7523  
ntc@maniscanning.com

June 13, 2003

The Honorable Orrin G. Hatch, Chairman  
Senate Judiciary Committee  
Room 224 Senate Dirksen Office Building  
1<sup>st</sup> & C Streets  
Washington, DC 20510

Dear Chairman Hatch:

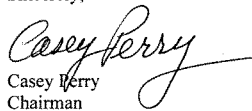
On behalf of the 35,000 state police and highway patrol officers who make up the National Troopers Coalition (NTC), I am writing to advise you of our support and endorsement of Karen P. Tandy for the position of Administrator of the Drug Enforcement Administration.

Associate Deputy Attorney General Tandy currently serves as the Director of the Organized Crime Drug Enforcement Task Force. She has over 25 years of experience in prosecuting drug and money laundering cases that involve close interaction with state troopers and highway patrol officers. This cooperative relationship is critically important to law enforcement efforts to tear down major drug and terrorist networks that threaten the stability of our great nation.

Ms. Tandy's professional accomplishments, education, and experience with the law enforcement community, her interaction with Congress and the Office of Management and Budget for the Department of Justice, attest to her personal commitment and drive. She would be an outstanding selection to support the Bush Administration's efforts to counter the continued threat of terrorism and narcotics as the Administrator of the Drug Enforcement Administration.

I appreciate any consideration our endorsement might be given, and thank you for your thoughtful appraisal of her candidacy.

Sincerely,

  
Casey Perry  
Chairman

08/18/03 10:09 FAX

FROM : SK011M

FAX NO. : 18122271689

Jan. 20 2003 01:28PM PG 003/010



January 20, 2003

## NATIONAL TROOPERS COALITION

121 STATE STREET • ALBANY, N.Y. 12207 • 518-436-0751

Scott Reinacher, Chairman  
 P.O. Box 415  
 Howell, NJ 08044  
 Home: 810-227-2322  
 Office/Fax: 810-227-1089  
 Cell Ph: 917-718-1578  
 E-Mail: ntcchair@comcast.net

The Honorable Clay Johnson  
 Director, Presidential Personnel  
 The White House  
 1600 Pennsylvania Ave, NW  
 Washington D.C. 20500

Dear Mr. Johnson,

On behalf of the National Troopers Coalition, I am writing to advise you of our support and endorsement of Karen P. Tandy for the position of Administrator of the Drug Enforcement Administration.

Associate Deputy Attorney General Karen P. Tandy currently serves as the Director of the Organized Crime Drug Enforcement Task Force. Ms. Tandy has over twenty-five years of experience of prosecuting drug and money laundering cases that involve interaction with state troopers and highway patrolmen. This cooperative relationship is critically important to law enforcement efforts to tear down major drug and terrorist networks that threaten the stability of our great nation.

Ms. Tandy's professional accomplishments, education, and experience within the law enforcement community, her interaction with Congress and the Office of Management and Budget for the Department of Justice attest to her personal drive and success.

Ms. Karen P. Tandy is outstanding candidate to support the Bush Administrations efforts in thwarting the continued threat of terrorism and the narcotics enigma as the Administrator of the Drug Enforcement Administration. I would appreciate any consideration my endorsement might be given and thank you and your staff who will make this selection for your thoughtful appraisal of her candidacy.

Sincerely,

Scott Reinacher, Chairman

**Testimony Before the Senate Committee on the Judiciary**  
**Introducing Magistrate Judge Lonny R. Suko,**  
**Nominated to be United States District Judge**  
**for the Eastern District of Washington**

Rep. George R. Nethercutt, Jr.  
June 25, 2003

Mr. Chairman, thank you for this opportunity to address the Senate Judiciary Committee to introduce United States Magistrate Judge Lonny R. Suko. Magistrate Suko is the President's nominee to fill a vacancy in the United States District Court for the Eastern District of Washington.

Magistrate Suko has been a Magistrate Judge since 1995, when he was chosen from among a panel of finalists by a unanimous vote of all United States District Judges for the Eastern District of Washington. In that time, he has earned high marks and the respect of his peers, his staff, his superiors, and nearly all those who have passed through his courtroom. I have heard nothing but glowing reports of Magistrate Suko, and he has certainly earned my respect and endorsement. His confidence, humility and impartiality in his current position make him an exemplary candidate for U.S. District Court Judge.

While the selection commission was interviewing and vetting applicants for this U.S. District Court position, I received dozens of letters of support for Magistrate Suko from throughout Washington State. Words such as "compassionate," "sincere," "well-respected," and "intelligent" pervade these letters. It is abundantly apparent from these letters that Magistrate Suko's integrity transcends his personal and professional life.

The selection commission was charged with the daunting task of selecting the most well-qualified candidates to recommend to the President for nomination, and it is my opinion that they have succeeded admirably. I wholeheartedly support the nomination of Magistrate Suko.

Again, Mr. Chairman, thank you for this opportunity, and for holding this hearing on the nomination of Magistrate Suko. I urge this Committee to - and am confident that it will - quickly and favorably report his nomination to the full Senate for eventual confirmation.



1005

APR-04-2003 11:01 AM BOBBY RIDDLE

919 498 0547

P. 01

April, 4, 2003

Chairman Orrin Hatch  
Senate Judiciary Committee  
224 Dirksen Office Building  
Washington, DC 20510

By FAX: 202-224-6331



RE: Nomination of Judge Terrence Boyle to the Fourth Circuit Court of Appeals

Dear Chairman Hatch:

On behalf of the Professional Fire Fighters and Paramedics of North Carolina, I urge you and other members of the Judiciary Committee to oppose the nomination of Judge Boyle to the Fourth Circuit Court of Appeals. Judge Boyle's record here in North Carolina is one that indicates a hostility to the interests of working men and women, both in the private and public sectors. I am informed that during his career as a District Court Judge, his decisions have been reversed more than one hundred times. In particular, and most important to the public employees that elected me their President, Judge Boyle has not shown the sensitivity and the respect for the fundamental rights guaranteed by our constitution, such as the right to free speech, the right to free association, and the right to due process, that are the primary bulwark protecting public employees here in North Carolina from arbitrary, unfair, and retaliatory actions.

The Professional Fire Fighters and Paramedics of North Carolina is an organization consisting of about 2500 emergency service employees from all over the state. It is our member paramedics and firefighters who respond on a daily basis to emergencies, risking their lives to save the lives and property of other citizens. And, as has been recognized many times since September 11, 2001, we are the first responders who will be in the forefront if there is another terrorist attack. The members of my organization are very committed to their work, and, indeed do the jobs not primarily for the pay that they receive (which all too often is inadequate to raise a family), but because of their personal desire and commitment to helping others. In doing this essential and dangerous work, it is important for us to know that if we become the victim of unfair treatment by our employers, there will be fair-minded judges to whom we can take our concerns. Unfortunately, Judge Boyle has shown himself to lack the fairness and concern for working women and men that our federal judges should possess and exercise. For these reasons, I urge you to oppose and reject his nomination.

Respectfully,

Bobby C. Riddle, Jr., President  
Professional Fire Fighters and Paramedics of North Carolina

cc: Ranking Member Senator Patrick Leahy (By FAX: 202-228-0861)  
Senator John Edwards (By FAX: 202-224-1374)

APR 04 2003 11:17

PAGE. 01

1006

06/18/03 15:26 FAX

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**SHERIFF  
JERRY SPEZIALE**



**PASSAIC COUNTY SHERIFF'S DEPARTMENT  
OFFICE OF THE SHERIFF  
435 Hamburg Turnpike  
Wayne, New Jersey 07470  
974 359-5919**

March 27, 2003

U.S. Senator Frank Lautenberg  
Hart Senate Office Building  
Suite 825-A  
Washington, DC 20510

Dear Senator Lautenberg:

Please accept this letter as a recommendation in support of Karen Tandy recently named by President Bush to serve as the Administrator to the Drug Enforcement Administration.

Frank, I have known Karen Tandy for many years and she is an extremely talented prosecutor who has dedicated her life to government. She is someone who is responsible, conscientious, compassionate, and above all a person of the highest integrity and trust. During my career with the Drug Enforcement Administration, I have had the opportunity to witness her abilities first hand in fighting the drug wars. Her talent is immeasurable especially when it comes to drug law enforcement, communication amongst agencies and the coordination of multi-jurisdictional investigations. Karen Tandy truly is an exceptional individual that is dedicated to her goals and accomplishes them with great diligence. Her excellent judgment and common sense are a very strong part of her character along with the ability to communicate with people, both on a professional and personal level. Ms. Tandy is a very special person and I know she will be a credit to the Drug Enforcement Administration.

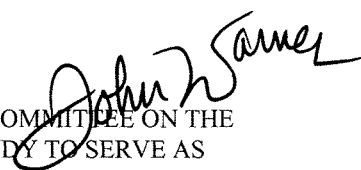
My recommendation of Karen Tandy is made without reservation. I can think of no other time when I have felt better about giving a reference than I do now.

I would appreciate your support in this nomination. Should you have any questions or concerns, please feel free to call me directly. I can be contacted at (973) 389-5919.

Very truly yours,

  
Jerry Speziale  
Sheriff

FAIRNESS EQUALITY DIGNITY

  
STATEMENT TO THE JUDICIARY COMMITTEE ON THE  
NOMINATION OF KAREN P. TANDY TO SERVE AS  
ADMINISTRATOR OF THE DRUG ENFORCEMENT  
ADMINISTRATION WITHIN THE DEPARTMENT OF JUSTICE  
June 25, 2003

Chairman Hatch, Senator Leahy, and my other distinguished colleagues on the Senate's Judiciary Committee, I thank you for holding this confirmation hearing today. I am pleased to introduce a Virginian, Karen Tandy, who has been nominated to serve as Administrator of the Drug Enforcement Administration within the Department of Justice.

Ms. Tandy's background makes her highly qualified for this position. Subsequent to earning her law degree from Texas Tech University, she served as a law clerk for Chief Justice Woodward of the Northern District of Texas.

After serving as a law clerk, Ms. Tandy served as an Assistant United States Attorney for the Eastern District of Virginia. While an assistant U.S. attorney, she focused on the prosecution of violent crime and complex drug, money laundering, and forfeiture cases.

Subsequent to her service as an assistant U.S. attorney, Ms. Tandy has worked in the Department of Justice in many capacities, including: the first Chief of the Litigation Unit in the Asset Forfeiture Office; Deputy Chief of the Narcotic and Dangerous Drug Section; and as the first Deputy Chief for the Special Operations Division. Currently, Ms. Tandy serves within the Department of Justice as Associate Deputy Attorney General and Director of the Organized Crime Drug Enforcement Task Force (OCDETF). As Associate Deputy General, she

oversees the Drug Enforcement Administration and the National Drug Intelligence Center, while advising the Deputy Attorney General and Attorney General on drugs, money laundering, and forfeiture issues. As Director of OCDETF, she helps direct the Department of Justice's strategy on drug enforcement.

Mr. Chairman, Karen is obviously a very accomplished American who has dedicated a large portion of her career to public service. She is well qualified, and I am certain she will prove to be a strong asset for the Drug Enforcement Administration.

I am pleased to introduce her to the Committee, and I look forward to the Committee reporting her nomination favorably.

1010

MELVIN L. WATT  
12TH DISTRICT  
NORTH CAROLINA



COMMITTEES  
FINANCIAL SERVICES  
JOINT ECONOMIC  
JUDICIARY

**Congress of the United States**  
**House of Representatives**  
Washington, DC 20515-3312

June 24, 2003

The Honorable Orrin G. Hatch, Chairman  
Senate Judiciary Committee  
224 Dirksen Building  
Washington, DC 20510

The Honorable Patrick J. Leahy, Ranking Member  
Senate Judiciary Committee  
224 Dirksen Building  
Washington, DC 20510

Dear Chairman Hatch and Senator Leahy:

I am writing to express support for the confirmation of Allyson Duncan to the United States Court of Appeals for the Fourth Circuit. I have known Ms. Duncan for more than 20 years and I am confident that she has the intelligence, legal expertise and judgment to serve with integrity and distinction.

Sincerely,

Melvin L. Watt

cc: Senator John Edwards  
Senator Elizabeth Dole

PLEASE RESPOND TO:

2236 RAVIURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-3312  
(202) 225-1510  
Fax: (202) 225-1512  
rl12.public@mail.house.gov

1230 WEST MOREHEAD STREET  
SUITE 308  
CHARLOTTE, NC 28208-5214  
(704) 344-9950  
Fax: (704) 344-9971

301 SOUTH GREENE STREET  
SUITE 210  
GREENSBORO, NC 27401  
(336) 275-9950  
Fax: (336) 379-9951

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## DEBEVOISE &amp; PLIMPTON

919 Third Avenue  
New York, NY 10022  
Tel 212 909 6000  
www.debevoise.com

Mary Jo White  
Partner  
Tel 212 909 6260  
Fax 212 909 6836  
mjwhite@debevoise.com

June 23, 2003

Senator Orrin G. Hatch  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Re: Nomination of Christopher Wray

Dear Mr. Chairman:

I write in enthusiastic support of the nomination of Christopher Wray for Assistant Attorney General for the Criminal Division of the Department of Justice.

As the United States Attorney for the Southern District of New York from June 1993 until January 2002, I had the privilege of working personally with Mr. Wray, in his capacity as Principal Associate Deputy Attorney General, on a variety of issues, including on counterterrorism matters involving al Qaeda and Osama bin Laden. In my view, Christopher Wray would be an outstanding Assistant Attorney General who would bring intelligence, experience, and exceptional judgment to this important position at a particularly critical time for our nation and the criminal justice system.

As his impressive record demonstrates, Mr. Wray has served with great distinction in the Department of Justice, in positions of increasing responsibility, both as an Assistant United States Attorney in Atlanta and then as the primary deputy to Deputy Attorney General Larry Thompson. In both capacities, Mr. Wray has successfully investigated, prosecuted and supervised a broad range of important criminal matters, including matters involving white collar crime, terrorism, civil rights, public corruption, gun trafficking, narcotics, and immigration. Mr. Wray also spent four years in the private sector at the highly respected law firm of King & Spalding where his practice focused on white collar defense and internal investigations, areas of particular priority for the Department of Justice today.

Mr. Wray thus brings a depth and range of experience, from both the public and private sectors, that will be invaluable to his work as Assistant Attorney General. From my own experience with him, I am confident that Mr. Wray will approach every issue and matter with knowledge, balance and mature judgment. He is a dedicated,

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@003

Senator Orrin G. Hatch


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June 23, 2003

accomplished public servant who will act vigorously and fairly in furtherance of criminal law enforcement and in the best interests of the public.

If confirmed, I am confident that Christopher Wray will provide outstanding service to the criminal justice system and the American people. He will be, in my view, a highly respected and successful Assistant Attorney General for the Criminal Division. If I can provide further information, please do not hesitate to have your staffs contact me.

Respectfully submitted,



Mary Jo White

cc: Honorable Patrick Leahy  
Ranking Minority Member

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PAGE.03



**NOMINATIONS OF JAMES O. BROWNING, OF  
NEW MEXICO, NOMINEE TO BE DISTRICT  
JUDGE FOR THE DISTRICT OF NEW MEX-  
ICO; KATHLEEN CARDONE, OF TEXAS,  
NOMINEE TO BE DISTRICT JUDGE FOR THE  
WESTERN DISTRICT OF TEXAS; JAMES I.  
COHN, OF FLORIDA, NOMINEE TO BE DIS-  
TRICT JUDGE FOR THE SOUTHERN DIS-  
TRICT OF FLORIDA; FRANK MONTALVO, OF  
TEXAS, NOMINEE TO BE DISTRICT JUDGE  
FOR THE WESTERN DISTRICT OF TEXAS;  
AND XAVIER RODRIGUEZ, OF TEXAS, NOMI-  
NEE TO BE DISTRICT JUDGE FOR THE  
WESTERN DISTRICT OF TEXAS**

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**WEDNESDAY, JULY 9, 2003**

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

The Committee met, pursuant to notice, at 3:02 p.m., in room SD-226, Dirksen Senate Office Building, Hon. John Cornyn presiding.

Present: Senator Cornyn.

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

Senator CORNYN. The hearing of the Senate Judiciary Committee will come to order, and I appreciate Chairman Hatch asking me to chair this hearing since it does, not coincidentally, include the nominations of a number of exceptionally qualified judges and judicial nominees, including folks from the great State of Texas, but also including New Mexico and Florida.

I know we have a number of distinguished Senators who want to introduce nominees from their respective home States, and out of deference to them, the Chair will proceed to hear your introductions. And then I will be happy to do the introductions of the Senators from Texas.

I know Senator Hutchison will also be here, but I know each of the members of the Senate as well as our colleague Silvestre Reyes from the House have conflicting engagements. And so in an effort

to try to get to you and allow you to get on to your other business, I will be glad first to turn to the senior Senator from New Mexico, Senator Domenici.

**PRESENTATION OF JAMES O. BROWNING, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF NEW MEXICO, BY HON. PETE V. DOMENICI, A U.S. SENATOR FROM THE STATE OF NEW MEXICO**

Senator DOMENICI. Thank you very much, Mr. Chairman, and in deference to you, you can be sure we won't take much of your time. Thank you so much.

First, it is my distinct privilege to be here to introduce to you and the Committee the nominee of our President for district judge in the State of New Mexico, James O. Browning. Mr. Browning is joined by his wife, Jan, and one of his three children, Elizabeth, both of whom are here with him, if maybe they could stand and we could recognize them. And Mr. Weldon Browning and his wife, Shirley, are here. They are the mother and father. They are from Hobbs down in your country, his parents. They are here.

Senator CORNYN. Welcome.

Senator DOMENICI. Thank you for welcoming them.

Mr. Chairman, seldom do I have an opportunity to introduce a candidate with such outstanding credentials. That is why I indicated to you that it ought to be very brief from our standpoint. This young man is a native of Hobbs, New Mexico. He attended Yale University where he graduated magna cum laude, receiving three varsity letters playing football. He then attended University of Virginia Law School, serving as the editor in chief of the Virginia Law Review. And after graduating from law school, he clerked for Collins Seitz, the chief judge of the Third Circuit Court of Appeals, and he followed that clerkship by a clerkship with the United States Supreme Court with Lewis F. Powell, Jr., being his clerk at the United States Supreme Court.

We in New Mexico are fortunate that he returned to our State to practice law after his clerkships. He has generally been in the practice of law with the exception of practicing as Deputy Attorney General for a couple of years.

I am very pleased with his nomination, certain that he will meet with your satisfaction and that of the Committee, as he did with the President of the United States. Clearly, the American Bar did not take any length of time to find that he deserved their highest accolade as well qualified. I believe they are right. I believe our President was right. And I hope that this Committee will find and concur in those findings and send him to the Senate quickly. We are in need of judges in New Mexico very badly, and we hope that he will move quickly through the Committee.

Thank you, and I am very appreciative that I am joined here by my colleague, Senator Bingaman.

Senator CORNYN. Thank you, Senator Domenici.

Senator Bingaman, I know you are listed next, but you graciously agreed to allow Senator Hutchison to go next because I know she has a conflicting Committee hearing on the appropriations markup for defense and legislative branch approps. And so at

this time, staff tells me I am supposed to recognize Senator Hutchison.

Senator HUTCHISON. Thank you very much, Senator. I can wait. I would rather let Senator Bingaman finish with this wonderful nominee from New Mexico, and then I will go. My markup is at 3:15, so I will be okay, I think, unless you are very long-winded.

Senator CORNYN. Very well. Thank you. I think bipartisanship is breaking out all over, which is a rare thing in the Judiciary Committee, but it is welcome nonetheless.

**PRESENTATION OF JAMES O. BROWNING, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF NEW MEXICO, BY HON. JEFF BINGAMAN, A U.S. SENATOR FROM THE STATE OF NEW MEXICO**

Senator BINGAMAN. Well, we are glad to bring a change to your Committee. Thank you very much, Mr. Chairman. Let me just second the comments that Senator Domenici already made and indicate that I strongly support this nominee. James Browning is extremely well respected as a lawyer in our State, and I have heard from many of my friends who are practicing law in New Mexico about his reputation for fairness and straight dealing as well. And I think that he comes highly recommended by Republicans, by Democrats, by Independents, by people of all political persuasions, as somebody who will add greatly to the Federal court in our State.

He does have an excellent background, as Senator Domenici indicated. His legal background and his educational background are without blemish. So I strongly recommend him to the Committee, and I urge you to act quickly on his nomination so that we can have a new Federal district judge in New Mexico.

Thank you.

Senator CORNYN. Very good. Thank you, Senator Bingaman.

At this time the Chair will recognize Senator Kay Bailey Hutchison, my colleague and fellow Senator from the State of Texas.

**PRESENTATION OF KATHLEEN CARDONE, FRANK MONTALVO AND XAVIER RODRIGUEZ, NOMINEES TO BE DISTRICT JUDGES FOR THE WESTERN DISTRICT OF TEXAS BY HON. KAY BAILEY HUTCHISON, A U.S. SENATOR FROM THE STATE OF TEXAS**

Senator HUTCHISON. Well, thank you, Mr. Chairman. I am very pleased to have three nominees today for Texas, and I'm also very pleased that these are nominees from the Western District, and especially two from El Paso, which was a new court created by this Senate because of the great backlog and the really huge caseload that we have in the Western District in El Paso. So we are going to fill these judgeships with very qualified nominees.

It is my pleasure to introduce Kathleen Cardone. Kathleen would be serving as a U.S. District Judge for the Western District of Texas. If confirmed, she would preside in El Paso, and she is a New York native who graduated from the State University of New York at Binghamton and St. Mary's School of Law in San Antonio, Texas.

After graduating from law school, Kathy clerked for a U.S. magistrate for the Southern District of Texas before moving into private practice. Ms. Cardone has the distinction of serving as the first judge of the 388th Judicial District Court, a new State court created in El Paso in 1999. While serving as the judge of the 388th, she developed and founded the El Paso County Domestic Relations Office. This office serves as an intermediary between courts and litigants in family law matters. Ms. Cardone also presided over another judicial district court in El Paso and has a great deal of judicial trial experience.

Kathy has an excellent record of civic involvement as well. She is a member of the board of directors of the Upper Rio Grande Workforce Development Board and the El Paso Center for Family Violence. She is a past board member of the YWCA, the El Paso Holocaust Museum and Study Center, the El Paso Bar Foundation, the El Paso Mexican American Bar Association, and the Child Crisis Center of El Paso. She is joined today by her husband, Bruce, and their son, Dominic. Her parents and four of her siblings are here from New York. And I would like to ask all of them, including Kathy, to stand, please.

Senator CORNYN. Please stand so we can recognize all of you. Thank you very much and welcome.

Senator HUTCHISON. She has been certified as well qualified by the ABA.

Frank Montalvo is our second nominee. Judge Montalvo currently presides over the 288th District Court in San Antonio, and he also will be nominated for another bench in El Paso. He is a Puerto Rican native who moved to Texas in 1988. He has served both the community and the San Antonio Bar Association with distinction. He is an engineer by training, receiving his bachelor of science with honors from the University of Puerto Rico in 1976, then a master of science in bioengineering from the University of Michigan in 1977, and a J.D. from Wayne State University Law School in 1985.

He then worked as an automotive safety engineer, both for General Motors and the Chrysler Corporation. That was before he became a full-time lawyer.

He moved to San Antonio in 1998 working as an associate at Groce, Locke & Hebdon. He worked at Ball & Weed in San Antonio and had a lot of litigation and trial experience. He continues to preside today over the judicial district court in San Antonio, a State court.

He is an active member of the San Antonio Bar Association, speaking at a number of bar related functions over the past 10 years, currently serving as Chairman of the Bexar County Juvenile Board Budget Committee. While chairman, he assisted with the effort to have the juvenile probation department of Bexar County assume direct responsibility for the operation and management of the Bexar Juvenile Correctional Treatment Center, a post-adjudication residential treatment facility.

He is joined today by his son, Carlos. If you would please stand?

Senator CORNYN. Thank you. Welcome, Carlos and Judge Montalvo.

Senator HUTCHISON. And my third Texan is Xavier Rodriguez. Judge Rodriguez has been nominated for the U.S. District Court for the Western District in San Antonio. He earned his B.A. from Harvard University in 1983. In 1987, he earned his master of public administration and juris doctorate from the University of Texas.

Following his graduation from Harvard, Judge Rodriguez was commissioned as an officer in the U.S. Army Reserve and served in the JAG Corps until 1993. After graduating from law school, he returned to San Antonio where he went with Fulbright & Jaworski and is currently a partner at that firm. He has concentrated in the areas of labor and employment law for which he is board-certified.

He is an active member of the community, routinely providing pro bono legal services to Respite Care of San Antonio, a non-profit organization that provides services to families caring for disabled children. He has also worked with Any Baby Can, a non-profit that provides support and crisis assistance to families with children with special health care needs.

In 2001, he was appointed to serve as a justice for the Texas Supreme Court. He did an outstanding job, and I know will do the same outstanding job on the Federal bench that he did while serving on the Supreme Court of Texas.

Judge Rodriguez is accompanied today by his wife, Raenell, and his daughters, Lauren and Sarah. If they would please stand?

Senator CORNYN. Thank you very much. Good to have you here.

Senator HUTCHISON. These three, as you know, Mr. Chairman, from personal knowledge as well and from the joint selection process that we have, are three highly qualified nominees who have the total support of the ABA. All three do, and they have the support of the bar associations and the people in their communities, as I am sure you know as well. I couldn't be more proud to nominate these three and ask for their support from the Judiciary Committee.

Thank you.

Senator CORNYN. Thank you very much, Senator Hutchison.

We have our friend and colleague, Hon. Silvestre Reyes, from the House of Representatives here, who represents El Paso in the United States House of Representatives. And I know you have some remarks you would like to make, and please proceed.

**PRESENTATION OF KATHLEEN CARDONE, FRANK MONTALVO, AND XAVIER RODRIGUEZ, NOMINEES TO BE DISTRICT JUDGES FOR THE WESTERN DISTRICT OF TEXAS BY HON. SILVESTRE REYES, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS**

Representative REYES. Thank you, Mr. Chairman, and it occurs to me sitting here listening to our senior Senator, the thought goes through my mind that it is a good day for Texas with three new judges. You know, our mantra is "Don't Mess With Texas." With three outstanding candidates like this, we hope they will go through a very speedy process through the Committee. It will be increasingly harder for people to mess with Texas.

But I do want to offer my congratulations to Judge Rodriguez and his family; and, of course, Judge Montalvo and his son, Carlos, who are here, who are soon to be part of my district in West Texas;

and also, of course, a long-time friend of mine and of my family, Kathy Cardone, and Bruce and Nicco, and, of course, the extended family that has turned out in force here, which makes me even prouder to be here to say a few words about Judge Cardone.

So with that, Mr. Chairman, Judge Cardone has been a leading figure of the family court system in my district of El Paso, Texas. She has been instrumental in highlighting important differences between the family court and other cases files at our courthouse. Today, the El Paso County Courthouse 11th floor is dedicated to families and to children, due in large part to Judge Cardone's vision.

Judge Cardone's experience speaks for itself. For nearly 20 years, she has been a judge both at the municipal and State level. Currently, she sits as a visiting judge for the State of Texas, where she presides over criminal and civil family law matters. She was appointed to that position by then-Governor George W. Bush, our current President, and she has been effectively recognized for managing a very vigorous trial docket and has a reputation of diligence, balance with fairness and thoughtfulness. Furthermore, her knowledge and commitment to our border region will be beneficial to the Federal court system.

The Western District of Texas urgently needs Judge Cardone and Judge Montalvo. Investments in law enforcement agencies along the U.S.-Mexico border have increased dramatically in the past several years. The resources of the legacy Immigration and Naturalization Service, the United States Border Patrol, the DEA, have more than doubled since 1994 as a result of America's effort on the war on drugs, and even more recently as a result of the events of September the 11th.

By the year 2000, arrests on the border had increased by 125 percent. During that same period within the Western District of Texas, the number of defendants prosecuted for immigration violations rose 849 percent. And the number of drug prosecutions rose another 268 percent.

According to the Administrative Office of the United States Courts, authorized Federal court judgeships, on the other hand, increased by only 6 percent in the five United States judicial districts along the border between fiscal years 1994 and 2000. During 2000, these five border districts, which include the Western District of Texas, handled 27 percent of all criminal cases filed in the United States, while the other criminal cases were spread among the country's other 89 Federal district courts. I think a staggering statistic by anybody's measure.

In the Western District of Texas alone, Federal criminal cases have increased by 218 percent since 1994, from 1,390 to today 4,425 cases. Nowhere within the Western District of Texas are circumstances more dire than in my own hometown of El Paso. The number of Federal criminal cases filed in El Paso County has increased from 443 to 2,192 cases since 1994. During the year 2000, the Federal judges sitting in El Paso averaged 817 cases, whereas the national Federal judges averaged 96 cases. No judge should be burdened with a caseload that is more than 8 times the national average. Thankfully, last year the Senate approved the judicial nomination of Judge Phillip Martinez to fill an existing vacancy in

the Western District of Texas and who, I might add, is doing an outstanding job for us.

Nevertheless, additional judges are desperately needed in the Western District to address what we think is a crisis on the border.

I have no doubt that Judge Cardone will be able to contribute significantly to addressing the large caseloads we have on the border, as will Judge Montalvo. I am also confident that both Judges Cardone and Montalvo will continue to be an asset to the Federal court system, and, in particular, Judge Cardone to the city of El Paso in this new capacity. She has been a very active member of our community, as Senator Hutchison made mention of all her individual commitments to the many different organizations that tells so much about her commitment to our community.

As I said, I have personally known Judge Cardone for almost 10 years and can attest to her character and fairness both as a person and as an officer of the court. She is a person of integrity and is well respected throughout El Paso and the rest of our great State.

Mr. Chairman and members of the Committee, I would like to thank all of you for the opportunity to speak here today and to express my support for both Judge Cardone and Montalvo for the U.S. district judgeships in the Western District of Texas, and I respectfully urge the members of the Committee to confirm her appointment as quickly as possible. As I stated before, the number of cases really creates a crisis for our community on the border region.

So, with that, again, congratulations to all the nominees here, Judge Montalvo, Judge Rodriguez, and, of course, our own Judge Cardone. And thank you, Mr. Chairman, for giving me an opportunity to be here this afternoon.

Senator CORNYN. Thank you. Thank you, Mr. Reyes. We appreciate your being here and your presence here.

I am going to have all of the written statements of each of the witnesses made part of the record. Also, Senator Leahy has a statement which will be made part of the record, Senator Nelson, and Senator Bob Graham—the last two, Senator Nelson and Senator Graham, on behalf of James Cohn, who has been nominated to serve as U.S. District Judge for the Southern District of Florida.

And we will, as usual, leave the record open for a week to allow any Senator who would like to send written questions to any of the nominees, which, of course, we hope that you would respond to on a prompt basis so we can expedite consideration of your nomination on the floor.

I just want to add my comments to those of Senator Hutchison with regard to three of the nominees, whom I had the pleasure of working with Senator Hutchison in sending these nominees to the President, that is, Judge Cardone, Judge Montalvo, and Judge Rodriguez.

Actually, just to show what a small world it is, I actually practiced at the same law firm that Judge Montalvo did when he came to San Antonio. But at that time I was already a district judge in San Antonio and had been for about 4 years when he came along. So Judge Montalvo and I have known each other for quite a while now, and I have had a chance to see him tested by the judicial election process and on the bench in a professional manner, and he has

done an outstanding job. And I have every confidence he will make an outstanding United States district judge.

In a similar way, I have gotten to know Xavier Rodriguez, who was appointed to the Texas Supreme Court and who served honorably there. Before that, he worked at Fulbright & Jaworski as a labor lawyer in San Antonio, had an outstanding reputation, is well regarded professionally in San Antonio, and I know who likewise will do a very good job in the Western District of Texas there in the San Antonio Division, which is my hometown, and at least until shortly, the hometown of Judge Montalvo before he now relocates to El Paso, where I know he will be warmly greeted and embraced by the community there.

And Kathy Cardone, Judge Cardone, I have known also for quite a while and who served with great distinction there in El Paso on the district bench and has made numerous contributions to the local community there in the administration of justice, assisting those who are among the most vulnerable in that community. So I could not be more pleased to join with Senator Hutchison and Congressman Reyes in adding my congratulations to the nominees, as well as to their families, and make these brief comments by way of introduction.

Senator CORNYN. With that, let me please ask the judicial nominees to step forward, and we will seat you at the table and administer an oath.

Senator Hatch will also have a written statement that we will make part of the record, and as I said, the record will remain open for at least a week so that any other Senator who has a statement or any questions he or she would like to submit to the nominees can do so.

If each of you would please raise your right hand. Do each of you swear that the testimony you are about to give before this Committee is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. BROWNING. I do.

Judge CARDONE. I do.

Judge COHN. I do.

Judge MONTALVO. I do.

Justice RODRIGUEZ. I do.

Senator CORNYN. Thank you. Please have a seat.

Now that we have done the most important part and each of you had a chance to be introduced as well as introduce your family, we would like to give you an opportunity to make any brief statement that you would like to make before we begin with questions. And, James O. Browning, Mr. Browning, you have been recommended by both of your home State Senators, and you are a next-door neighbor in New Mexico to those of us in Texas. We would be glad to hear any comments that you may have.

**STATEMENT OF JAMES O. BROWNING, NOMINEE TO BE  
DISTRICT JUDGE FOR THE DISTRICT OF NEW MEXICO**

Mr. BROWNING. Mr. Chairman, I very much appreciate being here today. I think now that Senator Domenici has introduced my family, I will just express my appreciation for being here today and leave it at that.



Thank you.

[The biographical information of Mr. Browning follows:]

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

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)  
James Oren Browning ("Jim")
2. Address: List current place of residence and office address(es).
  - Residence: Albuquerque, New Mexico
  - Office: Browning & Peifer, P.A.  
20 First Plaza, NW, Suite 725 (Zip 87102)  
Post Office Box 25245  
Albuquerque, New Mexico 87125
3. Date and place of birth.  
April 6, 1956 Levelland, Texas
4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).  
Married. Wife's name is Jan Ramey Browning. Her maiden name was Marla Jan Ramey. Jan is a teacher, but is not currently working outside of the home.
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.  
University of Virginia  
Attended: 1978 to 1981  
J.D. 1981  
Yale University  
Attended: 1974 to 1978  
B.A. Political Science (Intensive Program), 1978

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

Browning & Peifer, P.A.  
20 First Plaza, NW, Suite 725 (Zip 87102)  
Post Office Box 25245  
Albuquerque, New Mexico 87125  
(505) 247-4800

Shareholder: 1990 to the present  
Director: 1990 to the present  
Chairman: 1990 to the present  
Secretary: 1991 through 2000

Rodey, Dickason, Sloan, Akin & Robb, P.A.  
201 Third Street N.W., Suite 2200  
Post Office Box 1888  
Albuquerque, New Mexico 87103  
1983-1987, Associate  
February 1988 to June 1990, Shareholder and Director

Attorney General Harold (Hal) D. Stratton  
New Mexico Department of Justice  
Bataan Memorial Building, Suite 260  
Santa Fe, New Mexico 87503  
1987-1988, Deputy Attorney General

The Honorable Lewis F. Powell, Jr., Associate Justice  
The Supreme Court of the United States  
Washington, D.C. 20543  
1982-1983, Law Clerk

The Honorable Collins J. Seitz, Chief Judge  
United States Court of Appeals for the Third Circuit  
Federal Building, 844 King Street  
Wilmington, Delaware 19801  
1981-1982, Law Clerk

Covington & Burling

1024

1201 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
Summer 1981, Summer Associate

Cravath, Swaine & Moore  
Worldwide Plaza  
825 Eighth Avenue  
New York, New York 10019  
Summer 1980, Summer Clerk

Hinkle, Cox, Eaton, Coffield & Hensley  
400 Penn Plaza, Suite 700  
Roswell, New Mexico 88201  
Summer 1979, Summer Clerk

Manpower or some other temporary work service  
Charlottesville, Virginia  
Christmas break 1978 to 1979. I worked for a temporary job service.  
It assigned me to a textile mill.

Texaco  
Buckeye, New Mexico  
Summer 1978. Roustabout

Dairy Freeze  
Carlsbad Highway  
Hobbs, New Mexico  
Summer 1978. Cook and Order taker

Browning Investment Company  
20 First Plaza, NW, Suite 725 (Zip 87102)  
Post Office Box 25245  
Albuquerque, New Mexico 87125  
Director: 1992 to the present  
Officer: President and Treasurer, 1992 to the present

Montgomery Blvd. Church of Christ  
7201 Montgomery Blvd. NE  
Albuquerque, New Mexico 87109  
Elder and Director, 1995 to 1997

American Judicature Society  
180 North Michigan Avenue, Suite 600  
Chicago, Illinois 60601  
Director, Member of Board of Directors (1988 to 1999)

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

No.

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

Yale University

- Graduated magna cum laude
- Distinction in major
- Frank Miner Patterson Prize (1978) best senior essay on American political issues
- William L. Learned Scholarship (end of freshman-sophomore year 1975)

University of Virginia

- Editor in Chief, Virginia Law Review
- Recipient, Margaret G. Hyde Award for outstanding law student
- Order of the Coif
- Raven Society
- Colonel, Aide de Camp on the Staff of the Governor of the State of New Mexico (honor conferred on February 23, 1987 by the Honorable Jack Stahl, Lt. Governor, acting Governor of New Mexico)
- Best Lawyers in America (2003-2004)
- Chambers USA - America's Leading Lawyers' (2003)
- Who's Who in the West (1990);
- Who's Who in American Law (1990- 1994);
- Nominated, Sterling Who's Who Directory (1994);
- Nominated, Who's Who Among Rising Young Americans (1990, 1994);
- Nominated, Who's Who of Emerging Leaders in America, (3d ed. 1991, 4th ed.

1992);

- Nominated, Personalities of America (5th ed. 1990);
- Nominated, Who's Who Among Young American Professionals 1992-1994; and
- Certificate of Appreciation in recognition of noteworthy contributions to the Administration of Justice, given by the Honorable Burt Cosgrove, District Judge, Second Judicial District court, State of New Mexico (Dec. 31, 1996).

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

- Chairman, Committee on Admissions and Grievances, United States District Court for the District of New Mexico (7/31/1997 to 12/31/2000);
- Member, Committee on Admissions and Grievances, U.S. District Court, District of New Mexico (8/01/92 to 08/01/94 and 08/01/94 to 07/31/97);
- Member, New Mexico Bar Association (admitted in 1983);
- Albuquerque Bar Association (1982 to 1987; 1988 to 2000);
- The Bar Association for the United States District Court for the District of New Mexico (1996-2003);
- Member and Attendee, 1988, 1989, 1991, 1992, and 1993 Judicial Conference of the Tenth Circuit (there may have been others since 1993).

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

- Lobbying: None
- Other Organizations:
  - ✓ New Mexico Christian Legal Aid, Inc.;
  - ✓ Federalist Society;
  - ✓ Madison Club (Federalist Society);
  - ✓ Member, Practice Group, Federalist Society;

- ✓ Albuquerque Bar Association;
- ✓ Republican National Lawyers Association;
- ✓ Montgomery Boulevard church of Christ;
- ✓ Christian Scholarship Foundation;
- ✓ Member, Legal Advisory Committee for Rio Grande Foundation, Inc.;
- ✓ Yale Football Y Association.

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

- New Mexico Bar Association (admitted in 1983);
- Bar for the United States District Court for the District of New Mexico (admitted in 1983);
- Bar for the United States Court of Appeals for the Tenth Circuit (admitted in 1983);
- Bar for the United States Court of Appeals for the Federal Court (admitted in 1987);
- Bar for the Supreme Court of the United States (admitted in 1987);
- Bar for the United States Court of Appeals for the Ninth Circuit (admitted March 30, 1999);
- Pro Hac Vice, United States Bankruptcy Court for the Northern District of Texas for the Lubbock Division, In re: First Federal Bank, formerly First Federal Savings Bank of New Mexico v. South Plains Car & Truck Plaza, Inc. d/b/a Red Raider County Dodge, Jim Richardson and Charlene Richardson, No. 00-50086-RLJ-11, Adversary No. 00-5032 (admitted September 17, 2001);
- Pro Hac Vice, United States District Court for the Northern District of California, Joan C. Howard v. Steven L. W. Hui, Michael C.Y. Wong, Wong's International (Holdings) Limited and Gatcombs Corp. N.V., No. C 92-2742 CAL. (admitted June 30, 1998).

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material

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

- "Right to Bear Arms Born of Natural Law," Foundation of Our Freedom Second in Series to celebrate the 200<sup>th</sup> anniversary of the Bill of Rights, Albuquerque Journal 111<sup>th</sup> year, No. 343, December 9, 1991;
- Letter from James O. Browning to the Honorable Jack Stahl, Lt. Governor (dated March, 1990), reprinted in Vol. 1, Issue 3 of The Bernalillo County Bugle at 3, 6 (Spring 1990) (published by the Bernalillo County Republican Party).
- "Justice Powell Called Core of Supreme Court," Nov. 8, 1987, Hobbs Daily News-Sun;
- Letter to Editor on Legal Services Corporation, reprinted in State Bar Bulletin, Vol. 26, No. 42, Oct. 22, 1987;
- "AG's Office Upholds Watchdog Tradition," March 5, 1987, Albuquerque Journal;
- "AG's Advice on Tie-breaking Vote Based on Law, not Politics," Feb. 6, 1987 Albuquerque Journal;
- Att'y Gen. Op. No. 87-41 (1987) (public sector collective bargaining);
- Att'y Gen. Op. No. 87-56 (1987) (whether there is a current binding collective bargaining agreement between a state agency and AFSCME);
- Att'y Gen. Op. No. 87-01 (1987) (whether the Lt. Governor may vote in the case of a tie in the election of the president pro tempore);
- Hughes v. Oklahoma and Baldwin v. Fish and Game Commission: The Commerce Clause and State Control of Natural Resources, 66 Va. L. Rev. 1143 (1980).

#### LECTURES, SPEECHES, AND OTHER PUBLIC PRESENTATIONS

- Panel Member on "Changes in the Technology of Voting and Vote Counting: or, How to Forestall a Florida Fiasco in New Mexico and Other States" at The 2001 Conference on Campaigns, Elections, Redistricting, and Money to Fund the Elections System, a continuing legal education seminar sponsored by The University of New Mexico School



of Law and State Bar of New Mexico, Albuquerque, New Mexico (April 20, 2001);

- Presentation on "Preparing the Fact Witness for his Deposition" in continuing legal education seminar on "Taking and Defending Effective Depositions in New Mexico," Lorman Education Services, Albuquerque, New Mexico (May 16, 2000);
- Presentation on "Appellate Law Practice" in continuing legal education seminar, Lorman Education Services, Albuquerque, New Mexico (December 16, 1993);
- Mock Appellate Advocacy Judge, The University of New Mexico School of Law, Advocacy Seminar (April 1993);
- Presentation on "Proceedings in the Supreme Court of the United States" in continuing legal education seminar on "Appellate Law Practice," Lorman Education Services, Indian Pueblo Cultural Center, Albuquerque, New Mexico (December 11, 1992);
- Prayers, Fundraiser for William Davis, Republican candidate for Attorney General of New Mexico, Hyatt Hotel, Albuquerque, New Mexico (Aug. 11, 1990);
- Speech, Pro-Life Rally, Bataan Park, Albuquerque, New Mexico (April 28, 1990);
- Speech on Pro-Life Plank, Republican Party of New Mexico Platform Convention, Clarion Four Seasons Hotel, Albuquerque, New Mexico (April 7, 1990);
- Presentation on "Practice Before Administrative Agencies," continuing legal education seminar, University of New Mexico School of Law, Albuquerque, New Mexico, December 1, 1989;
- Lecture, "The Fourth Amendment and The Exclusionary Rule," Professor Leo Romero's Criminal Law Class, University of New Mexico School of Law, Albuquerque, New Mexico (April 3, 1989);
- Expert Witness Testimony before Senate Judiciary Committee, 1989 New Mexico Legislature for Senator Joe Harvey on Parental Consent Bill, Santa Fe, New Mexico (March 1, 1989);
- Lecture, "Federalism: In Search of a Neutral Judicial Principle," Federalist Society, University of New Mexico School of Law, Albuquerque, New Mexico (Oct. 24, 1988);
- Participant in Moot Oral Argument on Hazlewood at "Media Forum: First Amendment and Freedom of Speech" Seminar, New Mexico Law-Related Education Project, Albuquerque, New Mexico (Oct. 14, 1988);

- Speaker at American Freedom Coalition Citizenship '88 Seminar, "Your Vote and the Law: How the Legislative Process Works and How to Lobby," Albuquerque AmFac Hotel, Albuquerque, New Mexico (Aug. 20, 1988);
- Accepting Statesman of the Year Award for the Honorable Hal Stratton, Attorney General of New Mexico, National Right to Work Awards Luncheon, Board of Directors Annual Meeting and 13th Annual Concerned Educators Against Forced Unionism Seminar, Crystal City, Virginia (May 14, 1988);
- Lecture, "Alternatives to the Exclusionary Rule," Professor William S. Dixon's Constitutional Law Class, University of New Mexico School of Law, Albuquerque, New Mexico (1988);
- Many Legislative Committee Appearances on behalf of Attorney General Hal Stratton from December, 1986 to February, 1988;
- Introduction of the Honorable Patrick E. Higginbotham, Circuit Judge, United States Court of Appeals for the Fifth Circuit, Inaugural Speaker for New Mexico Federalist Society (November, 1987);
- "Prayer in New Mexico Schools," Talk for Inez Elementary School PTA Meeting, Albuquerque, New Mexico (Sept. 15, 1987);
- Judge, High School Moot Court Competition, New Mexico Law-Related Education Project, Albuquerque, New Mexico (April, 1987);
- Panel Member, "Views on Preparing Petitions and Oppositions to Certiorari - How to Get in or Stay Out Of the High Court": Judge, Moot Court Panel, Supreme Court Seminar, National Association of Attorneys General, Washington, D.C. (Jan. 22-23, 1987);
- Speaker, "Legislative Update," Victims Rights Convention, Albuquerque, New Mexico (1987);
- Lecture, "Public Sector Collective Bargaining for New Mexico Schools," New Mexico Association of School Superintendents, Santa Fe, New Mexico (1987);
- Class Presentation on SEC v. Dirks and Insider Trading, Professor Frank Gill and Dean Theodore Parnall's Securities Law Seminar, University of New Mexico School of Law, Albuquerque, New Mexico (April, 1986);
- Lecture, "Raising Capital" for Dr. Gordon R. Bopp's "Entrepreneurship Class," Socorro Technological Innovation Center, New Mexico Institute of Mining & Technology, Socorro, New Mexico (Feb. 16, 1986);

- Judge, Intramural Moot Court Competition, University of New Mexico School of Law, Albuquerque, New Mexico (April 24, 1984); and
- Master of Ceremonies and Introduction for the Honorable J. Skelly Wright, Senior Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit, Annual Banquet of Virginia Law Review, Charlottesville, Virginia (Feb. 14, 1981).

I could not find copies of all my speeches or CLE presentations. I did not attempt to locate all my notes for Sunday school classes or sermons because those are not really "speeches."

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

My health is excellent. My last physical examination was January 2003.

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

I have not been a judge.

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

I have not been a judge.

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

- Chairman, New Mexico Sentencing Guidelines Commission, appointed by Governor Garrey Carruthers May, 1988; confirmed by New Mexico Senate, March 1989; resigned June, 1989;
- Deputy Attorney General, 1987-1988; appointed by the Honorable Harold D. Stratton, then Attorney General and now Chairman of the United States Consumer Product Safety Commission;

17. Legal Career:

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

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

Justice Lewis F. Powell, Jr.  
The Supreme Court of the United States  
Washington, D.C. 20543  
1982-1983, Law Clerk

The Honorable Collins J. Seitz, Chief Judge  
United States Court of Appeals for the Third Circuit  
Federal Building, 844 King Street  
Wilmington, Delaware 19801  
1981-1982, Law Clerk

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

I have not practiced alone.

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

Browning & Peifer, P.A.  
20 First Plaza, Suite 725  
Post Office Box 25245  
Albuquerque, New Mexico 87125

(505) 247-4800  
Shareholder and Director (1990-present)

Rodey, Dickason, Sloan, Akin & Robb, P.A.  
201 Third Street N.W., Suite 2200  
Post Office Box 1888  
Albuquerque, New Mexico 87103  
Shareholder and Director, February 1988 to June 1990

Attorney General Harold D. Stratton  
New Mexico Department of Justice  
Bataan Memorial Building, Suite 260  
Santa Fe, New Mexico 87503  
1987-1988, Deputy Attorney General

Rodey, Dickason, Sloan, Akin & Robb, P.A.  
201 Third Street N.W., Suite 2200  
Post Office Box 1888  
Albuquerque, New Mexico 87103  
1983-1987, Associate

Covington & Burling  
1201 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
Summer 1981, Summer Associate

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

While at the Rodey law firm, I worked in the corporate department and the commercial litigation department, eventually deciding that I enjoyed litigation more than a corporate practice. I then concentrated on commercial litigation, particularly on the more complex cases in the office -- antitrust, securities fraud, and some civil rights. Most of my work was for corporate defendants and for governmental entities.

When I became Deputy Attorney General in 1987, my clients were entirely governmental entities and governmental officers and agents. I advised all the agencies of the state, had an active litigation practice in both state and federal court, and also was involved in approving all new prosecutions and presentations to grand juries.

When I returned to Rodey, I returned to the commercial litigation department. My practice resembled what it had been from 1983 to 1986. Most of my work was for corporate defendants and for governmental entities.

In 1990, when I co-founded Browning & Peifer, P.A., my practice began to change. While my practice initially resembled my work at Rodey, and I primarily represented corporate defendants in court, our small firm began to take more plaintiff cases. While my own practice for many years resembled what it was at Rodey, representing corporate clients as both defendants and plaintiffs, the firm has always been about 60% billable work and 40% contingency, which is for plaintiffs. Our firm is presently about 50-50 between billable and contingency work, with most of my own practice now being for plaintiffs, most of whom are individuals.

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

At Rodey, typical clients were: Mobil Oil, Shearson Lehman Brothers/American Express, Business Men's Assurance Company, Valley Improvement Association. I specialized in complex commercial litigation, particularly those in federal court involving federal substantive and procedural law -- antitrust, securities, and class actions.

At the Attorney General's office, I primarily did the state's civil work. I represented the Governor, the Corrections Department, Human Services Department. I tried to do the Attorney General's high profile cases at the Supreme Court and in federal court involving water and tax cases, civil rights cases involving the prisons and mental institutions, public employment issues, legislative retirement, and public retirement fund.

At Browning & Peifer, I have continued to represent many corporate clients -- Prudential Securities, Shearson, Texaco, Mellon Bank -- and governmental agencies and officials -- Governor Gary Johnson, the Department of Taxation and Revenue, New Mexico Coal Surface Mining Commission. However, I am currently representing a number of individuals and small companies against insurance companies and governmental agencies.

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

Almost all our firm work is litigation, so I appear in court frequently. I have been mostly a litigator since I left law school. The number of hearings and trials varies greatly; I am sometimes in the courtroom several times a week and month, and then I will sometimes go a while without being in court. But I am often during those stretches in discovery or filing briefs.

2. What percentage of these appearances was in:  
(a) federal courts;

45%

(b) state courts of record;

50% state court

(c) other courts,

5% arbitrations, state agency proceedings.

3. What percentage of your litigation was:

(a) civil;

99%

(b) criminal

1%.

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

I recall ten cases that I have tried to a judgment. I was lead counsel for my client in three, junior counsel in two, and co-counsel in five. I have had other trials and many evidentiary hearings, and have had many other cases end with a judgment as a result of the court granting motions to dismiss or motions for summary judgment.

5. What percentage of these trials was:

(a) jury;

60 % of the above trials were jury trials.

(b) non-jury.

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

participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

**ANSWER:**

It is difficult for me to pick the ten most significant cases, so I tried to pick four representative cases from my Rodey years, two from the Attorney General years, and four from the last 13 years with Browning & Peifer, P.A.

**Brashar v. Mobil Oil Corp., 626 F.Supp. 434 (D.N.M. 1984)**

Summary of Case: The Plaintiff, Brashar, worked on a drilling rig for third-party defendant Coleman Drilling Company. Brashar alleged that he suffered injuries from hydrogen sulfide poisoning, but could not sue Coleman because the Workmen's Compensation Act barred an action against his employer. Brashar thus sued the producer, Mobil.

Coleman and Mobil had entered into a written drilling contract. According to the terms of the contract, Coleman agreed to indemnify and hold harmless Mobil for claims arising from personal injury to Coleman's employees resulting from the work to be performed by Coleman. Coleman also agreed to carry employer's liability insurance. Coleman agreed to reimburse Mobil for expenses and attorneys' fees in investigating or defending any claims against Mobil.

Mobil added Coleman and others as third-party defendants. Mobil moved for summary judgment asking the court to declare the contract provisions were valid and enforceable. New Mexico had enacted §56-7-2 NMSA 1978, which stated that an agreement which purports to indemnify the indemnitee for damages "arising from the sale or concurrent negligence of the indemnitee" is void and unenforceable. Coleman tried to argue that the indemnification clause violated the public policy expressed in §56-7-2 and that New Mexico courts should not enforce the contract. The district court rejected this argument, holding that there was no conflict between Texas and New Mexico law. The court found contractual indemnity is permitted, if covered by liability insurance, under both states' law.

Hence, the indemnification provision was valid if covered by liability insurance. If Coleman failed to provide such insurance, it would be liable for resulting injury to Mobil for breaching its promise to provide such insurance. Thus, the court entered summary judgment for Mobil.



The case settled shortly after the court granted the summary judgment. Mobil paid nothing. It received some reimbursement of its fees and costs.

My Participation and final disposition: I represented Mobil and was involved in the case from beginning to the end. I was the associate on the case, taking care of the document productions, many depositions, and witness interviews. Most important, I drafted the successful motion for summary judgment.

(a) Dates: 1983 to 1985

(b) Court: United States District Court for the District of New Mexico

The Honorable Bobby R. Baldock,  
Senior Judge, United States Court of Appeals for the  
Tenth Circuit (then District Judge, United States District Court for the  
District of New Mexico)

(c) My co-counsel:

Jackson G. Akin  
Rodey, Dickason, Sloan, Akin & Robb, P.A.  
201 Third Street N.W., Suite 2200  
Post Office Box 1888  
Albuquerque, New Mexico 87103  
Telephone: (505) 765-5900

Counsel for Plaintiff Gary Brashar:

David Pittard  
formerly of: Briones & Pittard, P.A.  
333 East Main Street  
Farmington, New Mexico 87401  
(505) 325-0258

Mr. Pittard now works and resides, I believe, in Texas:

1304 San Antonio Street  
Austin, Texas  
(512) 472-3223  
and/or  
404 Sycamore Drive  
Cedar Park, Texas  
(512) 260-8599

Counsel for Third-Party Defendant Reliance Insurance Co.:

Paul Butt  
Alfred L. Greene, Jr.  
Butt, Thornton & Baehr  
4101 Indian School Rd., NE, Suite 300S  
Post Office Box 3170  
Albuquerque, New Mexico 87190  
(505) 884-0777

Counsel for Third-Party Defendants George Coleman and  
Coleman Drilling Company:

Richard L. Gerding  
Gerding & O'Loughlin  
Post Office Box 1020  
Farmington, New Mexico 87499-1020  
(505) 325-1804

Counsel for Third-Party Defendant Portable Logging and St. Paul Ins.  
Corp.:

Margo J. McCormick  
Clerk for the Honorable Richard L. Puglisi  
United States Magistrate  
333 Lomas Blvd., NW, #730  
Albuquerque, New Mexico 87102  
(505) 348-2360

[Ms. McCormick then worked for Miller, Stratvert, Torgerson & Brandt in  
Albuquerque, New Mexico.]

Docket No.: Civ. No. 83-1226BB

**Phelps Dodge Corp. v. Revenue Division of the New Mexico Department of Taxation  
& Revenue, 103 N.M. 20, 702 P.2d 10 (Ct. App. 1985), cert. denied, June 25, 1983.**

Summary of Case: In 1983, the New Mexico Court of Appeals held that certain mining companies were exempt from the payment of compensating and gross receipts tax by reason of their payment of the resources tax. Phelps Dodge filed a request for a refund of compensating taxes previously paid by it during the reporting period of 1980 through 1983. The Department did not immediately rule on the request for refund, but instead went to the legislature and secured the passage of HB6, which modified the right to claim tax exemptions. The legislative amendment expressly stated that the judiciary misconstrued the statute. After securing the

retroactive legislation, the Department then denied Phelps Dodge's refund request.

Phelps Dodge sued the Department for a tax refund. Phelps Dodge filed a motion for partial summary judgment. The Court entered a summary judgment for Phelps Dodge, directing the Department to refund compensating taxes previously paid by Phelps Dodge incident to its mining operations in New Mexico.

The Department appealed. The Court of Appeals held that a request for tax refund under §7-1-26 NMSA was a "pending case" within the meaning of art. IV, §34 of the state constitution and that the legislature's enactment of HB6, with retroactive application, violated the state constitution. The Court of Appeals also rejected the Department's contention that the statute was curative and held that HB6 was a change of law, not a clarification. The court held that HB6 had no retroactive effect. The Supreme Court denied the Department's petition for certiorari.

The Court of Appeals affirmed the district court's judgment ordering a refund. The end result was that Phelps Dodge received a multi-million dollar refund.

My participation and final disposition: My firm represented Phelps Dodge. As an associate, I played a major role in drafting the motion for summary judgment and all appellate briefs. I was involved in all phases of strategy and had direct contact with the corporate representatives for Phelps Dodge. The end result was the case settled favorably for Phelps Dodge after the major legal issues were resolved on appeal.

(a) Date: 1983 to 1985 (maybe 1986)

(b) Court(s):

First Judicial District, County of Santa Fe, State of New Mexico:

The Honorable Lorenzo F. Garcia, United States  
Magistrate  
333 Lomas Blvd., NW, Chambers #680  
Albuquerque, New Mexico 87102  
(505) 348-2320

Judge Garcia was then District Judge in the First Judicial District Court in Santa Fe;

Court of Appeals of New Mexico:

Judge (s): Donnelly (Chief Judge), Wood, and Neal;

Supreme Court of New Mexico

(c) Co-counsel:

1040

Charles L. Saunders, Jr.  
83 Via Oreada  
Corrales, New Mexico 87048  
(505) 898-9005

[Mr. Saunders was at the Rodey law firm at the time]

Counsel for the Defendant:

Frank Katz  
1300 Canyon Road  
Santa Fe, New Mexico 87501  
(505) 982-4342 (office at his home)

[Mr. Katz was, at that time, in-house counsel for the Taxation and Revenue Department].

Docket No.: 8070 at the Court of Appeals  
D-101-CV-308404920 First Judicial District

**State of New Mexico v. United States, 831 F.2d 265 (Fed. Cir. 1987)**

Summary of Case: Under the Mineral Leasing Act of 1920, Congress authorized the Secretary of Interior to lease certain federally owned lands containing oil and gas deposits to parties who would extract these resources. Lessors under this Act pay a royalty to the government of not less than 12 1/2 % of the value of the production removed from the leased land. The Secretary of the Treasury pays 50% of those proceeds to the states where the leased lands are located. In 1980, Congress enacted the Crude Oil Windfall Profit Tax Act, which imposed a tax on windfall profits realized from the extraction of domestic oil.

New Mexico originally brought suit in the United States Court for the District of New Mexico, arguing that the United States had improperly paid the state its share of federal royalties from post-tax royalties. The district court found for New Mexico, but the United States Court of Appeals for the Tenth Circuit held that the district court lacked jurisdiction. The case was transferred to the United States Claims Court.

On December 30, 1986, the Claims Court granted the United States' motion for summary judgment, holding that the payments should be made on a post-tax royalty basis. The Claims Court reasoned that the windfall profit tax is imposed upon oil, New Mexico's interest in the royalty does not become fixed until the royalty is converted into money by sale, and, therefore, New Mexico could only receive a share of the post-tax royalty.

The Federal Circuit Court of Appeals affirmed the Claim Court's judgment. The Federal Court found that the legislative history of the Windfall Profit Tax Act revealed that Congress'

purpose in taxing federal royalties was to reduce payments to the states. The Court of Appeals found that Congress did not want the states to obtain a windfall through inflated royalties that would accrue from the deregulation of the price of oil. Thus, the United States' "royalty oil" was not exempt from the windfall profit tax. The United States acted in accordance with the applicable statute when it subtracted the amount of the tax from the total royalty before it calculated the state's share of it.

My participation and final disposition: The Claims Court ruled on December 30, 1986. I became Deputy Attorney General on January 2, 1987. I helped outside counsel draft the briefs for the Federal Circuit and I argued the case in the Federal Circuit. After the State of New Mexico lost the case in the Federal Court, the Attorney General, upon my advice, decided not to seek further appellate review.

- (a) Date: 1987
- (b) Courts: United States Court of Appeals for the Federal Circuit  
Judge(s): Markey (Chief Judge), Davis, and Bissell
- (c) Co-counsel:

The Honorable Harold (Hal) D. Stratton, Chairman  
United States Consumer Product Safety Commission  
4330 East West Highway, Suite 724  
Bethesda, Maryland 20814  
Telephone: 301/504-7900

[Chairman Stratton was then the Attorney General of New Mexico]

Stephen Charnas  
Sutin Thayer & Browne, P.C.  
6565 Americas Parkway, NE, Suite 1000  
Albuquerque, New Mexico 87103-1945  
(505) 883-3413

Counsel for the United States: John S. McCarthy, Department of Justice

Docket No(s):  
District Court: D-101-CV-308404920  
Court of Appeals: 87-1210 (Appellate Docket Number)

**Jackson v. Fort Stanton Hosp. & Training School, 757 F.Supp. 1231 (D.N.M. 1990)**

- 757 F.Supp. 1243 (D.N.M. 1990)

- 964 F.2d 980 (10<sup>th</sup> Cir. 1992)

Summary of Case: Twenty-one developmentally disabled clients of the State's mental health facilities filed this civil rights class action in 1987 seeking deinstitutionalization remedies. Specifically, the plaintiffs challenged the institutionalization of developmentally disabled persons at Fort Stanton Hospital and Training School and Los Lunas Hospital and Training School.

In 1988, the district court allowed more than 125 parents and guardians of residents at Fort Stanton and Los Lunas to intervene. The Intervenor's opposed the plaintiffs' efforts to require mandatory transfer of the institutions' residents to community-based facilities.

In 1989, the district court certified a class of all persons who at the time resided and would reside at Fort Stanton and Los Lunas, or would be transferred from these two institutions to other facilities. The court created two subclasses. The original plaintiffs represented a subclass that sought both closure of Fort Stanton and Los Lunas and community placement of the residents. Intervenor's comprised the other subclass seeking to improve the conditions at the institutions, but opposing mandatory transfers of the institutions' residents.

The State filed a motion to disqualify the judge when he contacted the court-appointed expert directly. The court held that a reasonable person would not have doubted that the judge's opinion was important and was based solely on the merits of the case.

After many days of evidentiary hearings on requests for emergency relief beginning in late 1987, the main trial began in 1989 and lasted eight weeks, some in 1990. In the course of the trial, many witnesses, most of whom were presented as experts, testified; over eight hundred exhibits were admitted into evidence; and over 10,000 pages of transcripts were recorded. The case largely went against the State and the court awarded the plaintiffs substantial relief.

The Defendants did not appeal from the district court's 1990 order, but instead elected to attempt to comply with the planning and corrections process that the district court ordered. The Intervenor's, on the other hand, appealed the 1990 order, contending that the district court erred with respect to its holding that section 504 of the Rehabilitation Act and the due process clause require transfer of certain residents at Fort Stanton and Los Lunas.

The Tenth Circuit held that the portions of the district court's 1990 order requiring that the defendants submit plans both for the correction of deficiencies at Fort Stanton and Los Lunas and also for the transfer of residents whose IDTs recommend community placement was not independently appealable. The Tenth Circuit also concluded that it should not exercise its discretion at that time to address otherwise nonappealable issues. The Tenth Circuit thus reversed in part and remanded the case.

I represented: I think I represented the following Defendants (I know I represented most of the state institutions, but I do not know which ones were parties when I was Deputy Attorney General):

Fort Stanton Hospital and Training School;  
 Los Lunas Hospital and Training School  
 New Mexico Health and Environment Department  
 Dennis Boyd, Secretary of New Mexico Health and Environment Department  
 Carolyn Klintworth, Acting Administrator, Los Lunas Hospital and Training  
 School  
 David Lacourt, Ph.D., Administrator, Fort Stanton Hospital and Training School  
 New Mexico Human Services Department  
 Alex Valdez, Secretary of the New Mexico Human Services Department  
 New Mexico Department of Education  
 New Mexico Board of Education  
 Catherine Smith, Member of the New Mexico Board of Education  
 Lynn Medlin, Member of the New Mexico Board of Education  
 Rudy Castellano, Member of the New Mexico Board of Education  
 John W. Bassett, Member of the New Mexico Board of Education  
 L. Grady Mayfield, Member of the New Mexico Board of Education  
 Herman Wisenteiner, Member of the New Mexico Board of Education  
 Maria Chavez, Member of the New Mexico Board of Education  
 Melvin Martinez, Member of the New Mexico Board of Education  
 David McMann, Member of the New Mexico Board of Education  
 Millie Pogna, Member of the New Mexico Board of Education  
 Gerald Thomas, Member of the New Mexico Board of Education  
 Emmalow Rodriguez, Member of the New Mexico Board of Education  
 J. James Sanchez, Member of the New Mexico Board of Education  
 Virginia Trujillo, Member of the New Mexico Board of Education  
 Gordon King, Member of the New Mexico Board of Education  
 Alan Morgan, New Mexico Superintendent of Public Instruction  
 Jim L. Newby, Ph.D., Director of Special Education for the State of New Mexico

My participation and final disposition: This case was filed in 1987 while I was Deputy Attorney General of New Mexico. I participated in early hearing(s) and strategy. I toured all the state's mental health facilities and worked with the Governor's office, Human Service Department, the Attorney General, and outside counsel to formulate a defense strategy. I was largely responsible for selecting Joel Klein and Paul Smith to represent New Mexico. I also reviewed briefing while I was at the Attorney General's office and perhaps afterwards. I did not have much involvement in the case after I left the Attorney General's office in 1988.

- (a) Date: 1987 to 1988 (my involvement was while I was Deputy AG; the case lasted longer than that).
- (b) Courts:

United States District Court for the District of New Mexico

The Honorable James A. Parker, Chief Judge, United States District  
Court for the District of New Mexico

United States Court of Appeals for the Tenth Circuit

Circuit Judges Logan and Tacha, and the Honorable H. Dale Cook, Senior  
District Judge for the United States District Court for the Northern District of  
Oklahoma, sitting by designation.

(c) Co-counsel: There were many but the primary counsel was -

The Honorable Harold (Hal) D. Stratton, Chairman  
United States Consumer Product Safety Commission  
4330 East West Highway, Suite 724  
Bethesda, Maryland 20814  
Telephone: (301) 504-7900

[Mr. Stratton was then Attorney General of New Mexico]

Joel I. Klein  
Chancellor  
Office of the Chancellor  
NYC Department of Education  
52 Chambers Street, Room #320, B4  
New York, New York 10007  
(212) 374-0200

Paul M. Smith  
[now with Jenner & Block, 601 Thirteenth St., NW, Twelfth Floor,  
Washington, D.C. 20005, Telephone: (202) 639-6000]

Rebecca L. Brown  
Professor, Vanderbilt University School of Law  
237 Law School Building  
2201 West End Avenue  
Nashville, Tennessee 37235  
(615) 322-3239

Mr. Klein, Mr. Smith, and Ms. Brown were at the time with Onek, Klein & Farr  
in Washington, D.C.

Robert Tabor Booms  
Butt Thornton & Baehr, P.C.  
Post Office Box 3170  
Albuquerque, New Mexico 87190-3170



(505) 884-0777

[Mr. Booms was an Assistant Attorney General for the State of New Mexico]

The Honorable Tom Udall  
United States Congressman  
Third Congressional District  
502 Conner  
Washington, D.C. 20515  
(202) 225-6190

[Congressman Udall was Attorney General after Chairman Stratton. I did not work on the case with Mr. Udall]

Nancy A. Taylor  
47 Lincoln Avenue  
Northampton, Massachusetts 01060-2323  
(413) 584-6979

[Ms. Taylor was, at the time of the appeal to the Tenth Circuit, an Assistant Attorney General for the State of New Mexico]

Jerry A. Dickinson  
New Mexico Department of Health  
Post Office Box 26110  
Santa Fe, New Mexico 87502-0110  
(505) 827-0004

Beth W. Schaefer  
705 Viento Drive  
Santa Fe, New Mexico 87501  
(505) 984-8249

[Ms. Schaefer was a Special Assistant Attorney General for the State of New Mexico at the time of the trial]

Patricia E. Bustamante  
New Mexico Department of Health  
Post Office Box 26110  
Santa Fe, New Mexico 87502-0110  
(505) 827-2988

Christopher D. Coppin  
New Mexico Attorney General's Office

1046

111 Lomas Boulevard N.W., # 300  
Albuquerque, New Mexico 87102-2368  
(505) 222-9000

James P. Bieg  
Rodey, Dickason, Sloan, Akin & Robb, P.A.  
Post Office Box 1357  
123 E. Marcy Street # 101  
Santa Fe, New Mexico 87504-1357  
(505) 954-3916

[Mr. Bieg was, at the time of the trial, an Assistant Attorney General for the State of New Mexico]

Counsel for the Plaintiff: There were many, but it appears the chief counsel was:

Frank J. Laskin (not at Center any more)  
Judith A. Gran  
Timothy M. Cook (not at Center any more)  
Public Interest Law Center of Philadelphia  
51<sup>st</sup> Floor, 1735 Market Street  
Philadelphia, Pennsylvania 19103-7599  
(215) 665-8500

Peter M. Cuba  
122 Tulane, S.E.  
Albuquerque, New Mexico 87106-1440  
(505) 256-7690

Philip B. Davis  
814 Marquette, N.W.  
Albuquerque, New Mexico 87102-1959  
(505) 242-1904

Counsel for Intervenors:

Paul L. Biderman  
University of New Mexico Institute of Public Law  
1117 Stanford N.E.  
Albuquerque, New Mexico 87131-0001  
(505) 277-5006

Robert D. Levy  
Geer, Wissel & Levy, P.A.  
Post Office Box 7549

1047

20 First Plaza N.W. # 306  
Albuquerque, New Mexico 87194-7549  
(505) 243-1733

Daniel W. Shapiro  
Shapiro and Bettinger, L.L.P.  
4273 Montgomery Boulevard N.E. # 110E  
Albuquerque, New Mexico 87109-6746  
(505) 888-6463

Marlone Foster  
New Mexico Public Defenders  
301 N. Guadalupe Street # 101  
Santa Fe, New Mexico 87501-5502  
(505) 827-3931

[Ms. Foster was, at least at the time of the district court trial, with the Protection and Advocacy System for New Mexico with Developmental Disabilities]

Ann Tilford Sims  
Post Office Box 187  
10 Nightshade Court  
Los Lunas, New Mexico 87031-0187  
(505) 865-1449

[Ms. Sims was, at the time of the trial, with a firm in Belen, New Mexico]

Nancy Koenigsberg  
New Mexico Center on Law & Poverty  
5301 Central Avenue N.E. # 913  
Albuquerque, New Mexico 87108-1530  
(505) 255-2840

[Ms. Koenigsberg was, at the time of the trial, with the Protection and Advocacy System in Albuquerque]

Guardian ad Litem:

Barbara Bergman  
UNM School of Law  
University of New Mexico  
117 Stanford Drive, N.E.  
Albuquerque, New Mexico  
(505) 277-3304

Counsel for Appellants-in-Intervention:

Kent Winchester  
Post Office Box 7906  
Albuquerque, New Mexico 87194-7906  
(505) 247-3800

Roberta Beyer  
Oldaker Oldaker & Norris P.A.  
500 Marquette NW. #630  
Albuquerque, New Mexico 87102-5302  
(505) 247-3700

Vernon W. Salvador  
2400 Rio Grande Blvd., #541  
Albuquerque, New Mexico 87104-3240  
(505) 363-5868

Docket No.: CIV No. 87-0839 JP

**Lyon Development Co. v. Business Men's Assurance Company of America, 1994**  
**U.S. App. LEXIS 9589 (10<sup>th</sup> Cir. May 3, 1994), and 76 F.3d 1118 (10<sup>th</sup> Cir. 1996).**

**Summary of Case:** The Plaintiff, Lyon Development Company ("LDC") and the Defendant, Business Men's Assurance Company of America ("BMA"), had a partnership to develop a retirement resort community in Santa Fe, New Mexico. BMA exercised a buy-sell agreement. Shortly before its response time was to expire, LDC brought an action alleging that BMA's exercise of the buy-sell provision, its course of dealing, and its refusal to seek additional financing from the lender, constituted breach of contract, breach of fiduciary duty, and economic compulsion. BMA counterclaimed against LDC for breach of contract and breach of fiduciary duty.

In 1992, the district court granted partial summary judgment in favor of BMA, finding that BMA's exercise of the buy-sell provision was valid in all respects. On appeal, the United States Court of Appeals for the Tenth Circuit reversed, holding that the validity of BMA's conduct could not be determined without first developing the facts surrounding LDC's claims for breach of contract, breach of fiduciary duty, and economic compulsion.

On remand, the case was tried before a jury. The jury returned a verdict in favor of BMA on all of LDC's claims. The jury also found that LDC had breached its contract with BMA. The district court then granted BMA's motion for a judgment as a matter of law on all of the parties' claims and counterclaims, issuing an extensive rule 50(b) judgment. Finding that no reasonable jury could have returned a verdict against BMA on its claims of breach of contract for marketing

advances, the court awarded BMA \$176,094 in damages as a matter of law and later awarded interest on that amount.

On appeal of the district court's judgment, the Tenth Circuit held that the district court did not err in determining that the guaranty was unambiguous, that it did not modify the partnership, and that the guaranty did not require LDC's consent before the buy-sell provision could be invoked. The Tenth Circuit affirmed the judgment rejecting claims for breach of contract and of a fiduciary duty and for economic compulsion. The appellate court affirmed the District Court's award of costs, but reversed the district court's award of \$176,094 on BMA's counterclaim.

I represented: Business Men's Assurance Company of America.

My participation and final disposition: I was involved in this case shortly after it was filed. I was involved in all facets of discovery, and took or defended most of the depositions. I was involved in all briefing. I was second chair at trial, and took a majority of the witnesses. I had primary responsibility for the damages issues and witnesses. The case was resolved by a successful jury trial and affirmance of the judgment by the Tenth Circuit.

(a) Date: 1988 to 1996

(b) Courts:

First Judicial District Court, County of Santa Fe, State of New Mexico  
The Honorable Petra Jimenez Maes, District Judge  
(case was removed to federal court)

United States District Court for the District of New Mexico  
The Honorable Juan G. Burciaga, District Judge United States  
District Court for the District of New Mexico

United States Court of Appeals for the Tenth Circuit

1st Appeal: Circuit Judges Logan, Seymour, and Moore

2d Appeal: Circuit Judges Briscoe and Logan, and the Honorable Ralph G. Thompson, United States District Judge, United States District of Oklahoma (sitting by designation)

(c) My co-counsel:

Bruce Hall  
Edward R. Ricco  
Rodey, Dickason, Sloan, Akin & Robb, P.A.  
201 Third Street N.W., Suite 2200

1050

Post Office Box 1888  
Albuquerque, New Mexico 87103  
(505) 765-5900

and

David C. Davenport, Jr.  
Post Office Box 998  
Santa Fe, New Mexico 87504-0998  
(505) 983-1195

[Mr. Davenport was at the Rodey law firm during the time of this case.]

Gordon McCulloch  
Bradley & McCulloch  
Post Office Box 288  
Breckenridge, Colorado 80424-0288  
(970) 266-3995

Plaintiffs' counsel:

Randolph B. Felker  
Mariana G. Geer  
Felker Ish Ritchie & Greer  
911 Old Pecos Trail  
Santa Fe, New Mexico 87505-0366  
(505) 988-4483

Bruce S. Garber  
Garber & Hallmartz, P.C.  
P.O. Box 850  
Santa Fe, New Mexico 87504-0850  
(505) 983-3233

H. Vern Payne  
Payne & Rocha, P.C.  
2060 N. Main Street, #D  
Los Lunas, New Mexico 87031-6368  
(505) 865-5001

Robert M. Hall  
Payne & Hall, P.C.  
201 Third Street N.W., #1600  
Albuquerque, New Mexico 87102-3368

1051

(505) 883-1313

Charles D. Olmstead (deceased)  
Comeau, Maldegan, Templeman & Indall, LLP  
141 E. Palace Ave. (87501)  
Post Office Box 669  
Santa Fe, New Mexico 87504-0669  
(505) 982-4611

W. Patrick Harman  
The Harman Law Firm P.C.  
3355 W. White Oak Lane  
Highlands Ranch, Colorado 80129-4659  
(303) 703-6919

Joseph W. Halpern  
Heather R. Hanneman  
Holland & Hart, LLP, Denver  
555 Seventeenth Street, Suite 3200  
Denver, Colorado 80202-3979  
(303) 295-8000

(Holland & Hart was appellate counsel on the second appeal).

Counsel for Defendants Devco Enterprises, Inc. and Hensley Group Ltd.:

Stephen P. Curtis  
2701 San Pedro Dr., NE  
Albuquerque, New Mexico 87110-3300  
Telephone: (505) 884-9999

Counsel for Defendant Bradbury & Stamm Construction Co., Inc.:

Timothy M. Sheehan  
Sheehan, Sheehan & Stelzner, P.A.  
707 Broadway Blvd., NE  
Albuquerque, New Mexico 87102  
(505) 247-0411

Susan C. Leon (Little)  
Susan C. Little & Associates, P.A.  
4501 Indian School Road, NE, Suite 101  
Albuquerque, New Mexico 87190-3509  
(505) 254-7767

[Ms. Leon worked at the Albuquerque firm of Sheehan, Sheehan & Stelzner while she was representing Bradbury & Stamm]

Counsel for Defendant Toronto Dominion Inc.

David M. Lindley  
Winthrop Stimson, now Pillsbury Winthrop  
One Battery Park Plaza  
New York, New York 10004-1490  
(212) 858-1000

Docket No.: District Court: DC No. CIV-88-229-JB  
Appeal No. 1: 92-2264  
Appeal No. 2: Nos. 94-2202, 95-2000 & 95-2096

**Schmidt v. St. Joseph's Hospital, 105 N.M. 681, 736 P.2d 135 (Ct. App. 1987)**

Summary of Case: Schmidt underwent surgery for the removal of a hydrocele, which was caused by the accumulation of fluid in a testicle. The surgery was performed at St. Joseph's Hospital by Dr. Knight. The anesthesiologist, our client, was Dr. Broderick.

Schmidt sued the hospital and the two doctors, alleging malpractice and res ipsa loquitur. Our firm filed a motion for summary judgment, and the district court granted it. On appeal, the Court of Appeals affirmed the judgment.

The issue on appeal was the interaction of a plaintiff's duty under rule 56 to respond with evidence to a motion for summary judgment and the doctrine of res ipsa. The Court of Appeals held that res ipsa loquitur applied to medical malpractice actions, but did not relieve the injured person from establishing a prima facie case. The Court of Appeals held that the application of res ipsa does not negate a plaintiff's obligation to establish the existence of some genuine issue of material fact. The court also stated that expert testimony is required to rebut the prima facie showing that defendants adhered to recognized medical standards of the community and that their actions were not the proximate cause of plaintiff's injury. The Court of Appeals held that the hospital and doctors were entitled to summary judgment because the injured person failed to make a prima facie case.

I represented: Defendant Dr. Thomas E. Broderick

My participation and final disposition: I drafted the appellate brief that protected the judgment my co-counsel had secured in the district court. The case was resolved in my client's favor when the Court of Appeals affirmed the summary judgment for my client.

(a) Date: I worked on this case in 1986



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(b) Court(s):

Second Judicial District Court, County of Bernalillo, State of New Mexico  
The Honorable Philip R. Ashby, District Judge

New Mexico Court of Appeals  
Donnelly (Chief Judge), Garcia, and Fruman

(c) Co-counsel:

Bruce Hall  
Rodey, Dickason, Sloan, Akin & Robb, P.A.  
201 Third Street N.W., Suite 2200  
Post Office Box 1888  
Albuquerque, New Mexico 87103  
(505) 765-5900

Plaintiff's Counsel:

John J. Duhigg  
Duhigg Cronin Spring Berlin & Bencoe  
Post Office Box 527  
Albuquerque, New Mexico 87103-0527  
(505) 243-3751

Counsel for Defendant St. Joseph's Hospital

Carl J. Butkus  
Butkus Gay & Jahner PC  
500 Marquette Ave., NW, #720  
Albuquerque, New Mexico 87102  
(505) 842-5715

Counsel for Defendant Ian Knight, M.D.

The Honorable Bruce D. Black, District Judge  
United States District Court  
District of New Mexico  
Albuquerque Division  
Chambers 640  
333 Lomas Blvd., NE, Suite 270  
Albuquerque, New Mexico 87102  
(505) 348-2260

[at the time of this case, Judge Black was in private practice at Campbell & Black

in Santa Fe, New Mexico]

Docket No.: 8520 at Court of Appeals

**Yates Exploration v. Valley Improvement Association**,  
108 N.M. 405, 773 P.2d 350 (1989)

**Valley Improvement Association, Inc. v. Marco**, No. VA-92-468-CV, (13<sup>th</sup> Judicial  
District, County of Valencia, State of New Mexico, filed on December 30, 1992)

Summary of Case:

**Yates:** The Plaintiffs were past and present owners of lots in two subdivisions located in Valencia County, New Mexico. Horizon, a land development corporation, created VIA, a New Mexico nonprofit corporation, to be a civic organization representing the lot owners. After the formation of VIA, Horizon deeded all of the subdivision lots to VIA, who in turn deeded the properties back to Horizon subject to certain indentures. Then, between 1969 and 1981, Horizon sold thousands of individual lots subject to the indentures that empowered VIA to assess and collect annual changes on each lot.

In 1986, several VIA members and lot owners filed a case and requested that the court certify the case as a class action. The Plaintiffs in their lawsuit against VIA alleged that, while VIA had collateral funds in excess of \$15,000,000.00, VIA had actually used negligible amounts to benefit the properties. The Plaintiffs did not join in their suit the original development corporation, Horizon. The District Court denied VIA's motion to join Horizon as a necessary party to this action. VIA then attempted to join Horizon as a third-party defendant, seeking contribution, indemnity, and other relief from Horizon. The District Court dismissed the third-party complaint. The Supreme Court affirmed the dismissal.

VIA reached settlements with some of the Plaintiffs, and the Court dismissed their claims. VIA filed a motion for summary judgment against the remaining Plaintiffs. There were about nineteen (19) hearings in the summer of 1988, and considerable discovery.

After an eight-day class certification hearing, the court denied the Plaintiffs' motion for class certification.

In 1992, the Court granted the Plaintiffs leave to file an amended complaint a third time. The complaint added a new Plaintiff and ten counts -- including derivative claims and claims for actual and punitive damages -- and three officers or directors of VIA. The Court dismissed the slander of title claim, all claims for relief for predecessors in interest, and all claims for punitive damages except on three counts.

VIA filed a motion asking the Court to dismiss the Plaintiffs' challenge to the covenants' running with the land. In 1995, the Court denied VIA's motion to dismiss the Plaintiffs'

challenge to the covenants' running with the land. The case then settled.

The Court approved the Settlement Agreement and Release in Full in 1997. The Court dismissed the case with prejudice at the same time.

Marco: In 1992, VIA filed an action as creditor and lien holder to collect debts and to foreclose its liens on certain parcels of real property. Some defendants filed counterclaims. The Counterclaim sought to bring as a class action several claims that were similar to those being litigated in the Yates matter.

The counterclaim also sought class certification. VIA successfully resisted certification of the class. VIA also filed a motion to dismiss at least some of the Counterclaimants' claims.

By 1996, only one counterclaim remained. That one counterclaim brought one count to declare the covenant to pay assessments invalid. It was identical to the Count 1 in the Third Amended Complaint in the Yates matter. VIA prepared a motion for summary judgment to dismiss all that defendant's counterclaims.

By 1997, the court had dismissed all counterclaims. VIA foreclosed on the last counterclaimant's lots, and VIA conducted a foreclosure sale on some of the foreclosed lots.

I represented: Valley Improvement Association, Inc.

My participation and final disposition: I began working on the Yates case in 1988. I was involved in all phases of discovery, was one of three lawyers that was involved in the class certification hearing, was involved in the briefing of motions and the appellate briefs, handled most of the hearings, and was the primary negotiator of the settlement.

In the Marco case, I was the primary lawyer defending against the counterclaims, handling all discovery and hearings.

(a) Date: 1988 to 1997

(b) Court(s):

Thirteenth Judicial District, County of Valencia,  
State of New Mexico

District Judges for Yates case

(i) The Honorable William W. Deaton  
United States Magistrate Judge  
Chief United States District Court for the District of New Mexico  
333 Lomas Blvd., NW, Chambers #670  
Albuquerque, New Mexico 87102

1056

(505) 348-2300

[Deaton was, in the early phases of the case, a judge on the Court Second Judicial District Court, County of Bernalillo, State of New Mexico]

(ii) The Honorable Susan M. Conway  
District Judge, Division XVIII, Second Judicial District Court  
State of New Mexico  
400 Lomas Blvd., NW  
County Courthouse  
Albuquerque, New Mexico 87103  
(505) 841-7536

(iii) District Judge for Marco case:

The Honorable John W. Pope  
District Judge, Division I  
Thirteenth Judicial District  
County of Valencia, State of New Mexico  
Valencia County Courthouse  
Los Lunas, New Mexico 87031  
(505) 865-4639

Supreme Court Justices for Yates case

Justices Scarborough, Stowers, and Baca. All are now retired from the bench. Their current addresses are:

(i) Tony Scarborough  
Scarborough Law Office  
Post Office Box 268  
Española, New Mexico 87110-7733  
(505) 268-0947

(ii) Harry E. Stowers, Jr.  
Branch Law Firm  
813 Ranchitos Rd. NW  
Albuquerque, New Mexico 87114-1208  
(505) 243-3500

(iii) Joseph F. Baca  
Albuquerque, New Mexico  
(505) 821-6881

(c) Co-counsel:

Robert St. John  
William S. Dixon  
Charles K. Purcell  
Rodey, Dickason, Sloan, Akin & Robb, P.A.  
201 Third Street N.W., Suite 2200  
Post Office Box 1888  
Albuquerque, New Mexico 87103  
(505) 765-5900

Eric D. Lamphere  
6609 Casa Loma Loop, NE  
Albuquerque, New Mexico 87109  
(505) 857-0663

Counsel for Plaintiffs in Yates case: There were a number of counsel over the years, but the primary lawyers were:

The Honorable Jonathan B. Sutin, Judge  
New Mexico Court of Appeals  
1117 Stanford, NE  
Albuquerque, New Mexico 87131  
(505) 841-4609

[then an attorney at the Albuquerque law office of Sutin, Thayer & Browne]

Roger V. Eaton  
Eaton Martinez Hart & Valdez, P.C.  
1801 Rio Grande Blvd., NW  
Albuquerque, New Mexico 87104-2566  
(505) 343-1776

Vernon W. Salvador  
2400 Rio Grande Blvd., #541  
Albuquerque, New Mexico 87104-3240  
(505) 363-5868

Ronald Greenspan  
Greenspan & Mulvaney  
142 Lincoln Ave., #400  
Santa Fe, New Mexico 87501-2067  
(505) 982-2333

[Mr. Greenspan was with the Cohen & Cohen firm of Santa Fe at the time

we were working on the VIA case]

Counsel for Defendants-Counterdefendants in Marco case:

There was a number of counsel and some defendants/counterdefendants were pro se, but one significant lawyer was:

Louis N. Colon  
1421 White Plains  
Bronx, New York 10472-1702  
(718) 863-5286

Counsel for Third-Party Defendants Horizon Corporation:

John Houghton  
Modrall, Sperling, Roehl, Harris & Sisk, P.A.  
P.O. Box 2168  
500 4th St., NW, #1000  
Albuquerque, New Mexico 87102

Kevin T. Riedal  
formerly w/Modrall, Sperling, Roehl, Harris & Sisk, P.A.  
500 4th St., NW, #1000  
Albuquerque, New Mexico 87103-2168  
(505) 848-1800

[current address: 4740 Quail Run, Las Cruces, New Mexico 75235-1611]

J. Douglas Foster  
(formerly with Modrall, Sperling, Roehl, Harris & Sisk, P.A.)  
now at Foster Johnson McDonald Lucero Koinis, LLP  
40 First Plaza, NW, #735-N  
Albuquerque, New Mexico 87102-2175  
(505) 243-3000

Docket No.: Yates case: VA-86-61-CV/MS-CV-86-61

Marco case: VA-02-468-CV

Supreme Court Docket No. in Yates: No. 17790

**Ballen v. Prudential Bache Securities, Inc., 23 F.3d 335 (10<sup>th</sup> Cir. 1994)**

Summary of Case: The plaintiff, Sam Ballen, sued Prudential Bache Securities, Inc., and Prudential Bache Properties, Inc. ("Prudential") alleging damages arising from Prudential's violation of Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. §1961.

Prudential filed a motion to dismiss Mr. Ballen's complaint. The district court dismissed Mr. Ballen's first complaint but without prejudice, allowing Mr. Ballen an opportunity to plead his fraud allegations with more specificity. Mr. Ballen filed an amended complaint, and Prudential filed a second motion to dismiss. The district court dismissed Mr. Ballen's amended complaint with prejudice pursuant to rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to plead the racketeering acts with sufficient particularity to state a RICO claim.

On appeal, the Tenth Circuit did not address all of the issues, because it found that the statute of limitations had not been tolled and thus Mr. Ballen's claims were time barred. The Tenth Circuit affirmed the District court's judgment for Prudential.

I represented: Prudential Bache Securities, Inc. and Prudential Bache Properties, Inc.

My participation and final disposition: I was the lead attorney on all aspects of the case, helping to draft all briefs and arguing the cases in the District Court and in the Tenth Circuit. The Tenth Circuit affirmed the District Court's judgment for Prudential and against the Plaintiff, Mr. Ballen.

(a) Date: 1993 to 1994

(b) Court(s):

United States District Court for the District of New Mexico:  
The Honorable Juan G. Burciaga, United States District  
Judge;

United States Court of Appeals for the Tenth Circuit:

The Honorable Byron R. White, Associate Justice of the  
Supreme Court of the United States, sitting by designation  
pursuant to 28 U.S.C. 294 (a); Circuit Judges Tacha and  
Brorby

(c) Co-counsel:

Jane Wishner  
Browning & Peifer, P.A.  
20 First Plaza, Suite 725  
Albuquerque, New Mexico 87102  
(505) 247-4800

Plaintiff's Counsel:

R.A. Dean Carlton  
The Carlton Firm, P.C.  
Dallas, Texas

[Mr. Carlton now works for Fiedler, Akin, Frank & Carlton, 12801 North Central Expressway, #450, Dallas, Texas 75243-1881, (972) 490-7300]

James C. Compton  
Singer, Smith & Williams, P.A.  
Albuquerque, New Mexico

Mr. Compton is now with:

Butt, Thomson & Baehr  
4101 Indian School Rd., NE, Suite 300S  
Post Office Box 3170  
Albuquerque, New Mexico 87190  
(505) 884-0777

Docket Nos.:

District Court: D.C. No. CIV-91-519-JB  
Tenth Circuit: No. 93-2083

**Baker v. Yogi Bhajan, a/k/a Harbhajan Singh Yogiji Khalsa, a/k/a Siri Sing Sahiob Harbhajan Singh Khalsa Yogiji, et. al., 117 N.M. 278, 871 P.2d 374 (1994)**

Summary: The plaintiff, Baker, was a recruit in the New Mexico State Police Academy. The State Police Department ("NMSP") discharged him. Before becoming a candidate for employment as a police officer with the NMSP, Baker had been a member of the Sikh community and had been an employee of AKAL Security, Inc. a Sikh-run business.

Baker sued members of the Sikhs and operators of AKAL Security, Inc. (the "Sikhs") for defamation. Baker alleged that the NMSP dismissed him because the Sikhs maliciously defamed him to NMSP officials, the New Mexico Attorney General, and the New Mexico Governor's Office. The defendants filed a motion for summary judgment, arguing that the Sikhs' statements to government officials about Baker were privileged.

The District Court granted an award of summary judgment against Baker and in favor of the Sikhs. The District Court granted the Sikhs' motion for summary judgment on the grounds of absolute privilege. The Court of Appeals was unable to reach a decision and certified the case to the Supreme Court. The Supreme Court concluded that certain alleged defamatory statements were absolutely privileged under Baker's consent to waiver of liability and that summary judgment based upon these statements was proper. The Supreme Court thus affirmed in part and reversed in part.



On remand, the parties conducted further discovery. The defendants filed a motion for summary judgment. The District Court denied the motion and a motion to reconsider. The case subsequently settled.

The parties I represented:

- (i) Guru Terath Singh Khalsa
- (ii) Guru Jot Singh Khalsa
- (iii) Hari Kaur Khalsa
- (iv) Sikh Dharma of New Mexico, Inc.
- (v) 3HO Foundation of New Mexico, Inc.
- (vi) 3-H-0 Foundation
- (vii) Siri Singh Sahib of Sikh Dharma Brotherhood

My participation and final disposition: I became involved when the case was at the appellate level. I argued the case in the Court of Appeals; the motion for summary judgment and the motion to reconsider in the District Court on remand; and conducted all discovery for my clients on remand.

The case settled after the Supreme Court's decision.

- (a) Date of representation: 1990 to 1998
- (b) Court(s):

First Judicial District Court, County of Santa Fe, State of New Mexico

The Honorable Steve Herrera, District Judge

The Honorable Stephen Pfeffer, District Judge (Division VI)

Court of Appeals of New Mexico

The Honorable Harris L. Hartz,  
then Judge on the New Mexico Court of Appeals  
(now a Judge on the United States Court of Appeals for the  
Tenth Circuit.)

The Honorable William W. Bivins, then Court of Appeals Judge  
(now retired);

The Honorable Pamela B. Minzner, then Court of Appeals Judge  
(now Supreme Court Justice);

Supreme Court of New Mexico

The Honorable Stanley F. Frost, Justice (deceased)

The Honorable Richard E. Ransom, Justice (retired)

The Honorable Justice Joseph F. Baca, Chief Justice (retired)

(c) Co-counsel:

Jane B. Wishner  
Browning & Peifer, P.A.  
20 First Plaza, Suite 725  
P.O. Box 25245  
Albuquerque, New Mexico 87125  
(505) 247-4800

Counsel for Plaintiff:

Herbert M. Silverberg  
Silverberg Law Offices  
811 St. Michaels Drive  
Santa Fe, New Mexico 87505-7641  
(505) 989-5015

Counsel for Defendants Akal Security, Inc., Guru Taj Singh Khalsa and  
Daya Singh Khalsa:

Thomas C. Bird  
Russell Moore  
Keleher & McLeod, P.A.  
Post Office Box AA  
201 Third Street, N.W., 12<sup>th</sup> Floor  
Albuquerque, New Mexico 87103-1626  
(505) 346-4646

Counsel for Defendant Yogi Bhajan:

Daniel C. Lill  
Daniel Coit Lill, P.A.  
423 Sixth Street, N.W.  
Albuquerque, New Mexico 87102-2004

David N. Greer  
Post Office Box 27731  
Albuquerque, New Mexico 87125-7731  
(505) 842-6117

[Mr. Greer was associated with Mr. Lill's office at least in the early years of this case]

The Honorable Jonathan B. Sutin, Judge  
New Mexico Court of Appeals  
1117 Stanford, NE  
Albuquerque, New Mexico 87131  
(505) 841-4609

[Judge Sutin was, at the time of this case, an attorney at the Albuquerque law office of Sutin, Thayer & Browne]

Counsel for Amicus Curiae State Police:

Albert Roland Fugere  
NM Department of Public Safety  
Post Office Box 1628  
Santa Fe, New Mexico 87504-1628  
(505) 827-9036

Docket No. (i) District Court: D-101-CV-88 02286  
(ii) Court of Appeals: 12,519  
(iii) Supreme Court: 20,532

**Public Service Company of New Mexico, et al. v. Lyons, et al., 129 N.M. 487, 10 P.3d 166 (Ct.App.2000)**

**Summary:** PNM, a public utility company, is partial owner of the Palo Verde Nuclear Generator Station located in Maricopa County, Arizona. Federal regulations require PNM to assure that there will be sufficient funds to decommission the three units of the plant when those units have reached the end of their useful lives. In 1986, estimates projected that PNM would need to assure the availability of \$500 million for its share of decommission costs in the years 2024, 2025, and 2027.

In 1987, PNM created a settlor-directed, revocable trust to meet its decommissioning obligations. Plaintiff Mellon Bank is trustee of the decommissioning trust. The corpus of the trust was invested in a corporate-owned life insurance ("COLI") program called the Cost of Money Reduction Program ("COMReP"). COLI programs are designed to provide tax-free money to fund corporate obligations by using life insurance policies to insure corporate employees. Between 1987 and 1988, PNM used the decommissioning trust corpus to purchase 1729 life insurance policies issued by a number of Defendants and their predecessors.

The Plaintiffs -- PNM and Mellon -- alleged in their complaint that these investments were made based on representations from numerous Defendants that the returns would be

sufficient to satisfy PNM's decommissioning obligations under federal law. The Plaintiffs later discovered that the COMReP insurance investment scheme would not yield sufficient funds for PNM to meet its future obligations. This difference would have left the trust short of the decommissioning obligations by some \$372 million in date-of-license expiration dollars.

The Plaintiffs sued the Defendants under numerous theories. Some of the Defendants removed the case. The Plaintiffs moved to remand. Mellon and Towers are both citizens of Pennsylvania; thus, there was not complete diversity between the partners. The federal court found that Mellon had in fact stated a claim for negligence against Towers. The federal court also denied Tower's Motion to Dismiss Mellon and remanded to state court.

Some of the Defendants filed a motion to dismiss the complaint under rule 9(b) of the New Mexico Rules of Civil Procedure. The Court denied those motions.

By 1999, the Plaintiffs produced 70,000 pages of documents in the lawsuit. They also submitted a log book of documents that were protected by the attorney-client privilege and the work product doctrine. The Defendants filed a motion to compel production of privileged documents relevant to the Plaintiffs' assertion that they did not discover the alleged improper conduct until 1997.

The trial court granted the Defendants' motion. The district court ruled that PNM, by asserting claims of fraudulent concealment, equitable estoppel, and equitable tolling in their complaint to avoid statutory limitations, implicitly waived the attorney-client privilege and the protection of the work product doctrine as to its and its attorney's knowledge, documents, and communications that relate to the issues of fraudulent concealment, equitable tolling, or equitable estoppel as pled in the complaint. The Plaintiffs filed an application for interlocutory appeal from this order. The Court of Appeals granted the application. On appeal, the Court of Appeals held that the Plaintiffs' invoking of equitable tolling did not implicitly waive attorney-client privilege as to documents relevant to their knowledge of their claim.

After remand, the parties entered into a mediation in San Francisco before an experienced mediator. The case settled favorably to the Plaintiffs.

The party I represented: Mellon Bank, N.A., Trustee of the Public Service Company of New Mexico Master Decommissioning Trust

My participation and final disposition: I was involved in all facets of this case, including the drafting of the complaint and the shaping of the theories. I was extensively involved in the briefing, both in federal court, state district court, and the appellate court, and I argued many of the motions in the state district court. I also did much of the discovery, conducting discovery in Omaha, Nebraska and defending depositions in Atlanta and in Albuquerque.

The case settled favorably for my client after the victory in the Court of Appeals.

(a) Date of representation: March 5, 1998 to June 29, 2000 (date case

settled)

(b) Name of Court(s):

First Judicial District Court, County of Santa Fe, District of New Mexico

The Honorable T. Glenn Ellington, District Judge

The United States District Court, For the District of New Mexico

The Honorable Martha Vazquez, District Judge, United States District Court for the District of New Mexico

Court of Appeals of New Mexico

The Honorable Rudy S. Apodaca, Judge

The Honorable Richard S. Bossom, Judge  
(now Supreme Court Justice)

The Honorable M. Christina Armijo, Judge  
(now a federal court judge)

The case was assigned to the following state judges, but they were excused because of challenges: The Honorable Carol Vigil; the Honorable Petra Jimenez Maes; the Honorable Art Encinias; the Honorable Daniel A. Sanchez; the Honorable James A. Hall; the Honorable Stephen D. Pfeffer; the Honorable Michael E. Vigil; the Honorable Barbara J. Vigil.

Supreme Court: The Defendants' petition for certiorari was withdrawn as part of the settlement. The Justices on the Supreme Court at that time were:

Chief Justice Pamela B. Minzner

Justice Joseph F. Baca

Justice Gene E. Franchini

Justice Patricio M. Serna

Justice Petra Jimenez Maes

Co-counsel: David G. Campbell  
Osborn Maledon, P.A.  
The Phoenix Plaza  
2929 N. Central Ave., Suite 2100  
Phoenix, Arizona 85012-2794  
(602) 640-9306

Charles R. Peifer  
Cerianne L. Mullins  
Jane B. Wishner

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Browning & Peifer, P.A.  
20 First Plaza, Suite 725  
Post Office Box 25245  
Albuquerque, New Mexico 87125  
(505) 247-4800

Counsel for Plaintiff PNM:

David F. Cunningham  
Mary E. Walta  
White, Koch, Kelly & McCarthy, P.A.  
Post Office Box 787  
433 Paseo de Peralta  
Santa Fe, New Mexico 87501  
(505) 466-3786

Kevin V. Reilly  
4 Enebro Road  
Santa Fe, New Mexico 87508-8838

[at the time of the case, Mr. Reilly was associated with White,  
Koch, Kelly & McCarthy, P.A., in Santa Fe]

Counsel for Defendant The Equitable Life Assurance  
Society of the United States:

John W. Boyd  
Freedman, Boyd, Daniels, Hollander, Goldberg & Cline, P.A.  
20 First Plaza, Suite 700  
Post Office Box 25326  
Albuquerque, New Mexico 87125-0326  
(505) 842-9960

Richard A. Rosen  
Ronald P. Repogle  
Paul, Weiss, Rifkind, Wharton & Garrison  
1285 Avenue of the Americas  
New York, New York 10019-6064  
(212) 373-3000

Counsel for Defendant Loyd Williams:

Mel E. Yost  
Christopher M. Grimmer  
Schauer, Yost & Patterson, P.C.

1067

Post Office Box 9570  
125 Lincoln Ave. #223  
Santa Fe, New Mexico 87504-9570  
(505) 982-9911

Counsel for Defendant Kidder Peabody & Co., Inc.:

Jeffrey A. Brannen  
Wesley G. Handy  
Comeau Maldegen Templeman & Indall, L.L.P.  
Post Office Box 669  
141 E. Palace Ave.  
Santa Fe, New Mexico 87504-0669  
(505) 982-4611

Counsel for Defendants John Lyons. Financial Marketing Services, Inc. and  
COMReP, Inc.:

John M. Eaves  
Eaves, Bardacke, Baugh, Kierst & Kiernan, P.A.  
Post Office Box 33670  
6400 Uptown Blvd., N.E., #110-W  
Albuquerque, New Mexico 87176-5670  
(505) 888-4300

David H. Paige  
Nicholetti, Hornig, Campise & Sweeney  
Wall Street Plaza  
88 Pine Street, 7<sup>th</sup> Floor  
New York, New York 10005  
(212) 220-3780

Counsel for Defendant Massachusetts Mutual Life Insurance Co. and  
Connecticut Mutual Life Insurance Co.:

Lyman G. Sandy (deceased)  
Miller, Stratvert & Torgerson, P.A.  
Post Office Box 25687  
500 Marquette N.W. #1100  
Albuquerque, New Mexico 87125-0687  
(505) 842-1950

Vaughan C. Williams  
Skadden, Arps, Slate, Meagher & Flom LLP  
Four Times Square

1068

New York, New York 10036  
(212) 735-3000

Alan R. Fridkin  
Second Vice President  
General Counsel  
Massachusetts Mutual Life Insurance Co.  
1295 State Street  
Springfield, MA 01111  
(413) 744-6093

Counsel for Defendant Bernard Sperman:

Luis G. Stelzner  
Robert P. Warburton  
Sheehan, Sheehan & Stelzner, P.A.  
Post Office Box 271  
Albuquerque, New Mexico 87103-0271  
(505) 247-0411

Counsel for Defendant General American Life Insurance Co.:

Marshall G. Martin  
Stanley Kotovsky, Jr.  
Hinkle, Hensley, Shanor & Martin, L.L.P.  
500 Marquette N.W., #1300  
Albuquerque, New Mexico 87102-5300  
(505) 768-1500

Counsel for Defendant New England Mutual Life Insurance Co. and Metropolitan Life Insurance Co.:

Rex D. Throckmorton  
Charles K. Purcell  
Rodey, Dickenson, Sloan, Akin & Robb, P.A.  
Post Office Box 1888  
201 Third Street N.W. #2200  
Albuquerque, New Mexico 87103-1888  
(505) 765-5900

Donald A. Wall  
Squire Sanders & Dempsey, LLP  
Two Renaissance Square  
40 North Central Avenue, Suite 2700  
Phoenix, Arizona 85004-4498



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(602) 528-4000

Counsel for Defendant Towers Perrin, Forster & Crosby, Inc.:

William C. Madison  
Madison, Harbour, Mroz & Brennan, P.A.  
Post Office Box 25467  
201 Third Street N.W., #1600  
Albuquerque, New Mexico 87125-0467  
(505) 242-2177

Ralf B. Levey  
Daniel R. King  
King & Spalding, LLP  
191 Peachtree Street, N.E.  
Atlanta, Georgia 30303-1763  
(404) 572-4600

Counsel for Defendant Deloitte & Touche USA, L.L.P.:

John B. Pound  
Herrera, Long, Pound & Komer, P.A.  
Post Office Box 5098  
2200 Brothers Rd.  
Santa Fe, New Mexico 87502-5098  
(505) 982-8405

Frank B. Vanker  
Richard D. Bernstein  
Sidley & Austin  
One First National Plaza  
Chicago, Illinois 60603  
(312) 853-7000

Counsel for Defendants Kutak Rock & and P. Thomas Pogge:

Norman S. Thayer  
Sutin, Thayer & Browne, P.C.  
Post Office Box 1945  
6565 Americas Pkwy. N.E. #1000  
Albuquerque, New Mexico 87103-1945  
(505) 883-3390

Edward G. Warin  
McGrath, North, Mullin & Kratz, P.C.

1070

Suite 1400 One, Central Park Plaza  
222 South Fifteenth Street  
Omaha, Nebraska 68102  
(402) 341-3070

- Docket No(s):
- (i) State District Court: No. SF 98-815(c)
  - (ii) Federal District Court: CIV-98-642 MV/LCS
  - (iii) Court of Appeals of New Mexico: 20,575
  - (iv) Supreme Court: Nos. 26.445/26.446

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

(a) While I was at the Rodey firm, from 1984-1986, I was the associate at the firm on the Moncor litigation, a series of class actions involving the first bank holding company to go into bankruptcy. Our firm represented American Express/Shearson Lehman, the underwriter for Moncor's second public offering. We were initially successful in opposing class certification, but eventually settled the case.

(b) While I was Deputy Attorney General of New Mexico, I helped the State of New Mexico formulate its strategy to challenge a consent decree under which the federal court supervised the state prison system. We hired Joel Klein (former Assistant Attorney General during the Clinton Administration, now Chancellor of the New York City School system) to assist us in this litigation.

(c) While I was Deputy Attorney General, I also supervised the Civil Division, which advised all state agencies, boards, and commissions. I reviewed, edited, and approved all formal opinions, including important ones on the Public Retirement Association. I then handled the significant litigation that arose out of these issues in state district court, in the state court of appeals, and in the state supreme court.

(d) In 1998, my partner and I tried the first class action in San Francisco in many years. See Howard v. Everex Systems, Inc., 228 F.3d 1057(9<sup>th</sup> Cir. 2000). We represented the plaintiff class in a securities class action against an officer and director of Everex, a defunct maker of computers, and others in federal court.

(e) My firm represented the Governor of New Mexico in the redistricting cases in 2001 and 2002. There were two trials, one for the congressional redistricting and one for the state house's redistricting. The Governor's proposal prevailed in the congressional trial.

(f) I was a member and later chairman of the Committee on Admissions and Grievances for the United States District Court for the District of New Mexico. I was appointed and reappointed by two separate chief judges of the District. The Committee handled all applications for admissions to the bar and grievances filed against lawyers serving before the federal court for about eight years.

(g) I was one of the directors from New Mexico for the American Judicature Society. I later became the Young Lawyers' Representative on the AJS's Executive Society. I also served as a member of Judicature's Editorial Committee.

(h) Board of County Commissioners v. Liberty Group, 1994 U.S. App. LEXIS 9589 (10<sup>th</sup> Cir. May 3, 1994).

A county government in New Mexico adopted a policy of investing some of its funds in government-backed securities. The state auditor discovered one of the brokers for the county had been charging an undisclosed markup. The county plaintiff filed an action alleging defendant broker violated rule 10b-5, 17 C.R.F. 240.10b-5. The jury returned a verdict for the county. The county then served a writ of garnishment on my client, Prudential-Bache Securities, Inc. I secured an order quashing the writ. The brokers appealed the judgment; the county appealed the order quashing the writ of garnishment. The United States Court of Appeals for the Tenth Circuit reversed the judgment, thus making it unnecessary for the Tenth Circuit to consider the county's contention that the trial court erred in quashing the garnishment writ.

(i) Resolution Trust Corp. v. Currier, 1993 U.S. Dist. LEXIS 19010 (D.N.M. Oct. 25, 1993).

The Resolution Trust Corporation ("RTC") sued various former directors, attorneys, and others of a failed thrift institution. The RTC asserted that the defendants and others were liable for negligence, negligence per se, gross negligence, and breach of fiduciary duty. My clients were three elderly former directors. After lengthy and difficult negotiations, my clients and the RTC worked out a settlement agreement, even though most of the defendants did not settle at that time. The federal district court concluded that the settlement was fair, reasonable, and adequate, and would result in

substantial savings in time and money to the court and the litigants. The court approved the settlement agreement, which included a claims bar and a judgment reduction.

(j) Strata Production Co. v. Mercury Exploration Co., 121 N.M. 622, 916 P.2d 822 (1996).

My client, Strata Production Company, an oil producer, brought an action against an oil exploration company for breach of contract and negligent misrepresentation based on the defendant's failure to deliver the entire working and net revenue interests it had contracted to provide Strata in connection with a drilling farmout agreement. The trial court found for Strata. I did not try the case, but wrote the brief on appeal. The Supreme Court of New Mexico found that the parties had a unilateral contract and that the defendant had not modified its unilateral offer to Strata before Strata accepted it by performance. The Supreme Court held that the parties' farmout agreement expressly provided that it was on an option basis, that the option held open the underlying unilateral contract offer for a certain period, and that there was substantial evidence that Strata reasonably relied on the option to accept the unilateral farmout agreement within the allotted time and without modification. The opinion required the Uniform Jury Instruction Committee in New Mexico to revise certain UJI's.

(k) Executive Sports Club, Inc. v. First Plaza Trust, 125 N.M. 78, 957 P.2d 63 (1998).

I represented defendant First Plaza Trust in a trial in which First Plaza Trust prevailed. The plaintiff appealed, and First Plaza moved to dismiss the appeal as untimely. While the Supreme Court denied the motion to dismiss the appeal, the published opinion has clarified the law in New Mexico on when an appellant may elect to file a timely notice of appeal when the prevailing party files a motion for attorneys' fees. First Plaza subsequently prevailed on the appeal, and the judgment was affirmed.

(l) I served as the mediator in TMBR/Sharp Drilling, Inc., et al. v. Arrington Oil & Gas, et al., No. CV-2001-315 C (Fifth Judicial District, County of Lea, State of New Mexico). The case was a very complex oil and gas litigation, and the case was successfully mediated over a two day period in Midland, Texas.

(m) While Deputy Attorney General of New Mexico, I had supervisory responsibility for the Consumer Protection Division. I assisted the Honorable Hal Stratton, then Attorney General and now Chairman of the Consumer Product Safety Commission, on two key disputes:

i. The Attorney General's Office brought the largest single consumer protection action in the State's history against Frontier Ford and several of its employees. See State v. Frontier Ford, Inc., CV-88-08375 (2d Jud. Dist. Ct. filed Nov. 3, 1988). The Attorney General filed a lawsuit, alleging that the defendants had systematically and willfully engaged in a pattern of acts designed to coerce and confuse prospective purchasers into signing documents that they did not want to sign, buying vehicles they

did not want to buy, and paying more for the vehicles than they agreed to pay. See id., Complaint ¶17. Frontier Ford subsequently (after I left the AG's office) entered into a settlement agreement with the Attorney General under which Frontier Ford was obligated to pay \$1,200,000 (\$600,000 in restitution to consumers, and a \$600,000 civil penalty to the State).

ii. Public Service Company of New Mexico ("PNM") proposed a restructuring plan because of the heavy financial burden of its \$1.2 billion investment in the Palo Verde Nuclear Power Plant in Arizona. The Attorney General opposed PNM's plan and proposed his own plan which maintained Public Service Commission ("PSC") oversight of the rate-making process and created more competition in the utility industry. PNM subsequently (after I left the AG's office) withdraw its restructuring proposal from consideration by the PSC.

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

**ANSWER:** I currently do not have a deferred income arrangement with my law firm, but any deferred compensation will be a sum certain determined at the time of my departure based on my percentage of work completed. My compensation from the firm will end at the time I leave the firm or no later than three months after I leave. It is difficult to determine what my final check will be from the firm, as it depends on receipts and profits during that quarter. At the time I leave, I will also receive my investment in the firm, which is about \$42,500.00.

I cannot withdraw money from my firm's profit-sharing and pension plan until next year. I will then roll those retirement funds into my individual retirement accounts.

I will continue to own my investments, but do not expect to receive any other benefits from previous business relationships.

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

I intend to follow rigorously the requirements of 28 U.S.C. §455 and the Judicial Code of Conduct for United States Judges.

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

**ANSWER:** No.

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

Copy of the financial disclosure report required by the Ethics in Government Act of 1978 is attached.

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

**SEE ATTACHMENT - Net Worth statement**

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.
- Member of Executive Finance Committee for "People for Pete" Domenici campaign (Senator Domenici's reelection campaign) (2002);
  - Co-hosted fundraiser for Senator Domenici on July 1, 2002 in Roswell, New Mexico;
  - Host fundraiser for election campaign for the Honorable Rod Kennedy, Judge, New Mexico Court of Appeals (2002);
  - Contributions to many candidates and the New Mexico Republican Party in 2002 election cycles and other election cycles;
  - Co-Chairman, New Mexico Layers for Bush-Cheney (2000);
  - Member, Finance Committee, Campaign to Re-elect Judge Jonathan Sutin (2000);
  - Our firm was retained in 1992 by the Buchanan campaign to get him on the Republican primary ballot, which we successfully did. We were paid for that work. Neither I nor the firm played any other role in that campaign;

- Treasurer and campaign chairman, Marshall for State Senate (1984-1986);
- Bernalillo County GOP Ballot Security Committee (1984-1986);
- Member, Harris Hartz for New Mexico Supreme Court Steering Committee (1985 to Spring 1986);
- Hosted fundraiser for Steve Schiff's campaign for congress (1988);
- Dinner Committee, then Senator and later Vice-President Dan Quayle, Albuquerque, New Mexico (1988);
- Hosted fundraiser for Corky Morris' campaign for U.S. Senator (1988);
- Assisting Lawyer for Kerry Morris, Republican candidate for metropolitan judge, in O'Toole v. Morris, No. CV-86-02806 (2d Judicial District Bernalillo County, New Mexico, hearing on September 9, 1986), rev'd No. 16,655 (S. Ct. 1986) (ballot case);
- I have not listed all the contributions and fundraisers that I have made and attended. I have also not listed yard signs I have put in my yard or vocal support given.



Senator CORNYN. Thank you.  
Judge Cardone?

**STATEMENT OF KATHLEEN CARDONE, NOMINEE TO BE  
DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TEXAS**

Judge CARDONE. Senator, I want to thank all of the people that worked so hard in the nominating process to get me here, and I would like to very much thank my family, who have traveled from El Paso, Texas, and the State of New York and the State of Ohio to be here in attendance. And I appreciate being here.

Thank you.

[The biographical information of Judge Cardone follows:]

## I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).  
*Answer:* Kathleen Cardone, Kathleen Cardone Rodriguez
2. Address: List current place of residence and office address(es).  
*Answer:* Residence: El Paso, Texas  
Office: TAMS, 1444 Montana, Suite 205, El Paso, TX, 79902
3. Date and place of birth.  
*Answer:* December 25, 1953; Medina, New York
4. Marital Status: (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).  
*Answer:* Bruce E. Neugebauer  
Employed: Intel Analyst, H.I.D.T.A., Federal Building, 600 South Mesa Hills, El Paso, Texas, 79912.
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.  
*Answer:* J.D. , May 12, 1979  
August, 1976 to May, 1979  
St. Mary's School of Law  
One Camino Santa Maria  
San Antonio, Texas 78284  
  
Bachelor of Arts, May 11, 1976  
August, 1971 to May, 1976  
State University of New York At Binghamton  
Binghamton, New York  
Double Major: Spanish Language and Literature/Latin American Studies  
  
Andean Center for Latin American Studies  
August, 1974 to June, 1975  
Quito, Ecuador  
non-degree
6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, non-profit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor or employee since graduation from college.  
*Answer:* From January 1, 2001 to the present I have been an assigned/visiting Judge for the State of Texas. I preside over both civil and criminal trials. My current assignment is to the 34<sup>th</sup> Impact Court for El Paso County, Texas, where I preside over criminal cases involving drug-related offenses.

From January 1, 2001 to the present I have been working as a mediator. The mediation work I have done has involved both state and federal lawsuits. I have performed 100s of hours of mediations in civil matters including medical malpractice, employer/employee litigation, wrongful death and personal injury cases. I have also acted as a hearing officer for various employer/employee disputes.

From January 1, 1997 to the present I have been employed as a part-time instructor with the El Paso Community College where I teach a course entitled *Law and Legal Terminology*.

From September 21, 1999 to December 31, 2000, I served as Judge of the 388<sup>th</sup> Judicial District Court where I set up policy and procedures for a newly created state district court. As the first judge of that court it was my responsibility to implement the legislative mandate for a specialized court. It was during this period that I also developed and founded the El Paso County Domestic Relations Office.

From January 1, 1997 to September 21, 1999 I was employed as a mediator where I handled all types of civil litigation at both the federal and state level.

From November 8, 1995 to December 31, 1996 I served as Judge of the 383<sup>rd</sup> Judicial District Court. I presided over a court of general jurisdiction (both criminal and civil) with an emphasis on family law matters. During my tenure as Judge of the 383<sup>rd</sup>, I created the first specialized family law district court for El Paso County and I established a unified family court docket.

From December 14, 1990 to November 8, 1995, I was an Associate Judge with the Family Law Court of El Paso County, Texas. As an Associate Judge I presided over all assigned family law cases including divorce, child custody, child support and enforcement.

From October, 1983 to December, 1990 I was Judge of the Municipal Court #5 for the City of El Paso, Texas. I presided over Class C misdemeanor violations and performed magistrate duties.

From January, 1980 to December, 1990 I was a self-employed attorney in private practice where I handled civil, criminal and family law matters.

From August 1979 to June, 1980 I was a briefing attorney for the Honorable Philip A. Schraub, a United States Magistrate for the Southern District of Texas. In addition to research, I was assigned Social Security cases and prisoner's petitions.

Throughout my time in El Paso, Texas, I have served as a Member of the Board of Directors for a number of non-profit organizations. Here is a list and my years of service.

*Member, Board of Directors*

Upper Rio Grande Workforce Development Board  
10<sup>th</sup> Floor, 221 North Kansas St., El Paso, TX 79901  
Spring, 2001 to Present

*Member, Board of Directors*

YWCA, Paso Del Norte Region  
1918 Texas Ave., El Paso, TX 79901  
1997 to 2002

*Member, Board of Directors*

El Paso Holocaust Museum and Study Center  
7100 Westwind Dr., El Paso, TX 79912  
1997 to 2002

*Member, Board of Directors*

El Paso Bar Foundation  
Lower Level, El Paso County Courthouse, 500 East San Antonio, El Paso, TX 79901  
1998 to 2002

*Member, Board of Directors*

El Paso Center for Family Violence  
3800 North Piedras Street, El Paso, TX 79930  
Fall, 2001 to Present

*Member, Board of Directors*

El Paso County Domestic Relations Office  
Lower Level, El Paso County Courthouse, 500 East San Antonio, El Paso, TX 79901  
July, 1999 to September 2001

*Member, El Paso County Mexican American Bar Association*

El Paso County Courthouse, 500 East San Antonio, El Paso, TX 79901  
1985 to Present  
President, 1987-1988

*Co-Chair, Kids VOTE El Paso*

January, 1998 to August, 1999

*Member, Board of Directors*

Child Crisis Center of El Paso  
7100 North Stevens St. El Paso, TX 79930  
January, 1997 to 1998

*Member, Board of Directors*

CASA (Court Appointed Special Advocates)  
3<sup>rd</sup> Floor, El Paso County Courthouse, 500 East San  
Antonio, El Paso, TX 79901  
January, 1997 to 1998

*Member, Board of Directors*

El Paso Association of Performing Arts  
McKelligon Canyon Pavillion, Mckelligon Road, El Paso,  
TX 79930  
January, 1997 to 1999

*Member, Board of Directors*

El Paso County Purchasing Board  
El Paso County Courthouse, 500 E. San Antonio, El Paso,  
TX 79901  
1995 to 1996

*Member, Board of Directors*

El Paso County Juvenile Board  
El Paso County Courthouse, 500 E. San Antonio, El Paso,  
TX 79901  
1995 to 1996

*Member, Gender Bias Task Force Committee*

Eighth Court of Appeals  
12<sup>th</sup> Floor, El Paso County Courthouse, 500 E. San  
Antonio, El Paso, TX 79901  
1995 to 1996

*Member, Board of Directors*

Child Welfare Board  
El Paso County Courthouse, 500 E. San Antonio, El Paso,  
TX 79901  
Vice-Chair, 1987 to 1988

*Member, Board of Directors*

YWCA, Paso Del Norte Region  
1918 Texas Ave., El Paso, TX 79901  
Spring, 1981 to Spring, 1983  
Chair, Women's Resource Center

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

*Answer:* None

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

*Answer:* None

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

*Answer:* Member, State Bar of Texas  
August, 1979 to present

Member, Board of Directors  
El Paso Bar Foundation  
1998 to Present

Member, El Paso Family Law Bar Association  
1990 to present

Member, El Paso Bar Association  
1995 to present

Member, El Paso County Mexican American Bar  
Association  
1985 to Present  
President, 1987-1988

Member, Board of Directors  
El Paso County Juvenile board  
1995 to 1996

Member, Gender Bias Task Force Committee  
Eighth Court of Appeals  
1995 to 1996

Member, Child Support Guidelines Committee  
Supreme Court, State of Texas  
1987

Member, National Association of Women Judges  
2002-present

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

**Answer:** To my knowledge, I belong to no organization which is active in lobbying before public bodies. The other organizations to which I belong are as follows:

Member, Board of Directors  
El Paso Center for Family Violence  
Fall, 2001 to Present

Member, Board of Directors  
Upper Rio Grande Workforce Development Board  
Spring, 2001 to present

Member, Executive Forum  
January, 1997 to Present

Member, Latinas 100  
1999 to Present

Member, Italian American Cultural Society  
1995-present

Member, El Paso Buffalo Bills Fan Club  
1995-present

Member, PTA – Polk Elementary School  
2001-present

Member, Insights Museum  
2002-present

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

**Answer:** *State Bar of Texas*  
Admitted: November, 1979

*United States District Court for the Southern District of Texas*  
Admitted: December 11, 1979

*United States District Court for the Western District of Texas*  
Admitted: February 24, 1981

12. **Published Writings:** List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or policy. If there are press reports about the speech, and they are readily available to you, please supply them.
- Answer:** *Judicial Ethics and Courtroom Decorum*, Panel Member, El Paso Women's Bar Association CLE, November 8, 2002  
*Collaborative Law*, TAMS Newsletter, Fall, 2001  
*When Close Isn't Good Enough – Procedural Issues on the Border*, El Paso Family Law on the Border Conference; November 9, 2001  
*Let's talk about it – Mediation in Criminal Justice*; Presented to the Texas Probation Association Annual Conference; April 11, 2001  
*Divorce Mediation or Let's Agree to Split the Sheets and the Children*, TAMS newsletters, Spring & Summer, 1998  
*Flowchart of the Judicial System*, Presented at Junior League's Court Link Seminar; August 26, 1998  
*Legal Issues*, Presented at the TAPS, Teenage Parents Seminar, Project Redirection, November, 1997  
*Mediation*, Panelist at the Advanced Family Law Course, State Bar of Texas, August, 1997  
Faculty; 22nd annual Advanced Family Law Course, State Bar of Texas, August, 1996  
*The Crisis of the 90's, Family Law and its aftermath*, Presented at the EPISD Administrator's Summer training; Summer, 1996  
*Diary of A Baby Judge or Never Having to say you're sorry*, Presented at the 1996 College for New Judges, State of Texas  
*Conservatorship: 1995 Legislation and its effect*, Presented to the El Paso County Family Law Bar Association, Fall 1995  
*The Art of Persuasion: Persuading the Judge*, Presented at the 18th Annual Marriage Dissolution Institute, State Bar of Texas, May 5, 1995  
*Rewriting Our Future*, Presented at the Young Families Conference, March 29, 1988  
*Women's Issues Today*, panelist YWCA Women's Resource Center, July 12, 1983
13. **Health:** What is the present state of your health? List the date of your last physical examination.
- Answer:** State of health: Excellent  
Last physical exam: February 18, 2003
14. **Judicial Office:** Sate (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.
- Answer:** 1. From January 1, 2001 to the present - *Assigned Judge, State of Texas*. This is neither an elected nor appointed position.



Under Texas statute, as a former District Court Judge, I now qualify to sit as an assigned judge in any county within the State of Texas. I have general jurisdiction over any criminal or civil matter brought in the Courts of the State.

2. From September 21, 1999 to December 31, 2000 - *Judge, 388<sup>th</sup> Judicial District Court*. This was an appointed position to fill a vacancy until the next general election. I presided over a court of general jurisdiction (both criminal and civil) with an emphasis on family matters.

3. From November 8, 1995 to December 31, 1996 - *Judge, 383<sup>rd</sup> Judicial District Court*. This was an appointed position to fill a vacancy until the next general election. I presided over a court of general jurisdiction (both criminal and civil) with an emphasis on family matters.

4. From December 14, 1990 to November 8, 1995 - *Associate Judge, Family Law Court*. This is an appointed position. My jurisdiction was over all family law cases filed in El Paso County, Texas, under Titles I, II, and IV of the Texas Family Code.

5. From October, 1983 to December, 1990 - *Judge, Municipal Court #5 for the City of El Paso*. This is an elected position. However, I was initially appointed to fill a vacancy until the next city election. Thereafter, I ran unopposed for two subsequent terms. My jurisdiction was over Class C misdemeanor violations committed within the City of El Paso, Texas.

15. Citations:

If you are or have been a judge, provide:

(1) citations for the ten most significant opinions you have written;

*Answer:* Since I was a trial judge, I wrote no significant opinions. However, the ten most significant cases I presided over are as follows:

1. *Steven Jones v. The Toro Company*, Cause No. 2000-2429; County Court at Law No. 3, El Paso County, Texas - This was a civil suit tried before a jury. The Plaintiff, Steven Jones, sued his former employer, The Toro Company, alleging that his employer had discriminated against him for filing a workers' compensation claim in violation of VTCA, Labor Code, Section 451. The jury found against the Defendant and awarded to the Plaintiff the following amounts: \$25,000 for lost employment benefits in the past and \$150,000 for lost employment benefits in the future;

\$300,000 for mental anguish damages; and \$30,000,000 in exemplary damages. At a hearing for entry of judgment, the court found that the evidence supported the jury findings. However, I as the trial judge, determined that the cap on exemplary damages was applicable to the case and the cap was applied. Plaintiff's attorneys were Mr. John Wenke, Esquire, 1201 N. Mesa, Suite H., El Paso, Texas, 79902, 915-532-3224; and Mr. George Andritos, Esquire, 1201 N. Mesa, El Paso, Texas, 79902, 915-577-9994. Defendant's attorneys were Ms. Chris Borunda, Esquire, and Mr. Lisa Elizondo, Esquire, Carr Flora, P.C., 5809 Acacia Circle, El Paso, Texas, 79912, 915-587-1050.

2. *State of Texas v. Jarrod Duran*; Cause No. 970D03833, 41<sup>st</sup> Judicial District Court, El Paso County, Texas – This was a criminal case tried before a jury. Jarrod Duran was charged with one count of attempted murder and six counts of attempted capital murder for allegedly shooting at the El Paso County Sheriff's Department's SWAT team when they attempted to enter his home to arrest him for the attempted murder of a woman. The jury convicted Mr. Duran of aggravated assault and six counts of deadly conduct. The jury sentenced him to eight years of confinement and a fine of \$10,000 on the aggravated assault conviction and confinement of one year and a fine of \$1,000 for the deadly conduct. On appeal (Cause No. 08-01-00110-CR, 8th Cir., TX, 2002), the judgment of the trial court was affirmed. The State's attorney was Mr. Ballard Shapleigh, Esquire, Assistant District Attorney, El Paso County Courthouse, 500 East San Antonio, El Paso, Texas, 79901, 915-546-2059. The Defendant's attorney was Mr. Dolph Quijano, Esquire, 707 Myrtle, El Paso, Texas, 79901.
3. *Heriberto Munoz v. Texas Worker's Compensation Insurance Fund n/k/a Texas Mutual Insurance Company*, Cause No. 99-3193; County Court at Law No. 3, El Paso County, Texas – This is a suit for a declaratory judgment. The issue in this case was whether or not the Plaintiff, Heriberto Munoz, had an obligation to reimburse the Defendant, Texas Worker's Compensation Insurance Fund, n/k/a Texas Mutual Insurance Company, for benefits that he had received. The Plaintiff, a painter, was injured on the job. The Plaintiff had signed a contract of employment with All Client Industries, an employee leasing facility. Mr. David Rutledge was also a signatory to that agreement.

After the Plaintiff was injured on the job, David Rutledge submitted Worker's Compensation paperwork. However, All Client Industries was a non-subscriber. A jury verdict was rendered in the 327<sup>th</sup> District Court in Cause No. 97-3212, wherein the Plaintiff was granted a money judgment against the Defendant, All Client Industries. However, the Defendant, Texas Worker's Compensation Insurance Fund n/k/a Texas Mutual Insurance Company, decided not to participate in that trial. The Defendant sought reimbursement for benefits paid to Plaintiff. Plaintiff deposited the disputed amount into the Court's registry and then sought this declaratory judgment. After a hearing before the Court, I ruled that the Plaintiff had no obligation to reimburse the Defendant and awarded the Plaintiff his attorney's fees and costs. The attorney for the Plaintiff was Ms. Gina M. Palafox, Esquire, 4157 Rio Bravo, El Paso, Texas, 79902, 915-533-4884. The attorney for the Defendant was Mr. Stephen H. Nickey, Esquire, 415 N. Mesa, El Paso, Texas, 79901, 915-533-5938.

4. *Tae Sun Smith v. Smith Foods*; Cause No. 98-2957; County Court at Law No. 3, El Paso County, Texas – This was a civil case to be tried to a jury. However, after complex discovery and motion hearing and two unsuccessful attempts to select a jury, the case was transferred after a Motion to Transfer Venue was filed by the Defendant and granted by me as the presiding judge. The Plaintiff sued the Defendant after she was mugged and assaulted outside of the Defendant's grocery store by two unknown assailants. The Plaintiff alleged a premises case stating that the Defendant did not have proper security at the store. The attorney for the Plaintiff was Mr. James F. Scherr Esquire, 109 N. Oregon Street, 12<sup>th</sup> Floor, El Paso, Texas, 79901, 915-544-0100. The attorney for the Defendant was Mr. Mark C. Walker, Esquire, 100 N. Stanton, El Paso, Texas, 79901, 915-532-2000.
5. *In the Interest of Janani Martinez*, Cause No. 94-12787; 65<sup>th</sup> Judicial District Court, El Paso, County, Texas – This is a family law case regarding termination of parental rights and custody of a minor child. The case was tried to a jury. After the father of the minor child was shot and killed in front of the minor child's home, the paternal grandparents filed a Petition to Terminate the mother's parental rights and a Motion to Modify a prior court order granting primary custody of the minor child to the mother. In the

original Decree of Paternity, the mother and father were named joint managing conservators with the mother as primary caretaker. The father was granted standard possession which entitled him to a long Thanksgiving visitation ever other year. On a Wednesday evening, when the father went to the home of the mother to pick up the minor child for the long holiday visitation, the stepfather came out of the residence and shot the father dead. He left him there to die, returned into the home, and advised the mother of the child what he had done. The mother and stepfather then left the jurisdiction of the Court and were not found until approximately two years later. The case was tried to a jury. The jury did not terminate the parent-child relationship between the child and the mother. However, they granted custody to the grandparents. The attorney for the grandparents was Ms. Doris Sipes, Esquire, 1011 N. Mesa, El Paso, Texas, 79902, 915-544-5235. The attorney for the mother was Mr. Mark T. Davis, Esquire, 1554 Lomaland, El Paso, Texas, 79935, 915-779-3596. The attorney for the minor child was Ms. Maria B. Ramirez, Esquire, 1316 Montana, El Paso, Texas, 79903, 915-544-6115.

6. *State of Texas v. Roberto Macias*, Cause No. 20010D02195, 41<sup>st</sup> Judicial District Court, El Paso County, Texas -- This is a criminal case which was tried to a jury twice and on both occasions resulted in a mistrial because the jury was unable to reach a verdict. A few months after the second trial, the Defendant pleaded guilty to the court. The Defendant had been charged with the offense of DWI manslaughter. He had spent the day of the incident moving furniture for his family from the old home to the new home. At the end of the day after making the last delivery of furniture, he stopped and bought a six pack of beer which he immediately began drinking. On the way home, he was involved in a head on collision with a car which was traveling in the opposite direction. The Defendant claimed that his car stalled in the intersection due to mechanical failure. After the juries were unable to reach a verdict, the Defendant pleaded to the DWI manslaughter. Attorney for the State was Dolores Reyes, Assistant District Attorney, El Paso County Courthouse, 500 East San Antonio, El Paso, Texas, 79901, 915-546-2059. The attorney for the Defendant was Mr. Robert R. Harris, Esquire, 1009 Montana, El Paso, Texas, 79902, 915-545-1657.

7. *In the Interest of Jesus Vargas, Jr.*, Cause No. 90-3175; 65<sup>th</sup> Judicial District Court, El Paso County, Texas – This is a family law case that was tried to a jury regarding custody of the minor child. The parents had divorced several years prior to this modification that was filed by the father. The father then sought custody from the mother. I had previously presided over this case when I was the presiding judge of 388<sup>th</sup> Judicial District Court. At that time we attempted to resolve the dispute through the alternative dispute resolution method known as a summary jury trial. However, the parents were never able to settle the matter. Since the child was of the age permitted by law to make a designation of where he would like to reside, he selected to reside with his father. His mother disagreed and the case was tried to the jury. The jury returned a verdict naming the parties as joint managing conservators with the father as primary caretaker. The attorney for the father was Mr. Jose M. Gonzalez, Esquire, 120 North Florence, El Paso, Texas, 79901, 915-532-2577. The attorney for the mother was Mr. Luis Labrado, Esquire, 2601 Montana, El Paso, Texas, 79903, 915-562-1140. The attorney for the minor child was Mr. Gary Aboud, Esquire, 400 East Overland, El Paso, Texas, 79901, 915-532-2480.
  
8. *In the Interest of Ericka Alicia Martinez and Edward Paul Martinez, Jr.*, Cause No. 94-12787, 383<sup>rd</sup> Judicial District Court, El Paso County, Texas – This is a family law case involving child custody. The father of the child filed a Motion to Modify child custody and requesting that he be named as the primary caretaker of the minor children. This case had languished in the court system for a long time. The parties agreed to have this case tried before the court and I was assigned as the presiding judge. After a three day hearing, I determined that the mother should remain as the primary caretaker with the father receiving increased visitation. The attorney for the mother was Mr. Roberto Barrera, Esquire, El Paso County Legal Assistance Society, 1301 North Oregon, El Paso, Texas, 79902, 915-544-3022. The attorney for the father was Mr. G. Daniel Mena, Esquire, 3233 North Piedras, El Paso, Texas, 79930, 915-564-1336. The attorney for the minor children was Ms. Susan Urbietta, Esquire, 521 Texas Avenue, El Paso, Texas, 79901, 915-544-9061.
  
9. *In the Interest of Deanna and Jared Said*, Cause No. 95-14929; 383<sup>rd</sup> Judicial District Court, El Paso County, Texas

– This is a family law case involving the issue of child custody. After many years of contentious custody hearings, the mother of the minor children was awarded primary custody. However, in approximately 2001, the older daughter was placed in a foster home after spending several weeks in a runaway shelter where she had fled after reporting that her mother had threatened to kill her with a knife. The case is being tried before the court and I have been assigned as the presiding judge. The children have been temporarily placed with their father. The case is still pending. The attorney for the father is Ms. Susan M. Urbietta, Esquire, 521 Texas Avenue, El Paso, Texas, 79901, 915-544-9061. The attorney for the mother is Ms. Angelica Juarez, Barrill, Esquire, 220 Blacker, El Paso, Texas, 79901, 915-544-6480. The attorney for the minor children is Ms. Kristina Voorhies, Esquire, El Paso County Domestic Relations Office, 500 East San Antonio, Suite. LL108, El Paso, Texas, 79901, 915-834-8200.

10. *In the Matter of Enrique Escobar and Ysleta Independent School District*; binding arbitration – This case was tried before me as a hearing examiner. The Plaintiff had requested a hearing after he was suspended by the Ysleta Independent School District from his position as Executive Director of Facilities as a result of pending criminal charges of misapplication of fiduciary property and theft by a public servant. Mr. Escobar had obtained records belonging to the school district after he had been suspended from work. He obtained these documents by calling upon an employee of the district to bring the documents to him. Mr. Escobar claimed that the documents were necessary for his defense and that the documents were not ordinarily kept as permanent records but destroyed by the district. Therefore, there could be no misapplication. After a five day hearing before me as the hearing officer, I determined that Mr. Escobar was terminated for good cause. The attorney for Mr. Escobar was Mr. Thomas E. Stanton, Esquire, Stanton & Antcliff, 521 Texas Avenue, El Paso, Texas, 79901, 915-532-1122. The attorney for the Ysleta Independent School District was Mr. Bruce A. Koehler, Esquire, 100 North Stanton, Suite 1700, El Paso, Texas, 79901, 915-532-2000.

- (2) a short summary of and citations where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings;

*Answer.* *Maria Teresa Zavala v. State of Texas; #08-96-00136-CR* (8<sup>th</sup> Cir., Texas, 1998) – **reversed and remanded** – Maria Zavala appealed her conviction for aggravated assault after a jury had found her guilty and assessed punishment at eight years of community supervision and a fine of \$1,000. The court of appeals overruled Point of Error Nos. One, Two, Three, Four, and Five. In her 6<sup>th</sup> point of error, the Ms. Zavala attacked the legal sufficiency of the evidence supporting the finding by the jury of the use of a deadly weapon. In reviewing the record, the appellate court found no evidence that the knife was used or was intended to be used as a deadly weapon or that the wound inflicted was a serious bodily injury. Without such evidence, the jury could not have found that the knife was a deadly weapon and Ms. Zavala could not be convicted of aggravated assault. However, since I had also submitted a charge of assault to the jury which is a lesser included offense of aggravated assault, the court of appeals reformed the judgment to reflect conviction for the lesser included offense of assault and remanded to the trial court for a new hearing on punishment consistent with the lesser charge.

*Alejandro Marrufo v. State of Texas; #08-96-004CR* (8<sup>th</sup> Cir., Texas, 1996) – **modified** – Alejandro Marrufo appealed his conviction for the offense of aggravated assault, enhanced by the allegation of two prior felonies. I, as the trial court, had assessed punishment at twenty-five years imprisonment. The court of appeals overruled Point of Error Nos. One, Two, Three, Four, Five, Six, Seven, Eight, Nine, and Eleven. In Point of Error No. Ten, Mr. Marrufo alleged that the judgment and sentence were erroneous in that they reflected that the punishment phase of the trial was heard by the jury and that it was the jury that had assessed the punishment. In fact, the punishment hearing was held by the court and I, as the judge, assessed the sentence. Therefore, the appellate court ordered that the judgment and sentence be modified to accurately reflect that the court assessed punishment.

(3) citations for significant opinions on federal or state constitutional rulings on such opinions.

*Answer:* None

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

*Answer:* See attached

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

*Answer:* Public offices held (other than judicial): None

Unsuccessful candidacies:

1. November, 1996 – 383<sup>rd</sup> Judicial District Court
2. November, 2000 – 388<sup>th</sup> Judicial District Court

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

*Answer:* None

17. **Legal Career:** Please answer each separately.

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

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

*Answer:* Law Clerk, Honorable Philip A. Schraub, U.S. Magistrate for the Southern District of Texas, Corpus Christi; August, 1979 – June, 1980

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

*Answer:* A sole practitioner from January, 1980 to December, 1989. Addresses: 818 Texas Avenue, El Paso, Texas, 79901 from January, 1980 to approximately August, 1986; 310 North Mesa, Suite 402, El Paso, Texas, 79901 from approximately August, 1986 to December, 1989.

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

*Answer:* Kathleen Cardone, Attorney and Counselor at Law from approximately January, 1980 to December, 1989; Cardone & Kurita, from approximately December, 1989 to December, 1990.

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

*Answer:* The general character of my law practice was as a sole practitioner doing general civil and criminal work throughout the period of time that I was in private practice.



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

*Answer:* My typical former client was an individual working person in the El Paso, Texas community. I had no area of specialization.

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

*Answer:* I appeared in court frequently.

2. What percentage of these appearances was in:

(a) federal courts;

*Answer:* 1%

(b) state courts of record;

*Answer:* 99%

(c) other courts.

*Answer:* None

3. What percentage of your litigation was:

(a) civil proceedings;

*Answer:* 90%

(b) criminal proceedings.

*Answer:* 10%

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

*Answer:* The number of cases in courts of record I tried to a verdict is in the 100s, the exact number being unknown to me. My practice was largely in the family law area and virtually every case ended in a final judgment of divorce. I was always sole counsel.

(5) What percentage of these trials was:

*Answer:* (a) jury 2%;

(b) non-jury 98%

18. Litigation: Describe the ten (10) most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature

of your participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) the date of representation;
- (b) the name of the court, 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 parties

*Answer:* It has been over 15 years since I closed my law office. As a sole practitioner, records were destroyed after a number of years. However, I will recount the cases I have been able to recreate.

1. *In the Matter of the Marriage of Sharon Ann Eloreaga and Michael David Elorreaga and in the Interest of Michael D. Elorreaga, Jr. and Evelina R. Eloreaga, Minor Children;* Cause No. 85-3154, 210<sup>th</sup> District Court – Approximately five years after the parties were originally divorced and the mother was awarded custody, a Motion to Modify custody was filed by the father of the children alleging that the mother was no longer able to care for the minor children. Subsequent to the divorce the mother had a series of problems including: (1) a remarriage that had resulted in divorce after a number of incidents of family violence; (2) a report to the Texas Department of Protective and Regulatory Services by the maternal grandmother who alleged that the children were in danger if they remained in the mother's home; and (3) hospitalization of the mother in a psychiatric ward after a threat to commit suicide. This was a hotly disputed custody case wherein the father alleged that the mother was no longer mentally fit to care for the children. I represented the mother, Sharon Ann (Eloreaga) Parrish from approximately February 28, 1990 through November 5, 1990. The final disposition of the case was that my client, the mother, was awarded custody of the minor children and the father was ordered to pay an increased amount of child support. The case was tried before the Honorable Sam M. Paxson. Opposing counsel was John G. Mundie, Esquire, 4621 Pershing Drive, El Paso, Texas, 79903; 915-566-8688.
2. *In re: Michael M. Szfranski, Debtor, Michael M. Szfranski, Plaintiff, v. Edie Rubalcaba, District Clerk, El Paso County, Texas and Sara Elizabeth Saylor, Defendants;* Cause No. 88-30644 (Chapter 11); In the United States District Court for the Western District of Texas. This was a post divorce property enforcement case. I had previously represented Ms. Sara Elizabeth Saylor in a very contentious divorce involving a division of marital

property. The major asset of the parties had been a business known as *Mikbeth*. At the conclusion of the divorce, Sara Elizabeth Saylor was awarded a significant money judgment against her husband, Michael M. Szfranski and Mr. Szfranski was awarded the business and any related debts. Mr. Szfranski immediately filed a Chapter 11 Bankruptcy to avoid payment. I represented the Respondent, Sara Elizabeth Saylor, from approximately May 30, 1989 through August 14, 1990. The final disposition of the case was that my client, Ms. Saylor was awarded the money being held in the Registry of the Court and was released by the United States Small Business Administration for her portion of the debt owing on the business known as *Mikbeth*. The Judge who presided was the Honorable Ronald B. King. Opposing counsel was Herbert Ehrlich, Esquire, 109 North Oregon St., 12<sup>th</sup> Floor, El Paso, Texas, 79901; 915-544-0100.

3. *In the Interest of Erin Stephanie Wyrick and William Evan Wyrick, Minor Children*, Cause No. 87-9825; 41<sup>st</sup> District Court. This was a post divorce modification where the father of the children sought to reduce his child support obligation. After the request for a reduction in child support was filed by the father, the mother made allegations that the father's visitation should be restricted because the father had abused the children. I represented the father, James L. Wyrick, Jr. from approximately May 8, 1989 through December 4, 1990. The final disposition of the case was that the father's child support was reduced to \$150.00 per month and the father was given unrestricted access. The presiding judge was the Honorable Mary Anne Bramblett. Opposing counsel was Sergio Coronado, Esquire, 918 E. San Antonio, El Paso, Texas, 79901; 915-532-4500.
4. *In the Interest of Shaunessy Lynn Miller, A Minor Child*, Cause No. 80-7468; 41<sup>st</sup> District Court. This was a post divorce custody dispute. The father, Lloyd Miller, filed a Motion to Modify custody alleging that the minor child should no longer reside primarily with the mother. The mother had remarried. The child had made an outcry to her father that the new stepfather had punished her by handcuffing her and locking her in a room. While the case was pending in court, the child was required to obtain psychological counseling and the father was awarded temporary custody. I represented the Respondent, Lloyd Steven Miller from approximately March 20, 1988 through

February 22, 1990. The final disposition of the case was that my client, Lloyd Miller, was given custody of his daughter and the mother and stepfather were allowed access which was to begin only upon completion of parenting classes. The case was presided over by the Honorable Mary Anne Bramblett. Opposing counsel was William J. Ellis, Esquire, 609 Myrtle, El Paso, Texas, 79901; 915-542-1883.

5. *In the Matter of the Marriage of Elizabeth G. Romero and Jose Hector Romero and in the Interest of Denise Nicole Romero and Amanda Christine Romero, Minor Children*; Cause No. 88-3193; 41<sup>st</sup> District Court. This was a divorce case involving family violence. After the mother had requested a protective order alleging that the father had committed family violence, she filed for a divorce seeking custody of the minor children. Since the custody of the minor children was a contested issue, the Court ordered a Social Study. I represented the Respondent, Jose Hector Romero from approximately April 3, 1988 through November 30, 1988. The final disposition of the case was that the mother was awarded custody and my client, Mr. Jose Hector Romero, was awarded standard visitation. The judge who presided over this case was the Honorable Mary Anne Bramblett. Opposing counsel was the Honorable David Briones, U.S. District Judge for the Western District of Texas, 511 E. San Antonio, El Paso, Texas, 79901; 915-534-6744.
6. *In the Matter of the Marriage of G. Silva, Jr. and M.T. Silva and In the Interest of Guillermo Silva, III, and Alejandro Benjamin Silva, Minor Children*; Cause No. 89-6266; 34<sup>th</sup> District Court. This was a divorce case which had been filed by the father. He was not requesting custody of the minor children. His main concern was to maintain his retirement which he had earned through employment. The mother filed a counterclaim for divorce requesting both the custody of the minor children and 50 percent of the retirement. I represented the Respondent, M.T. Silva from approximately June 21, 1989 through December 4, 1990. The final disposition of the case was that my client, Maria Teresa Silva was awarded custody of the minor children as well as fifty percent of the retirement accumulated through the marriage. The stock accounts were set aside as an educational fund for the minor children. The presiding judge was the Honorable William Moody. Opposing counsel was Mr. Arne C. Schonberger, Esquire, El Paso

County Attorney's Office, 500 East San Antonio, 5<sup>th</sup> Floor, Room 503, El Paso, Texas, 79901; 915-546-2050.

7. *In the Matter of the Marriage of Rosa Aguilar and Ruben Aguilar and In the Interest of Raelene Aguilar, Randy Aguilar and Rosanne Aguilar, Minor Children*; Cause No. 89-11571; County Court at Law No. 4. This was a divorce case involving child custody and division of assets and liabilities. The parties had filed for a divorce and reconciled in approximately 1985. Four years later the mother filed a divorce petition requesting custody of the minor children and an equitable division of the marital estate. At the hearing on temporary orders, the mother was awarded the exclusive use and possession of the home and temporary custody of the minor children. The father refused to vacate the marital residence as ordered and the mother found it necessary to seek subsequent orders from the court finding the father in violation of the court's prior order and removing him from the home. I represented the Petitioner, Rosa Aguilar from approximately October 5, 1989 through December 13, 1990. The final disposition of the case was that my client, Rosa Aguilar, was awarded custody of the minor children and the marital residence. The judge presiding was the Honorable Guadalupe Rivera. Opposing counsel was Richard Contreras, Esquire, 2150 Trawood Drive, El Paso, Texas, 79935; 915-594-1970.
  
8. *In the Matter of the Marriage of P.H.P. and D.E.P. and in the Interest of S.P.P., A Minor Child*; Cause No. 88-5776; 327<sup>th</sup> District Court. This was a divorce case involving child custody and division of assets and liabilities. However, the main issue in the divorce was the division of the marital estate and tracing of separate property. The wife was born and raised in Germany and had met her husband when he was stationed in Germany with the United States Army. Even after the divorce, she remained in Germany because her husband was sent to Vietnam. Throughout the marriage the wife worked. When the parties were finally able to establish a marital residence together in the United States in 1965, the wife emigrated to the United States and by so doing, gave up the possibility of a partnership in her family business. When the parties bought a family home, the wife's family gave them \$27,000 for the down payment. Upon divorce, the husband denied the wife's right to her \$27,000 reimbursement. I represented the wife, D.E.P., from approximately July 17,

1988 through March 6, 1989. The final disposition of the case was that the parties entered into an Agreement Incident to Divorce wherein the wife was awarded custody of the minor child, the marital residence, and \$600 per month in spousal support. The judge presiding was the Honorable Enrique H. Pena. Opposing counsel was Robert L. Reinhardt, Esquire, 9924 Dyer, El Paso, Texas, 79924, 915757-1968.

9. *In the Matter of the Marriage of Marcos Gonzalez Olvera and Heribertha Olvera and In the Interest of Juan Marcos Olvera, A Minor Child*; Cause No. 89-9550; County Court at Law #5. . This was a divorce case involving child custody and division of assets and liabilities. The father had filed the divorce petition requesting custody of the minor children and an equitable division of the marital estate. The mother filed a counterclaim seeking custody. Throughout the discovery process, the father failed to cooperate in disclosing assets, in particular, his retirement benefits through his twenty one years of employment with Union Pacific Railroad Company. I represented the Petitioner, Rosa Aguilar from approximately January, 1989 through January, 1991. The final disposition of the case was that my client, Heribertha Olvera, was awarded custody of the minor children and fifty percent of the divisible retirement benefits held by the U. S. Railroad Retirement. The presiding judge was the Honorable Herb Cooper. Opposing counsel was Mr. Tom Rosas, Esquire, deceased.
  
10. *In the Interest of Christopher Lawrence Matta*; Cause No. 99-5022; 168<sup>th</sup> Judicial District Court. This is a paternity suit involving custody/possession and child support. The father of the minor child filed a suit for paternity requesting the court to find him to be the legitimate father of the minor child and granting him custody. At the conclusion of the case, the parties were named joint managing conservators of the minor child. I represented the mother, Guadalupe R. Garza from approximately June 10, 1988 through November 28, 1988. The judge presiding was the Honorable Guadalupe Rivera. Opposing counsel was Richard Contreras, Esquire, 2150 Trawood Drive, El Paso, Texas, 79935; 915-594-1970.

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

- Answer:*
1. Summary jury trial - I have had the opportunity to participate in a form of dispute resolution known as a summary jury trial. The lawsuit in question involved a claim under the Deceptive Trade Practices Act. After the claim was presented to the jury in a summary fashion, the jury deliberated and returned with a non-binding verdict. The litigants, with knowledge of the verdict, then immediately began mediation and the lawsuit was settled.
  2. Complex mediation – As a trained mediator, I have mediated a lawsuit which due to its complexity and the number of litigants required co-mediators. The claim involved an entire housing subdivision which was built on ground containing clay. After the homes were built and sold (for the price of \$250,000 to \$500,000), the foundations began cracking, the swimming pools began lifting, and a 19 foot tall rock retaining wall began to lean. There were approximately seven Plaintiffs (home buyers) and eight Defendants (land developers and contractors).
  3. El Paso County Domestic Relations Office – Between the years 1999 and 2000, I researched and developed an office known as the El Paso County Domestic Relations Office. This office is responsible for handling all of the monthly child support collection and disbursement for the County of El Paso (involving some 49,000 accounts). It also provides child support monitoring and enforcement for those accounts. In addition to the child support, this office has a Family Court Services Division that provides home studies for contested custody litigation and mediation services. Most recently, this office has developed a Family Law Information System for pro se litigants which allows them to seek information and support.

## II. FINANACIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

*Answer:* None

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

*Answer:* A judge should disqualify himself or herself in a proceeding in which the judge's impartiality may be questioned. This would include instances where a judge has a personal bias or prejudice concerning a party, where the judge has personal knowledge of disputed evidentiary facts, where the judge has served as a lawyer in the matter in controversy, where a lawyer with whom the judge previously practiced law has served as a lawyer during such association, where the judge knows that the judge or his/her spouse or minor child residing in the judge's household has a financial interest in the subject matter in controversy, or where the judge or the judge's spouse is related within the third degree of consanguinity to a litigant or an attorney.

With those rules in mind, I will resolve any potential conflict of interest by first informing the litigants and their attorneys of the conflict. Then, I will disqualify myself from the case and request that the case be randomly reassigned to one of my fellow judges.

The only category of litigation that I believe is likely is present a potential conflict of interest during my initial service as Federal District Court Judge would be if I were to be assigned a case where I had previously acted as a mediator. Since I would have personal knowledge of disputed evidentiary facts, I would request that the case be randomly reassigned.

Regarding financial arrangements that are likely to present potential conflicts of interest during my initial service, I do not believe that there will be any. However, should one arise, I will follow the same procedure.

3. Do you have any plans, commitments, or arrangements to pursue outside employment, with or without compensation, during your service with the court? If so, please explain.

*Answer:* None

4. List sources and amounts of all income received during the calendar year preceding your nomination, and for the current calendar year, including all



salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more. (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

*Answer:* See attached Financial Disclosure Statement

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

*Answer:* See attached Net Worth Statement

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

*Answer:* No

## FINANCIAL STATEMENT

## NET WORTH

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

ASSETS		3/31/2003	LIABILITIES		3/31/2003
Cash on hand and in banks		\$ 36,945	Notes payable to banks-secured		
U.S. Government securities-add schedule			Notes payable to banks-unsecured		
Listed securities-add schedule			Notes payable to relatives		
Unlisted securities--add schedule			Notes payable to others		
Accounts and notes receivable:			Accounts and bills due		
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		236,000	Chattel mortgages and other liens payable		
Real estate mortgages receivable			Other debts-itemize:		
Autos and other personal property		64,000			
Cash value-life insurance		10,755			
Other assets itemize:					
			Total liabilities		\$ -0-
			Net Worth		\$347,700
Total Assets		\$347,700	Total liabilities and net worth		\$347,700

CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, comaker or guarantor		no	Are any assets pledged? (Add schedule)		no
On leases or contracts		no	Are you defendant in any suits or legal actions?		no
Legal Claims		none	Have you ever taken bankruptcy?		no
Provision for Federal Income Tax		Paid quarterly			
Other special debt		none			

## III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.  
*Answer:* In approximately 1980, after first coming to El Paso, I volunteered with the YWCA, El Paso del Norte to provide legal counseling to women. I volunteered one night per week for approximately 2 hours per night for 2 years.  
 From approximately 1997 through 1999, I served as a mediator for the Children's Court of El Paso County, where I provided mediation services, pro bono, to assist families in the reunification process. I did approximately two mediations per month, five hours each.  
 In 1999, working through the County of El Paso, I founded the El Paso County Domestic Relations Office. This office serves as an intermediary between the courts and the litigants and has significantly reduced the costs of family law matters such as mediations, social studies, and enforcements. The El Paso County Domestic Relations Office also has, as one of its departments, Family Court Services. The purpose behind this office is to provide services to people who wish to handle their divorce pro bono or have other legal questions regarding family law. In order to create this office, I traveled throughout the State of Texas visiting various other Domestic Relations Offices in Fort Worth, San Antonio, and Austin, all at my own expense. Then, working with a student from the University of Texas at El Paso, I prepared a formal presentation for the County Commissioners of El Paso in order to get their support for the creation of such an office at County expense. The number of hours I dedicated to this project was in the hundreds.  
 In the years 2001-2002, I served as the Chair of the Child Care Management Services committee which is instrumental in providing affordable child care to the families of El Paso County through the YWCA, El Paso del Norte.
2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates – through either formal membership requirements or the practical implementation of membership policies? If so, list with dates of membership. What have you done to try to change these policies?  
*Answer:* No.
3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts?

*Answer:* Yes

If so, did it recommend your nomination?

*Answer:* Yes

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

*Answer:* Upon learning that there would be a vacancy in El Paso for the United States District Court for the Western Division of Texas, I wrote a letter advising my United States Senator, the Honorable Kay Bailey Hutchison, that I was interested in applying. After a period of time, I was contacted by the Texas Judiciary Advisory Committee and given an interview with approximately 24 committee members and representatives from both Senator Kay Bailey Hutchison's office and Senator John Cornyn's office. A short period of time passed, and I was then contacted by a representative of Senator Kay Bailey Hutchison's office to arrange a personal interview in the Washington, DC offices of Senator Kay Bailey Hutchison and Senator John Cornyn. At the conclusion of the personal interviews by the Senators, I was advised that I would be notified of the Senators' decision at a later date. Thereafter, I was contacted telephonically by Senators Hutchison and Cornyn and was told that it was their decision to recommend me for nomination.

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

*Answer:* No

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a.* A tendency by the judiciary toward problem-solution rather than grievance-solution;

- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

**Answer** It is a basic tenet of our democratic government that there is to be a separation of powers between the executive, legislative, and judicial branches. This framework allows for intelligible and applicable laws by which we in society can conduct ourselves knowing that a violation of these laws may result in either criminal or civil consequences. This sort of justice cannot be achieved unless there is a system of general rules which are impartially applied.

The role of the judge is to make a decision that is in accordance with these recognized principles and rules of law and to do so by following defined procedures. It is not to insert one's own views into the law, even if that law is unclear.

A good judge should be fair and impartial. A good just judge should not show bias, partiality or favoritism and should listen to both parties. A good judge should *do justice according to the law* by treating the parties to the litigation fairly and impartially based on the authoritative rules of law.

To rule *according to the law*, the judge must apply the law, not legislate from the bench, loosen jurisdictional requirements such as standing and ripeness, or impose personal views that could jeopardize the fundamental principals of the rule of law, the constitution and the separation of powers.

Senator CORNYN. Judge Cohn?

**STATEMENT OF JAMES I. COHN, NOMINEE TO BE DISTRICT  
JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA**

Judge COHN. Thank you, Mr. Chairman. I am pleased to have with me this afternoon my wife, Kathleen, and my son, William. Would you all stand, please?

Senator CORNYN. Absolutely. Sorry we did not recognize you earlier. Welcome. Glad you all could come and be with your spouse and your father on this important day.

Judge COHN. It is an honor to appear before this Committee this afternoon. I want to thank the President for having nominated me, Senator Graham and Senator Nelson for their support in the confirmation process, and Florida's Federal Judicial Nominating Commission for advancing my name to the White House.

Thank you, Mr. Chairman.

[The biographical information of Judge Cohn follows:]

## I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)
  - James Ivan Cohn
  - Jimmy Cohn
2. Address: List current place of residence and office address(es).
  - (R) Fort Lauderdale, Florida
  - (O) Broward County Courthouse  
201 S. E. 6th Street, Room 5760  
Fort Lauderdale, Florida 33301
3. Date and place of birth.
  - December 23, 1948, Montgomery, Alabama
4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).
  - Married  
Kathleen Komlossy Cohn, Housewife
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.
  - Samford University, Cumberland School of Law  
1971 - 1974  
J.D., 5/25/74
  - University of Alabama  
1967 - 1971  
B.S., Commerce and Business Administration, 5/13/71
6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were



connected as an officer, director, partner, proprietor, or employee since graduation from college.

1995 - Present  
State of Florida  
Circuit Judge 17th Judicial Circuit  
Fort Lauderdale, Florida

1979 - 1995  
Private Practice  
Fort Lauderdale, Florida

1978 - 1979  
Michael G. Widoff, P.A.  
Fort Lauderdale, Florida

1975 - 1978  
Broward County State Attorney's Office  
Fort Lauderdale, Florida

1975  
Broward County Public Defender's Office  
Fort Lauderdale, Florida

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

Alabama Army National Guard (1970-1972)  
U. S. Army Reserves (1972-1975)  
Florida Army National Guard (1975-1976)  
E-4  
Selective Service Number 1-44-48-261  
Social Security Number 424-60-1907  
Honorable Discharge

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

High School Valedictorian, Member of National Honor Society, and AV rating from Martindale-Hubbell

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

Alabama State Bar  
Florida State Bar  
Broward County Bar Association  
National Association of District Attorneys  
Association of Trial Lawyers of America  
Board of Governor's Young Lawyer's Section, Florida Bar  
Academy of Florida Trial Lawyers  
Conference of Circuit Judges  
Criminal Rules Committee  
American Judicature Society  
B'nai B'rith Justice Lodge  
Grievance Committee, 17th Judicial Circuit  
American Bar Association

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

Exceptional Student Education Advisory Council  
(children with special needs)

Please list all other organizations to which you belong.

University of Alabama Alumni Association  
Temple Bat Yam of East Ft. Lauderdale

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

State Courts of Alabama (Alabama State Bar - 1974)  
State Courts of Florida (Florida Bar - 1974)  
U.S. Court of Appeals, Fifth Circuit (1975)  
U.S. District Court, Southern District of Florida (1976)  
U.S. Supreme Court (1980)  
U.S. Court of Appeals, Eleventh Circuit (1981)

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

Lectured at various schools throughout county on  
"Career Day"

Keynote speaker at B'nai B'rith Justice Lodge  
Installation Brunch - 1999

Participated as a moderator in Broward County Bar  
Association, Bench-Bar conference, topic, jury  
selection - 2001

Speech to Pine Crest High School on importance of  
integrity - 2002

There is no written text for any of the foregoing  
speeches. All were extemporaneous.

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

Excellent  
March 21, 2003

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

Appointed Circuit Judge of 17th Judicial Circuit, June, 1995. Elected Circuit Judge of 17th Judicial Circuit, July, 1996, and again in May, 2002. Circuit Court has jurisdiction over all criminal felonies, civil matters involving damages which exceed \$15,000.00, probate, domestic relations, Juvenile and dependency.

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

- (1) (i) Sentencing Order, Death Penalty, dated May 16, 1997.  
State v. Blackwood, Case No. 95-1473CF10A. (copy attached)  
 Affirmed by Florida Supreme Court, 777 So. 2d 399 (Fla. 2000).
- (ii) Sentencing Order, Death Penalty, dated March 19, 1999.  
State v. Rimmer, Case No. 98-12089CF10B. (copy attached)  
 Affirmed by Florida Supreme Court, 825 So. 2d 304 (Fla. 2002).
- (iii) Opinion written as an associate appellate judge in  
Community Christian Center Ministries, Inc. V. Plante,  
 719 So. 2d 368 (Fla. 4th DCA 1998). (copy attached)
- (iv) Opinion written as as associate appellate judge in  
State v. Graham, 721 So. 2d 361 (Fla. 4th DCA 1998).  
 (copy attached)
- (v) Order Denying Defendant's Second Amended Motion to Vacate  
 Judgment of Conviction and Sentence, Death Penalty, dated  
 May 25, 2001. State v. Armstrong, Case No. 90-5417CF10B.  
 (copy attached)
- (vi) Order Denying Defendant's Motion to Suppress Physical  
 Evidence, dated October 3, 1997.  
State v. Ruiz, Case No. 97-7797CF10B. (copy attached)  
 Affirmed, 831 So. 2d 199 (Fla. 4th DCA 2002)
- (vii) Order Re: Admissibility of Child Hearsay, dated June 9, 1998.  
State v. Ingrassia, Case No. 97-14712CF10A. (copy attached)  
 Affirmed, 747 So. 2d 445 (Fla. 4th DCA 1999)
- (viii) Order Denying Post Conviction Relief, dated January 29, 2001.  
State v. Mannoilini, Case No. 96-7938CF10A. (copy attached)  
 Affirmed, 819 So. 2d 786 (Fla. 4th DCA 2002)
- (ix) Order Denying Motion to Suppress Physical Evidence, dated  
 December 28, 1995. State v. Morris, Case No. 95-14627CF.  
 (copy attached) Affirmed, 681 So. 2d 292 (Fla. 4th DCA 1996)
- (x) Order Denying Defendant's Motion to Declare Florida Statute  
 775.051 Unconstitutional, dated April 13, 2000.

State v. Brawley, Case No. 99-18204CF10A. (copy attached)  
Affirmed, 815 So. 2d 789 (Fla. 4th DCA 2002)

- (2) In reference to reversals, I have categorized errors as follows: sentencing errors, errors in summary denial of post conviction claims, evidentiary errors, and miscellaneous errors. It should be noted that I presided over in excess of 750 felony jury trials in slightly less than eight years. For the past five years, I have been assigned only repeat offender cases. Florida has enacted statutes creating various repeat offender sentencing designations. Sentencing designations are dependant upon a defendant's criminal history and last date of release from prison. Some designations require mandatory minimum sentences, and all designations subject the defendant to enhanced penalties. This is an area of Florida law that is constantly changing and is being tested in the appellate courts. The five district courts of appeal have disagreed with respect to their interpretations of these laws. In many instances certain dual designations and sentences were found by the district court of appeal violative of constitutional double jeopardy prohibitions only to be reinstated by the Florida Supreme Court. This would be reflected as two reversals when in actuality the Supreme Court found no trial court error. In addition, in 2000, the Florida Supreme Court sustained a constitutional challenge to the 1995 sentencing guidelines based on a violation of the single subject rule. This necessitated the reversal and resentencing of numerous cases.

Sentencing Errors (Conviction Affirmed - Remand for Resentencing only)

Brady v. State, 2003 WL 729036 (Fla. App. 4 Dist.)  
Brooks v. State, 2003 WL 355412 (Fla. App. 4 Dist.)  
Rivera v. State, 837 So. 2d 569 (Fla. 4th DCA 2003)  
Ross v. State, 831 So. 2d 817 (Fla. 4th DCA 2002)  
Eugene v. State, 828 So. 2d 1055 (Fla. 4th DCA 2002)  
Inman v. State, 824 So. 2d 218 (Fla. 4th DCA 2002)  
Cadet v. State, 816 So. 2d 1202 (Fla. 4th DCA 2002)  
Salters v. State, 802 So. 2d 501 (Fla. 4th DCA 2002)  
Oberst v. State, 796 So. 2d 1263 (Fla. 4th DCA 2001)  
Anderson v. State, 792 So. 2d 679 (Fla. 4th DCA 2001)  
Roberts v. State, 793 So. 2d 133 (Fla. 4th DCA 2001)  
Thomason v. State, 790 So. 2d 1189 (Fla. 4th DCA 2001)  
Johnson v. State, 789 So. 2d 1235 (Fla. 4th DCA 2001)  
Wright v. State, 782 So. 2d 1007 (Fla. 4th DCA 2001)  
Brown v. State, 784 So. 2d 527 (Fla. 4th DCA 2001)  
Henderson v. State, 780 So. 2d 319 (Fla. 4th DCA 2001)  
Underwood v. State, 780 So. 2d 320 (Fla. 4th DCA 2001)

Willis v. State, 782 So. 2d 445 (Fla. 4th DCA 2001)  
Martin v. State, 777 So. 2d 461 (Fla. 4th DCA 2001)  
Simeon v. State, 778 So. 2d 455 (Fla. 4th DCA 2001)  
James v. State, 778 So. 2d 457 (Fla. 4th DCA 2001)  
Bromwell v. State, 777 So. 2d 438 (Fla. 4th DCA 2001)  
Weire v. State, 776 So. 2d 1088 (Fla. 4th DCA 2001)  
Green v. State, 776 So. 2d 993 (Fla. 4th DCA 2001)  
Watson v. State, 774 So. 2d 902 (Fla. 4th DCA 2001)  
Yehowshua v. State, 773 So. 2d 654 (Fla. 4th DCA 2000)  
Joseph v. State, 771 So. 2d 1293 (Fla. 4th DCA 2000)  
Gatto v. State, 768 So. 2d 1169 (Fla. 4th DCA 2000)  
Willis v. State, 769 So. 2d 1072 (Fla. 4th DCA 2000)  
Braham v. State, 766 So. 2d 297 (Fla. 4th DCA 2000)  
Jones v. State, 765 So. 2d 942 (Fla. 4th DCA 2000)  
Lewis v. State, 764 So. 2d 874 (Fla. 4th DCA 2000)  
Johnson v. State, 765 So. 2d 773 (Fla. 4th DCA 2000)  
Corinthian v. State, 761 So. 2d 1180 (Fla. 4th DCA 2000)  
Mendez v. State, 761 So. 2d 438 (Fla. 4th DCA 2000)  
Robinson v. State, 757 So. 2d 1267 (Fla. 4th DCA 2000)  
Collins v. State, 754 So. 2d 140 (Fla. 4th DCA 2000)  
McFadden v. State, 775 So. 2d 965 (Fla. 4th DCA 2000)  
Oliveira v. State, 751 So. 2d 611 (Fla. 4th DCA 2000)  
Powell v. State, 719 So. 2d 963 (Fla. 4th DCA 1998)  
Thompson v. State, 707 So. 2d 1191 (Fla. 4th DCA 1998)  
Noel v. State, 705 So. 2d 648 (Fla. 4th DCA 1998)  
Miller v. State, 744 So. 2d 460 (Fla. 4th DCA 1997)  
Forbes v. State, 681 So. 2d 911 (Fla. 4th DCA 1996)

Almost all repeat offender defendants file motions for post conviction relief irrespective of whether their case was tried before a jury or they entered a plea. The vast majority of these motions are summarily denied because the record reflects no entitlement. Most motions allege ineffective assistance of counsel as a basis for relief. The district court of appeal has found this to be a fertile area for reversals finding that almost any unresolved factual issues would require an evidentiary hearing.

Post Conviction Motions - Summary Denials Reversed for Evidentiary Hearing

Kijewski v. State, 831 So. 2d 757 (Fla. 4th DCA 2002)  
English v. State, 830 So. 2d 240 (Fla. 4th DCA 2002)  
Harris v. State, 829 So. 2d 381 (Fla. 4th DCA 2002)  
Jackson v. State, 831 So. 2d 722 (Fla. 4th DCA 2002)  
Heard v. State, 824 So. 2d 965 (Fla. 4th DCA 2002)

Griggs v. State, 821 So. 2d 1139 (Fla. 4th DCA 2002)  
Wilson v. State, 812 So. 2d 591 (Fla. 4th DCA 2002)  
Ford v. State, 814 So. 2d 1121 (Fla. 4th DCA 2002)  
Cameron v. State, 807 So. 2d 744 (Fla. 4th DCA 2002)  
 (2 cases, same issue)  
Thornton v. State, 809 So. 2d 37 (Fla. 4th DCA 2002)  
Lacy v. State, 805 So. 2d 72 (Fla. 4th DCA 2002)  
Harris v. State, 804 So. 2d 457 (Fla. 4th DCA 2001)  
Louis v. State, 797 So. 2d 1281 (Fla. 4th DCA 2001)  
Boyd v. State, 801 So. 2d 116 (Fla. 4th DCA 2001)  
Williams v. State, 789 So. 2d 1112 (Fla. 4th DCA, 2001)  
Hoyt v. State, 785 So. 2d 672 (Fla. 4th DCA 2001)  
Daniels v. State, 777 So. 2d 1133 (Fla. 4th DCA 2001)  
Brown v. State, 777 So. 2d 1131 (Fla. 4th DCA 2001)  
Mannolini v. State, 760 So. 2d 1014 (Fla. 4th DCA 2001)  
Stringer v. State, 757 So. 2d 1226 (Fla. 4th DCA 2001)  
Thomas v. State, 745 So. 2d 468 (Fla. 4th DCA 1999)  
Griggs v. State, 744 So. 2d 1145 (Fla. 4th DCA 1999)  
Debonis v. State, 712 So. 2d 844 (Fla. 4th DCA 1998)  
Wilkey v. State, 712 So. 2d 847 (Fla. 4th DCA 1998)

Evidentiary Errors

Kimbrough v. State, 2003 WL 1027760 (Fla. App. 4 Dist.)  
 Insufficient predicate for admission of statement as  
 a past recollection recorded.

Smith v. State, 837 So. 2d 567 (Fla. 4th DCA 2003)  
 Hearsay evidence alone can not constitute basis for  
 a finding of violation of probation.

Palmer v. State, 739 So. 2d 644 (Fla. 4th DCA 1999)  
 Response to jury question could have been construed  
 as a comment on defendant's failure to present evidence.

McDougle v. State, 828 So. 2d 454 (Fla. 4th DCA 2002)  
 Taped statement should have been suppressed based on  
 appeal's court finding that the defendant was in custody  
 for purposes of Miranda.

Alfaro v. State, 837 So. 2d 429 (Fla. 4th DCA 2002)  
 Improper exclusion of non-hearsay statement that a  
 passenger told a witness that he owned van which was  
 subject of alleged theft.

Kiner v. State, 824 So. 2d 271 (Fla. 4th DCA 2002)

Detective's comment that the defendant after giving oral statement refused to go on tape until provided with a lawyer was an improper comment on defendant's right to remain silent.

Gilbert v. State, 817 So. 2d 980 (Fla. 4th DCA 2002)

Evidence was insufficient to prove market value of stolen property exceeded \$300 thus precluding a grand theft conviction.

Johnson v. State, 808 So. 2d 1276 (Fla. 4th DCA 2002)

Hearsay alone is insufficient to violate defendant's probation.

Otero v. State, 807 So. 2d 666 (Fla. 4th DCA 2002)

Convictions for armed robbery, extortion and false imprisonment were affirmed. Conviction for burglary was reversed due to insufficiency of the evidence as defendant was a business invitee when he entered the structure.

Brown v. State, 787 So. 2d 136 (Fla. 4th DCA 2002)

The trial court's curative instruction to disregard evidence of the witness' prior convictions was insufficient to overcome the prejudice to the defendant.

Roberts v. State, 778 So. 2d 512 (Fla. 4th DCA, 2001)

Use of a single photograph of defendant to refresh eye-witness recollection was impermissibly suggestive. In addition, the probative value of photograph of defendant's girlfriend lying in a hospital bed after a beating was outweighed by substantial prejudice of showing her battered condition.

Brown v. State, 764 So. 2d 741 (Fla. 4th DCA 2000)

State presented insufficient evidence to prove the "knowledge" element of the crime of felony driving with a suspended license. Driving record alone fails to show knowledge.

Metelus v. State, 762 So. 2d 940 (Fla. 4th DCA 2000)

Admitting undercover officer's unresponsive, prejudicial



hearsay testimony that crime reporting service received numerous alerts about the defendant constituted reversible error.

Felton v. State, 753 So. 2d 640 (Fla. 4th DCA 2000)

Uncorroborated anonymous tip that the defendant had a gun did not give rise to reasonable suspicion to conduct investigatory stop. Motion to suppress should have been granted.

Shores v. State, 756 So. 2d 114 (Fla. 4th DCA 2000)

Presence of defendant's fingerprints on box of ammunition in drawer that was ransacked by burglar was insufficient to support a conviction.

Hogan v. State, 753 So. 2d 570 (Fla. 4th DCA 1999)

State should not have been permitted to comment on the failure of the defendant to produce a witness when there was no evidence of a "special relationship" between the witness and the defendant.

White v. State, 734 So. 2d 484 (Fla. 4th DCA 1999)

Defendant's motion for mistrial should have been granted in prosecution for possession of drug paraphernalia after the officer testified that during surveillance of defendant's home, immediately prior to execution of the search warrant, he observed a narcotics transaction. This created an inference that the defendant was guilty of other crimes for which he had not been charged.

Span v. State, 732 So. 2d 1196 (Fla. 4th DCA 1999)

Evidence was insufficient to support conviction for trafficking in cocaine and possession of marijuana. State failed to make prima facie showing of constructive possession.

Arroyo v. State, 705 So. 2d 54 (Fla. 4th DCA 1997)

Evidence insufficient to support conviction for interference with a minor. Presence of the defendant without evidence of assistance or encouragement in the commission of the crime are insufficient as a matter of law.

Brown v. State, 684 So. 2d 265 (Fla. 4th DCA 1996)

Evidence was insufficient to support finding that the defendant violated his community control by committing loitering and prowling. State witnesses were unable to point to specific and

articulable facts to warrant the conclusion that either breach of peace or threat to the public safety was imminent.

Miscellaneous Errors

Graham v. Jenne, 837 So. 2d 554 (Fla. 4th DCA 2003)

Writ of habeas corpus issued where court found improper involuntary commitment of incompetent defendant.

Piccioni v. State, 833 So. 2d 247 (Fla. 4th DCA 2002)

Failure to instruct on lesser included offense of trespass.

Giles v. State, 831 So. 2d 1263 (Fla. 4th DCA 2002)

Instruction on forcible felony was misleading and therefore prejudiced defendant's right to fair trial.

Partlow v. State, 813 So. 2d 999 (Fla. 4th DCA 2002)

State v. Partlow, 28 Fla. L. Weekly S148 (Fla. Feb. 20, 2003)

Sexual offender registration is a collateral consequence of plea and defendant need not be informed of same in plea colloquy. Supreme Court of Florida agreed with my interpretation and reversed the district court of appeal.

Gary v. State, 806 So. 2d 582 (Fla. 4th DCA 2002)

Failure to give Chicone instruction stating that guilty knowledge was an essential element of the crime and that the state was required to prove that the defendant knew of the illicit nature of the substance was not harmless error even though the defense was that the defendant never had the drugs.

Robinson v. State, 804 So. 2d 451 (Fla. 4th DCA 2001)

Designation of defendant as a "sexual predator" did not bear a relationship to the purpose of the sexual predator classification statute.

Otero v. State, 793 So. 2d 1115 (Fla. 4th DCA 2001)

Record did not reflect that the trial court had subject matter jurisdiction to revoke alleged probation in light of the fact that the order of probation had been lost.

Davis v. State, 778 So. 2d 1096 (Fla. 4th DCA 2001)

Trial court was premature, without conducting a juror interview, in concluding the juror's nondisclosure of his altercation with the defendant did not warrant a new trial.

Simeon v. State, 778 So. 2d 455 (Fla. 4th DCA 2001)

Enhancement of sentence for petit theft to a first-degree misdemeanor based on prior conviction for grand theft was improper since the prior theft was not alleged in the information.

Stokes v. State, 773 So. 2d 1236 (Fla. 4th DCA 2001)

Aggravated Assault is not necessarily a lesser included offense of Aggravated Battery. There must be an allegation in the information that the defendant placed the victim in fear. There was no such allegation in Stokes. Therefore, the conviction for aggravated assault is reversed. The armed burglary conviction, a life felony, was affirmed.

Gaschler v. State, 804 So. 2d 333 (Fla. 4th DCA 2002)

Net weight of hydrocodone as opposed to gross weight of pills must be used in determining whether aggregate amount exceeds the minimum for trafficking. Conviction for Trafficking in Oxycodone was affirmed.

Delarosa v. State, 757 So. 2d 1284 (Fla. 4th DCA 2000)

Conflict of interest was presented by virtue of defense counsel having information bearing on the voluntariness of the defendant's confession. Trial court failed to inquire about conflict and seek waiver from the defendant.

Rosen v. State, 757 So. 2d 1236 (Fla. 4th DCA 2000)

The defendant was convicted of first-degree organized fraud. The trial court found that the crime charged was subject to application of the "continuing offense doctrine" and thereby tolled the statute of limitations. The district court of appeal disagreed finding that each predicate criminal act was separated in time and unrelated to one another, therefore the doctrine did not apply and the statute ran.

State v. Viatical Services, Inc., 741 So. 2d 560 (Fla. 4th DCA 1999)

Writ of Certiorari issued and trial court was directed to issue search warrant in accordance with the conditions set forth in the opinion. The trial court had conducted an adversary hearing and had limited the scope of the search warrant to files where fraud had been found. The concern being the confidentiality of records pertaining to primarily aids patients who had purchased viaticals. The district court of appeal agreed to the extent that the insured's medical records would be sealed until a post-seizure hearing could be held on the issue of privacy.

Brown v. State, 733 So. 2d 1128 (Fla. 4th DCA 1999)

State's striking of black juror was reversible error where white juror made similar comments regarding police being racially biased and was not stricken.

Kilgore v. State, 736 So. 2d 87 (Fla. 4th DCA 1999)

Revocation of probation reversed where Alabama conviction used as basis to violate defendant's probation was appealed and defendant entitled under Alabama law to a trial de novo.

Jenkins v. State, 732 So. 2d 1185 (Fla. 4th DCA 1999)

Defendant was entitled to an evidentiary hearing on his motion for new trial and a jury interview to determine whether, at time of trial, the defendant had knowledge of his wife's conduct in the presence of the jury venire. The wife allegedly yelled at the defendant in the venire's presence accusing the defendant of an extramarital affair. The defendant did not move to strike the panel or inquire of the venire at that time. The trial court ruled the defendant waived his right to object on this ground.

Thomason v. State, 732 So. 2d 1122 (Fla. 4th DCA 1999)

Evidentiary hearing required on motion to withdraw plea due to allegations made by the defendant against his attorney.

Miller v. State, 723 So. 2d 353 (Fla. 4th DCA 1999)

Error to instruct the jury that the defendant raising the defense of entrapment must prove by a preponderance of the evidence that his criminal conduct occurred as a result of the entrapment.

Hebb v. State, 714 So. 2d 639 (Fla. 4th DCA 1998)

It was error to revoke defendant's probation when term of

probation had expired at the time of sentencing.

State v. Smith, 697 So. 2d 889 (Fla. 4th DCA 1997)

Notice to one governmental agency of the State of Florida can not be imputed to another for purpose of the running of the statute of limitations.

Affirmance with Criticism

Blackwood v. State, 777 So. 2d 399 (Fla. 2000)

Justice Anstead, who concurred in part and dissented in part, wrote that the trial court conceded in its order that it could find no single aggravator cases involving comparable circumstances where the Florida Supreme Court has approved the imposition of the death penalty. Note, this was a strangulation death and the jury voted 9 to 3 for imposition of the death penalty. In this court's opinion, the aggravating factor outweighed the mitigating factors.

Milian v. State, 764 So. 2d 860 (Fla. 4th DCA 2000)

Judge Shahood dissented. Attorney was held in contempt for engaging in an altercation with another attorney in the courthouse hallway in the presence of several people including a juror. Justice Shahood wrote that he would reverse the judgment because the evidence was insufficient to show the defendant had the requisite specific intent to hinder the court in its orderly administration of justice.

Rimmer v. State, 825 So. 2d 304 (Fla. 2002)

Justice Pariente, in her dissent, found the trial court's admission of a detective's testimony regarding his visual acuity with and without glasses to rebut the defense's expert testimony that the defendant wore eyeglasses and without them he would be considered legally blind to be erroneous. She found the testimony irrelevant and the error in its admission was exacerbated by the fact that the rebuttal testimony was provided by a police officer.

- (3) Although many decisions made by me address both federal and state constitutional issues, there have been no significant appellate opinions regarding these issues.

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

None

17. Legal Career:

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

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

NO

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

YES

1983 - 1995  
315 Southeast Eleventh Street  
Fort Lauderdale, Florida 33316

1979 - 1983  
315 Southeast Seventh Street  
2nd Floor  
Fort Lauderdale, Florida 33316

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

1/75 - 7/75  
Broward Public Defender  
Asst. Public Defender  
201 S. E. 6th Street  
Fort Lauderdale, Florida 33301

8/75 - 3/78  
Broward State Attorney

Asst. State Attorney  
201 S. E. 6th Street  
Fort Lauderdale, Florida 33301

6/95 - Present  
State of Florida  
Circuit Judge  
201 S. E. 6th Street  
Fort Lauderdale, Florida 333301

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

General trial practice with emphasis in criminal law through 1983. Subsequently, emphasis shifted to personal injury and medical negligence.

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

Typical clients were injured in an accident or as a result of a professional's negligence, charged with a crime or had marital problems.

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

Regularly

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

Federal Courts 2%  
State Courts of Record 96%  
Other Courts 2%

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

(b) criminal.

Civil 75% (1985-1995)  
25% (prior to 1985)

Criminal 25% (1985-1995)  
75% (prior to 1985)

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

125 - always sole counsel  
in cases tried

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

Jury 80%  
Non-Jury 20%

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

- (a) the date of representation;  
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and  
(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

- (i) State v. Endicott - 79-5867CF  
Fla. 17th Circuit - Judge Coker - 2/80  
Represented defendant charged with first Degree murder. Jury returned verdict of not guilty by reason of insanity. It was reported to be the first such verdict in Broward County in over 15 years. Sole counsel for defendant. State represented by Mark Springer, 201 S. E. 6th Street,



Fort Lauderdale, Fl. 33301, (954) 831-6955  
Shows diverse experience.

- (ii) Corts v. Novotny et al. 81-25203CZ  
Fla. 17th Circuit - Judge Weissing - 9/83  
Sole counsel for plaintiff. Automobile accident involving a defendant who was driving under the influence. Plaintiff suffered minor injuries. Jury awarded substantial sum in punitive damages in light of relatively minor injury sustained by the Plaintiff. Defendants represented by J. Lane Middleton, 9100 S. Dadeland Blvd., Suite 905, Miami, Fl 33156-7815 (305)670-1122 and Burton Burdick, 4367 N. Federal Highway, Suite 200, Ft. Lauderdale, Fl 33308-5213 (954) 493-8081. Shows diverse experience.
- (iii) State v. Chestnut 76-679CF  
Fla. 17th Circuit - Judge Futch - 9/76  
Prosecuted man for sexual battery of an elderly woman. Defendant was convicted on largely circumstantial evidence and sentenced to 75 years in prison. Sole counsel for State. Defendant represented by Robert Makemson, P.O. Box 746, Stuart, Fl.34995-0746 (561)288-5570. Shows diverse experience.
- (iv) Gardner v. Gardner - 86-23616  
Fla. 17th Circuit - Judge Fischer - 7/88  
Sole counsel for father who was awarded custody of his minor son. 545 So. 2d 239 (Fla. 4DCA 1989). Numerous experts testified providing opinions as to the best interests of the child. Mother represented by Hugh T. Maloney, 600 S. Andrews Avenue, Suite 600, Fort Lauderdale, Fl 33301 (954)522-1700. Shows diverse litigation experience.
- (v) State v. Thorne - 82-5225CF  
Fla. 17th Circuit - Judge Kaplan - 2/83  
Sole counsel for defendant charged with attempted first degree murder of a Hollywood police officer. The officer was stabbed by the defendant. Defendant asserted self defense. Jury found defendant not guilty. State represented by Carl Weinberg, 746 Mamaroneck Avenue, Apt. 1205, Mamaroneck,N.Y.

10543-1987, (914)946-0400 Shows experience and versatility as a trial lawyer.

- (vi) State v. Wigley - 83-7088CF  
 Fla. 17th Circuit - Judge Kaplan - 5/84  
 Sole counsel for defendant charged with first degree murder in the rape, strangulation killing of a motorist who experienced car problems on the turnpike. Defendant was convicted as charged, but jury recommended by vote of 12 to 0 that life sentence be imposed. Judge followed jury's recommendation. State represented by Robert Carney, 201 S.E. 6th Street, Room 1010A, Fort Lauderdale, Fl 33301 (954)831-7642.  
 Shows experience and versatility.
- (vii) U.S. v. Haughey - 79-6069-CR-NCR  
 U.S. District Court, Southern District  
 Judge Roettger - 6/80  
 Sole counsel for defendant charged with conspiracy to distribute, possession with intent to distribute and distribution of Cocaine. Defendant was convicted as charged. Opposition - Bruce Zimet, 1 Financial Plaza, Suite 2612, Ft. Lauderdale, Fl 33394-0026 (954)764-7081. Shows experience and versatility.
- (viii) State v. Mathis - 91-15898CF  
 Fla. 17th Circuit - Judge Streitfeld - 1/93  
 Sole counsel for defendant convicted of first degree murder arising from a robbery shooting of a bar patron. Jury recommended by a 12 to 0 vote that life sentence be imposed. Judge followed recommendation. State represented by Brian Cavanagh, 201 S.E. 6th Street, Ft. Lauderdale, Fl 33301 (954)831-7923. Shows experience and versatility.
- (ix) State v. Nelson - 77-1186CF  
 Fla. 17th Circuit - Judge Coker - 5/77  
 Prosecuted and convicted defendant of second degree murder. Sole assistant state attorney trying case. Reversed on judge's failure to instruct on excusable homicide. 371 So. 2d 706 (Fla. 4th DCA, 1979) Opponents were Bruce

Zimet, 1 Financial Plaza, Suite 2612, Ft. Lauderdale, Fl 33394-0026 (954) 764-7081 and Hilliard Moldof, 1311 S.E. 2nd Avenue, Ft. Lauderdale, Fl 33316-1809 (954)462-1005 Shows experience and versatility.

- (x) Estate of Charles Couch v. KAM Cars of America, Inc. - 93-911(07)  
Fla. 17th Circuit - Judge Luzzo - 10/93  
Sole counsel for estate and surviving parent of 14 year old bicyclist killed by a speeding motorist. Jury determined minor child to be comparatively negligent thus reducing award, however, judgment and other monies tendered prior to trial pursuant to high-low agreement provided adequate compensation to plaintiffs. Opponents - Kevin O'Connor and William Lemos, P.O. Box 149022, Coral Gables, Fl 33114-9022 Shows experience and versatility.

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

- (i) Estate of Savarese v. Pearl M.D., et al.  
Palm Beach County - 1983  
Represented wife and children of decedent. Decedent collapsed in doctor's office following injections of steriods for back pain. Doctor provided substandard CPR resulting in decedent's death. Case settled.
- (ii) Estate of Bliss v. School Board of Broward County  
Broward County - 1985  
Represented parents of 8 year old boy who was struck and killed by school bus. This was a case of aggravated liability in light of gross negligence of bus driver and driver's poor prior driving record which School Board knew or should have known. Driver was not suitable to transport children. Case settled.
- (iii) Abelove v. Holmes Regional Medical Center, et al.  
Brevard County - 1989

Represented guardian of 13 year old girl who was moderately injured as a result of auto-pedestrian accident. Surgery for repair of ligament damage was uneventful. Subsequently, while still in hospital, child developed sepsis which went undiagnosed for three days. Child suffered ischemia and spiked 108 degree fever. Result, both legs amputated and severe brain damage. Case settled. Two other attorneys worked jointly with me on this case.

- (iv) Patti v. HBA Management, Inc., et al.  
Broward County - 1990  
Represented an elderly lady who was the victim of nursing home negligence. As a result, she fell and broke her hip and subsequently developed severe decubitus ulcers on her back and buttocks. Case settled.
- (v) Estate of Michael Garcia v. Kentucky Western Truck Lines  
Broward County - 1992  
Represented the children of decedent whose car was struck while parked under an overpass on Interstate 95. The decedent was killed instantly. His two minor children were living with his former wife in Pennsylvania at the time of death. Case settled.
- (vi) Member of the Criminal Rules Committee and Grievance Committee of Florida Bar for the 17th Judicial Circuit.

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

The only anticipated receipt of income is rental income from Loughren & Doyle, P.A., a month to

month tenant, and Florida Retirement System Pension Plan.

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

I would recuse myself from any matter which presents a potential conflict. In addition, I would also recuse myself from any case in which a party was represented by my tenants, the tenant was a party to or the tenant had a stake in the outcome of the litigation. If I held stock in a company which was a party, I would recuse myself. I would follow the Code of Judicial Conduct.

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

No

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

See attached Financial Disclosure Report

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

See attached Net Worth Statement

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

Campaign Treasurer for State Attorney, Michael J. Satz, in election years 1980, 1984, 1988 and 1992.

## FINANCIAL STATEMENT

NET WORTH  
AS OF 5/06/03

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	3,827	0 0	Notes payable to banks-secured	0	0 0
U.S. Government securities-add schedule	0	0 0	Notes payable to banks-unsecured	0	0 0
Listed securities-add schedule	603,716	0 0	Notes payable to relatives	0	0 0
Unlisted securities--add schedule	0	0 0	Notes payable to others	0	0 0
Accounts and notes receivable:	0	0 0	Accounts and bills due	0	0 0
Due from relatives and friends	0	0 0	Unpaid income tax	0	0 0
Due from others			Other unpaid income and interest	0	0 0
Doubtful	12,938	0 0	Real estate mortgages payable-add schedule	60,000	0 0
Real estate owned-add schedule	1,099,000	0 0	Chattel mortgages and other liens payable	0	0 0
Real estate mortgages receivable	0	0 0	Other debts-itemize:	0	0 0
Autos and other personal property	45,000	0 0			
Cash value-life insurance	0	0 0			
Other assets itemize:					
Deferred Compensation	65,018	0 0			
Franklin - Denver	5,000	0 0			
Boston Financial Apts	390	0 0	Total liabilities	60,000	0 0
			Net Worth	1,774,889	0 0
Total Assets	1,834,889	0 0	Total liabilities and net worth	1,834,889	0 0

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As of 05/06/03

**Schedule of Listed Securities**

<b><u>Non-IRA</u></b> -	Applied Materials	\$ 60,320.
	EMC	19,420.
	Intel	57,060.
<b><u>IRA</u></b> -	Price Science & Technology	131,156.
	Vanguard 500 Index	92,534.
	Vanguard Capital Appreciation	188,181.
	Vanguard Value Index	55,045.

**Schedule of Real Estate**

Residence		
Fort Lauderdale, Florida	\$	450,000.
*Office Bldg.		
Fort Lauderdale, Florida		500,000.
**Condominium		
Hollywood, Florida		149,000.
*Gross rental income	\$	38,160/yr.

\*\*Parents live in condominium

Franklin-Denver & Boston Financial Apartments are partnerships  
in which the applicant is a limited partner

CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor	NO	Are any assets pledged? (Add schedule)	NO
On leases or contracts	NO	Are you defendant in any suits or legal actions?	NO
Legal Claims	NO	Have you ever taken bankruptcy?	NO
Provision for Federal Income Tax	NO		
Other special debt	NO		



## III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

As an attorney, I represented indigent individuals in both criminal and domestic relations cases on a pro bono basis periodically throughout my career.

In a non-legal capacity, I have been active in helping children with special needs through the Exceptional Student Education Advisory Council and serving on rating committees for summer programs for children with special needs.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

No

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

Yes.

I was first interviewed by the Florida Federal Judicial Nominating Commission on July 11, 2001, and was selected as one of three finalists whose names would be advanced to the White House. I was first interviewed in the White House on July 27, 2001.

Following the announcement of a new vacancy, I was

next interviewed by the Florida Federal Judicial Nominating Commission on February 27, 2002, and was again selected as a finalist whose name would be advanced to the White House. Prior to being interviewed at the White House, the White House requested three additional names be submitted. I was interviewed at the White House on June 20, 2002.

A third vacancy was noticed in December, 2002. By virtue of a rule change, my name automatically advanced to the White House along with ten other finalists. I was interviewed for the third time at the White House on February 5, 2003. On March 14, 2003, I was notified by the White House of my selection to fill the newly created seat on the United States District Court for the Southern District of Florida. On May 1, 2003, I was nominated for the position.

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

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem- solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Our Constitution created three independent branches of government, each with separate powers. A recognition and strict adherence to the doctrine of separation of powers is essential to the orderly administration of governmental affairs. Judges should adjudicate only those issues presented without extending a ruling to matters not properly before them. In interpreting the law, a judge should first look to the plain meaning of the law. If that is not readily apparent, then a review of the legislative history may be necessary to ascertain the intent of the legislative body. A judge must uphold the doctrine of stare decisis and follow precedent.

Senator CORNYN. Thank you.  
Judge Montalvo, we would be pleased to hear from you.

**STATEMENT OF FRANK MONTALVO, NOMINEE TO BE  
DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TEXAS**

Judge MONTALVO. Mr. Chairman, thank you for this great opportunity. I am not as fortunate as my colleagues here to have my family today, and for one very specific reason: I am about to become a grandfather, and my wife, Maria, and my daughters are with my oldest son, Francisco, as he and my daughter-in-law expect their first child. So today is a momentous occasion for my family and my mother and my brother for more than one reason, and I am here in this august Committee, and I thank you for your support and Senator Hutchison's support and really the support of the bar in the county where I practice as a judge.

Thank you very much.

[The biographical information of Judge Montalvo follows:]

## I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)  
My birth name is Frankie Montalvo, and I go by Frank Montalvo
2. Address: List current place of residence and office address(es).  
Residence: San Antonio, Texas  
Office: 288<sup>th</sup> District Court, Bexar County Courthouse,  
100 Dolorosa, San Antonio, Texas, 78205
3. Date and place of birth.  
Bayamon, Puerto Rico, May 6, 1956
4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).  
Married to the former Maria D. Martinez. Mrs. Montalvo is employed as a part-time mathematics instructor at San Antonio College, 1300 San Pedro Ave., San Antonio, TX, 78212.
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.
  - 1) University of Puerto Rico- 8/72 to 5/76- Bachelor of Science with honors
  - 2) University of Michigan- 9/76 to 12/77- Master of Science in Bioengineering, degree awarded in 4/78.
  - 3) Wayne State University- 1/79 to 5/79- School of Engineering, no degree earned
  - 4) Wayne State University Law School- 5/80 to 6/85- Juris Doctor
6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.  
Attended graduate school between college graduation and the beginning of employment with Chrysler Corporation.  
**Chrysler Corporation Proving Grounds**- Impact Laboratory, PO Box 387, Chelsea, MI 48118  
Test Engineer- 1/78 to 6/78  
**General Motors Proving Grounds**- Safety R & D Laboratory, 1 GM Road, Milford, MI 48042  
Project Engineer- 6/78 to 1/83

**General Motors Technical Center**, 30200 Mound Road, Warren, MI 48090

Analysis Engineer- 1/83 to 2/84

Senior Analysis Engineer- 3/84 to 2/85

Staff Engineer- 3/85 to 1/88

**Groce, Locke & Hebdon**, a Professional Corporation, 1200 Frost Bank Tower, 100 E. Houston St., San Antonio, Texas, Associate Attorney, 2/88 to 7/91

**Ball & Weed**, a Professional Corporation, 745 E. Mulberry, Suite 500, San Antonio, Texas, 78212, Associate Attorney, 8/91 to 12/94

**Judge, 288<sup>th</sup> Judicial District Court**, Bexar County Courthouse, 100 Dolorosa, San Antonio, Texas, 78205

Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.  
I have not.

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

**San Antonio Black Achievement Awards**- Community service award, March 15, 2003

**FBI Citizens Academy**- Invited to participate in the Bureau's academy for community and civic leaders, March 10, 2003

**Texas Supreme Court**- Appointed to preside over Judicial disciplinary proceeding- January 2003

**National Security Forum**- Maxwell Air Force Base- May 27-31, 2002

Guest of the Secretary of the Air Force

**Court Reporters Certification Board**- On June 20, 2001 a unanimous Supreme Court of Texas appointed Judge Montalvo, Chairman of the licensing and regulatory agency governing 3000 court reporters and 300 court reporting firms in the state of Texas. The agency has been in existence since 1977.

**Fellow Texas Bar Foundation- 1998**

**Honorary Deputy Sheriff Bexar County- 1998**

Numerous certificates and letters of appreciation from community organizations and entities such as the Lions Club, University Of Texas at San Antonio, St. Mary's University San Antonio Hispanic Police Officers Association and San Antonio College.

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

State Bar of Texas 1987- present  
 District 10C Grievance Committee 1992 - 1994  
 College of the State Bar of Texas 1991 - 1994  
 Pattern Jury Charge Committee 1997-1998

San Antonio Bar Association 1988- present  
 Member Fee Dispute Committee 1990 - 1994  
 Vice Chairman Fee Dispute Committee 1993 - 1994

Bexar County Women's Bar Association  
 Judicial Advisory Board 1995- present

Hispanic National Bar Association 1990 - 1991  
 Co-chairman organization committee for annual  
 Convention held in San Antonio in September 1991

Chairman- Budget Committee Bexar County Juvenile Board-1996-  
 present

Chairman- County Auditor Oversight Committee- 1998- present

Bexar County Juvenile Board-1995- present

Advisory Board of Directors- Bexar County Dispute Resolution Center-  
 1995-1998

Bexar County Women's Bar Association- Board of Judicial Advisors-  
 1995- present

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

I do not belong to any organizations that are active in lobbying before public bodies.

Saint Elizabeth Ann Seton Parish 1988-present

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please

explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

State Bar of Texas- November 5, 1987

State Bar of Michigan- April 3, 1986.

U.S. District Court Eastern District of Michigan- May 9, 1986.

U.S. District Court Western District of Texas- April 15, 1988.

U.S. District Court Southern District of Texas- September 2, 1988.

U.S. District Court Northern District of Texas- February 28, 1989.

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

Author/Speaker- San Antonio Bar Association- Trial Seminar- Post Trial Procedure: Request for Findings of Fact and Conclusions of Law- November 17, 1999

Author/Speaker- St. Mary's University Law Alumni Association- General Practice Seminar- July 17, 1999

Speaker- Mexican American Bar Association- New Rules of Civil Procedure- February 9, 1999

Author/Speaker- San Antonio Bar Association Trial Seminar- "Presenting and Defending Robinson motions"- November 21, 1997

Author- San Antonio Young Lawyers Association- The Docket Call- "A View from the Bench: How to Compute Time Pursuant to Rules"- November 1997

Author/Speaker- State Bar of Texas 13<sup>th</sup> Annual Advanced Personal Injury Law Course- "Inside the Courtroom: The Sexual Harassment Case"- July 1997

Speaker- San Antonio Bar Association Trial Seminar- "Exhibits and Demonstrative Aids" April 11, 1997



Author- San Antonio Young Lawyers Association- The Docket Call- "A View from the Bench: Motions for Continuance"- November 1996

Author- San Antonio Bar Association- San Antonio Lawyer- "Jury Research: A General Overview"- Summer 1994

Author/Speaker- Texas Association of Defense Counsel, Spring Meeting Charleston, South Carolina- "The Role of Trial Consultants in the Defense or Complex Products Liability Cases"- April 1993

Author- "Cervical Spine Injury Mechanisms"- 27<sup>th</sup> Stapp Car Crash Conference San Diego, California- 1983

Author - "Possible Position and Postures of Unrestrained Front-Seat Children at the Instant of Collision"- 9<sup>th</sup> Experimental Safety Vehicle Conference- Tokyo, Japan-1982

I have never given speeches involving constitutional law or legal policy.

13. Health: What is the present state of your health? List the date of your last physical examination.  
Good state of health. Last physical examination was in June 2002, and on 2/24/03 my personal physician reviewed and signed the health questionnaire from the Department of Justice.
14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.  
Judge- 288<sup>th</sup> Judicial District Court- In Texas the District court is the highest court of general jurisdiction in a county. The 288<sup>th</sup> is required by statute to give preference to civil and family law cases. I have held that position since January 1, 1995. This is an elected position. I was first elected in November 1994, and subsequently re-elected in 1998 and 2002.
15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state

constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

15 (1) As a State District Judge I do not write opinions; but, the following are ten of the most significant matters over which I have presided.

**Filemon Garza Gutierrez, Et. Al. v. Curtis, Mallet-Prevost, Colt & Mosle, In the 288<sup>th</sup> District Court, Docket Number 2000-CI-18358, Len G. Blackwell, Et. Al. v. Curtis, Mallet-Prevost, Colt & Mosle, In the 288<sup>th</sup> District Court, Docket Number 2000-CI-18347.**

These cases involve allegations that Curtis Mallet-Prevost, through the legal services it provided to the InverWorld Entities in the United States, Cayman Islands and the United Kingdom, caused substantial injury to the class and the estate in bankruptcy. Alleged damages are in excess of three hundred and fifty (350) million dollars. The class consisted of approximately one thousand investors from the United States, Mexico and Venezuela. Jose P. Zollino, Chairman of various of the InverWorld entities and George Fahey, the President of InverWorld Inc., and InverWorld Securities Inc., have both plead guilty to federal charges for their actions that resulted in the demise of the InverWorld Entities. Curtis Mallet contends that the illegal actions of Zollino, Fahey and possibly others within the InverWorld Entities were the sole or primary causes of any damages asserted by the plaintiffs.

After extensive litigation involving numerous contested hearings, scores of depositions and massive paper discovery, this court gave final approval to a settlement that concluded these cases on March 25, 2003. The settlement was accepted without objection or opting out by any party.

**The Board of Adjustment of the City of San Antonio v. Wende 92 S. w. 3<sup>rd</sup> 424,**  
(Texas Supreme Court, 2002)

The city's board of adjustment found a company had land with a preexisting nonconforming use and residential zoning did not apply. The city's department of building inspections approved the board's decision. The trial court, Judge Frank Montalvo, presiding, affirmed the board's decision. The Court of Appeals for the Fourth District of Texas reversed, 27 S. w. 3<sup>rd</sup> 162. Petitioners, the board, department, and city, petitioned for review to the Texas Supreme Court. Review was granted and the Court of Appeals for the Fourth District of Texas decision was reversed. The land, a quarry, was annexed into the city and zoned as a quarry district. Subsequently, two more tracts were annexed and zoned residential. The company filed a registration statement of nonconforming use for them with the department, which

approved it, thereby giving the company the right to use them as part of its quarrying operations. Taxpayers appealed to the board. At the board's hearing, the company produced its preexisting pre-annexation leases. The board approved the department's decision and the trial court affirmed the board's decision. The court of appeals reversed, holding the preexisting leases were insufficient to establish nonconforming use rights. Under the city's development code, a nonconforming use would exist if the purpose for which land was leased did not comply with the use regulations applicable to the district in which it was located. The city's determination that leasing land or showing that the land was designed, arranged, or intended to be used for a nonconforming purpose could establish nonconforming use rights, was not absurd merely because it was contrary to the common law and zoning ordinances in other cities.

**Wellish v. United Services Automobile Association, 75 S.W. 3<sup>rd</sup> 53**

Petition for review to the Texas Supreme Court denied, September 12, 2002.

The trial court, Judge Frank Montalvo, presiding, granted summary judgment to insurance company and against appellant parents on the parents' claims for damages under multiple theories arising out of the death of their daughter as a result of fatal injuries she sustained as a passenger in an auto accident. The vehicle was insured. The parents settled with the driver's estate. They then sought recovery of insurance policy limits under their own uninsured/underinsured coverage. The insurance company involved was the same one that had paid benefits on behalf of the driver's estate. It denied the parents' claim. The parents sued and received a verdict exceeding the amount they previously recovered from the driver's estate and the uninsured motorist limits combined. On the same day judgment was entered, the insurance company paid to the parents the limit available under their underinsured motorist policy. The parents made extra-contractual claims against the insurance company for the alleged breach of the duty of good faith and fair dealing, statutory violations, and mental anguish. After the trial court granted summary judgment, the appellate court found no improper payment delay as the insurance company only waited to pay until the parents established they had a right to the money. Accordingly, the parents also were not entitled to mental anguish damages. The judgment was affirmed.

**Crescendo Investments Inc. v. Brice, 61 S.W.3d 465**

Petition for review to the Texas Supreme Court denied, February 14, 2002.

The plaintiffs were the victims of an investment scheme directed by Hugh Scott. Appellees Bill and Julie Brice are the only remaining defendants. The Brices owned Brice Foods, Inc., (BFI) which was the general partner in a limited partnership, which owned the franchise (and some actual shops) of "I Can't Believe It's Yogurt!" (ICBIY).

Scott operated various Cayman Islands corporations, which obtained master franchises from BFI/ICBIY to develop large international areas. Plaintiff investors sued defendant corporate officers for securities fraud and civil conspiracy. Defendants were officers and stockholders in a corporate general partner of a limited partnership that franchised yogurt stores. Plaintiffs invested in yogurt store franchisees. Plaintiffs sued Hugh Scott, the man who sold them interests in those franchisees. Plaintiffs also sought to hold defendants liable as aiders and abettors of fraudulent sale of securities, participants in a civil conspiracy, and as control persons under the Texas Securities Act. On appeal, the court found (1) the evidence did not show defendants were acting as aiders and abettors; (2) the trial court did not abuse its discretion in granting a directed verdict on the conspiracy claim against one defendant; (3) the evidence was legally and factually sufficient to support the verdict; (4) the allegedly conflicting jury findings could be reconciled; (5) the trial court did not abuse its discretion in excluding evidence or refusing to give a spoliation of evidence instruction; (6) the issue of the trial court's refusal to allow substitution of nominal plaintiffs was moot; (7) the trial court did not err in its award of costs; and (8) there were no cumulative errors by the trial court that required reversal.

**Littleton v. Prange, 9 S.W.3d 223, Petition for Review Texas Supreme Court, denied March 2, 2000. Certiorari denied, October 2, 2000, Littleton v. Prange, 531 U.S. 872**

Appellant, a transsexual sought relief from an order from Judge Montalvo, which granted summary judgment in favor of appellee doctor who challenged appellant's status as a surviving spouse in wrongful death action, asserting appellant was a man and could not be the surviving spouse of another man. Appellant was a transsexual, born as a male, and had had a sex change operation. Appellant married a man and lived with him until his death when she filed a medical malpractice suit under the wrongful death statute as the surviving spouse. The doctor filed for summary judgment, challenging appellant's status as a proper wrongful death beneficiary, asserting that she was a man and could not be the surviving spouse of another man; the trial court agreed. This was a case of first impression in Texas, and the court held that the underlying statutory law was simple enough. Texas does not permit marriages between persons of the same sex, and as a matter of law, appellant is a male, thus as a male, she could not be married to another male. Her marriage was invalid, and she could not bring a cause of action as the surviving spouse of another male.

**In the Matter of M.R.R., Jr., A Juvenile, 2 S.W.3d 319**

Defendant appealed a guilty finding of delinquent conduct for committing the offense of capital murder of a four year old child, asserting that the trial court erred in admitting

his written confession, Upon his confession to a drive by shooting, defendant was charged with delinquent conduct for the commission of capital murder. A jury found defendant guilty and assessed a determinate sentence of 40 years' imprisonment. On appeal, defendant challenged the admissibility of his written confession, which was obtained in the absence of Miranda warnings and without compliance with the requirements for detaining and processing juveniles. The court affirmed, concluding that neither the lack of Miranda warnings nor the non-compliance with the requirements of the Texas Family Code for detaining and processing juveniles rendered the confession inadmissible. Applying an objective standard, the court found that defendant was not in custody when he gave his statement because police informed him that he was not under arrest and was not restrained from leaving. Further, the court found that the statement was voluntary where he voluntarily went to the police station and police reminded defendant that he was not obligated to talk. Finally, the trial court erred by admitting the co-conspirator's confession, which contained references to defendant. The error, however, was harmless in light of the admission of defendant's confession and other untainted damaging evidence.

**Jones v. Beech Aircraft, 995 S.W. 2<sup>d</sup> 767, disapproved, BMC Software Belgium, N.V. v. Marchand, 83 S.W.3d 789 (Texas 2002)**

Plaintiff aircraft crash survivors sought review of a decision of the 57th Judicial District Court, Bexar County (Texas), which sustained a special appearance by defendant aircraft manufacturer. The underlying wrongful death action, alleging product defect and negligence claims, resulted from an airplane crash in which plaintiffs were all foreign nationals who were barred from asserting tort claims in their country. This accelerated appeal was generated by the trial court's order sustaining a special appearance by Beech Aircraft Corporation, a Kansas aircraft manufacturer. The underlying wrongful death action, alleging product defect and negligence claims, resulted from an airplane crash in New Zealand that killed six people. Their survivors are all foreign nationals who were barred from asserting tort claims in their country.

The question more than just jurisdictional involved whether to allow forum selection. Plaintiffs had the burden of proving the existence of a relationship between defendant aircraft manufacturer and its subsidiaries such that the court could disregard separate corporate structures to establish minimum contacts in Texas for purposes of personal jurisdiction. Applying an abuse of discretion standard in reviewing the trial court's ruling the court of appeals held that the relationship between defendant and its subsidiaries was such that defendant was engaged in business through the activities of the subsidiaries. Further, although defendant's web site alone would not be sufficient to establish jurisdiction in Texas, it was a factor to consider along with other contacts. The

aircraft had been operated in Texas and had been modified there and a similar crash had occurred in Texas through which appellants alleged, and the appeals court agreed, defendant had acquired notice of the alleged defect. Further, the most convenient and efficient way to resolve the controversy was to allow appellants to proceed in Texas. In *BMC Software* the Texas Supreme Court for the first time clearly articulated the standard for reviewing a trial court's order denying a special appearance. The Supreme Court observed that the San Antonio Court of Appeals had held that, because personal jurisdiction involves both legal and factual questions, appellate courts should review the trial court's decision for an abuse of discretion. However, it also noted that other courts of appeals review the trial court's factual findings for legal and factual sufficiency and review the trial court's legal conclusions *de novo*. The Supreme Court held that the better approach was the latter and disapproved of those cases applying an abuse of discretion standard only, specifically listing *Jones v. Beech Aircraft* as one of those cases.

**The Honorable Frank Montalvo, Judge, Relator v. The Fourth Court of Appeals, Respondent, 917 S.W. 2d 1(Texas, 1995)**

Relator judge, on his own initiative, sought a writ of mandamus concerning a writ of mandamus conditionally issued by respondent, Fourth Court of Appeals, compelling him to vacate an order setting an abbreviated schedule for a hearing on motions to transfer venue, one of which had been pending for over eighteen months. His order also set an abbreviated schedule for discovery and hearing of the motions to transfer venue. The injured party objected to the schedule established by Judge Montalvo and sought a writ of mandamus directing him to vacate his order. The lower court conditionally granted the writ, concluding that restricting the time for and scope of discovery on the venue issues deprived the injured party of an adequate remedy by appeal. The Supreme Court held that the injured party failed to present evidence that the limitation on discovery or schedule deprived it of any ability to develop evidence pertinent to the venue issue. Therefore, the lower court abused its discretion in issuing the writ of mandamus without a clear showing that the injured party had met the requirement of an inadequate remedy by appeal.

**Dwight L. Lieb v. Ronald A. Lindsey and Broadway Funding Corp., Cause No. 99-CI-09567, Appeal dismissed**

Mr. Lieb, the plaintiff, alleged that he owned a controlling interest in Broadway Funding Corporation ("BFC"). BFC owned, either directly or through subsidiaries, La Fogata and Tomatillo's, two of the most popular and highly successful restaurants in San Antonio. BFC also owned a large tract of land in north San Antonio that was intended for development into a third restaurant.

Mr. Lieb's interest in BFC was not documented; to the contrary, he and his business partner, Mr. Lindsey, had always operated BFC informally with little or no documentation. The only writing was BFC's charter from the Texas Secretary of State. When a dispute developed between Mr. Lieb and Mr. Lindsey, Mr. Lindsey hired lawyers to prepare corporate documents, which completely excluded Mr. Lieb from any ownership or management authority in BFC. Elizabeth Mangum, a minority owner of BFC, along with Robert Baccus, who had invested only in La Fogata, intervened in the case in support of Mr. Lindsey. Mr. Lindsey and Ms. Mangum removed BFC's records from its offices, and denied Mr. Lieb any salary or benefits.

Shortly after the suit was filed, the Court appointed an auditor and entered an injunction, at Mr. Lieb's request, to prevent withdrawal of funds or assets from BFC. In response, Mr. Lindsey, acting as president of BFC, put BFC in Chapter 11 bankruptcy proceedings. Mr. Lindsey also caused BFC to remove the lawsuit to the U. S. Bankruptcy Court. The Bankruptcy Court remanded most of the claims for trial in the Bexar County District Court, but retained control of any claims that could impact the ongoing business of the two restaurants or disposition of the land. Resolution of the case required sorting out unique questions of how a corporation functions with nothing in writing but its charter, how undocumented ownership of a corporation could be "restored," and what relief the 288th District Court could grant without invading the Bankruptcy Court's jurisdiction.

The jury found in favor of Mr. Lieb. On July 13, 2000, the 288th District Court entered declaratory judgment that Mr. Lieb was rightful owner of 42.5 percent of the stock of BFC and had voting control over all of BFC's shares, including the shares owned by Mr. Lindsey and Ms. Mangum. The Court imposed a constructive trust over all shares in BFC until such time as Mr. Lieb's ownership and voting control was properly documented. The Court also awarded, based upon the jury's verdict, attorney's fees of \$240,000.00, jointly and severally against Mr. Lindsey, Ms. Mangum, and Mr. Baccus, and \$180,100.00 in punitive damages against Mr. Lindsey. An appeal was taken but was dismissed, leaving Mr. Lieb with full ownership and control over BFC.

**MOC-O&G, Inc., Et. Al. v. Paradigm Oil, Inc., Docket Number: 97-CI-14664, Appeal dismissed.**

The controversy in this case surrounds the successive assignments of oil and gas exploration leases in various tract of land in south Texas and whether the various covenants contained in the assignments run with the land.

Batesville Farming Co. entered into an oil and gas lease with M.O. Cardin regarding a 2,500-acre tract in Zavala County. On or about December 1979, Laverne Lee and

others entered into an oil and gas lease with MOC-O&G, Inc. involving another tract of land also in Zavala County.

Shortly thereafter, M. O. Cardin, MOC-O&G, Inc. joined by a group of individual investors entered into a letter agreement regarding the assignment of said leases to Steve Gose. The letter agreement provided, among other things, that Steve Gose, his successors and assigns shall provide to MOC-O&G, inc, the right of reassignment of the leases at any time Gose or his successors or assigns desired to release, surrender, abandon or allow the leases to expire. Thereafter on or about January 1980, MOC-O&G, Inc assigned the leases to Gose. The assignments were filed and recorded and clearly indicated that they were subject to the terms and conditions of the letter agreement. In early 1993 Gose assigned both leases to PNB Securities Corporation, and in May 1993, PNB Securities Corporation assigned both leases to Paradigm Oil, defendant herein.

On or about November of 1995, due to market conditions, Paradigm executed a release to the record owners of the land of the 2,500 acres lease. Also on the same date, Paradigm executed a release of the 10,000 acres lease, to the record owners of the land. Plaintiffs allege that Paradigm as successor and assign of Steven Gose became obligated and bound by the terms of the letter agreement and by the terms of the assignment of said leases. Thus Paradigm was bound and obligated to offer to MOC-O&G, Inc. the right of reassignment of the leases prior to Paradigm releasing them to the landowners. After a hotly contested trial a jury returned a verdict for plaintiffs. The jury found that Paradigm had notice of the agreement to reassign the leases to MOC-O&G, Inc. and plaintiffs had not waived the right to enforce the agreement. Based on geological expert testimony the jury assessed the fair market value of the lease and awarded that amount as damages.

15. (2) Summary and Citations of Trial Court Decisions Reversed on Appeal

(The numbers correspond with the full opinions found in attachment A)

1. In the Matter of J.C.C. 952 S.W.2d 47

Order certifying juvenile as an adult was reversed and remanded because State failed to use due diligence in prosecuting appellant before his eighteenth birthday. State lacked an explanation as to why it did not prosecute J.C.C. on a regular petition, several months earlier, when it prosecuted his twin brother for the same alleged arson. Therefore, no evidence supported trial court's order. Absence of written findings in the order was harmless, since findings were clearly identifiable and unambiguous.



2. **In the Matter of B.J.** 960S.W.2d 216  
Trial court attempted, but failed to give proper admonishments to twelve-year-old boy charged with serious alleged sexual offenses. Reversed due to fundamental error. Additionally, questions arose concerning the youth's mental competency to stand trial. A fitness hearing was ordered upon remand.
3. **Cox & Smith Inc. v. Cook** 974 S.W.2d 217  
Jury verdict for sexual discrimination claim was reversed due to legally and factually insufficient evidence. The Court of Appeals applied the reasonable belief standard used in employment discrimination cases. In order for appellee to have a reasonable belief, she had to subjectively believe, in good faith, that her employer was illegally discriminating against her; and, her belief had to be objectively reasonable given the context in which it occurred. Here the five instances of appellant's alleged misconduct were either not directed at appellee personally, not sexual in nature, or represented an isolated event that, in and of itself, did not constitute unlawful discrimination. Court held that appellee lacked the threshold requirement of a reasonable belief and; therefore, could not establish a prima facie case of unlawful sexual discrimination. Take-nothing judgment rendered against appellee.
4. **Monreal v. Cody** unpublished 1998 WL 354805  
Appellant, plaintiff in a personal injury cause of action, challenged the trial court's directed verdict and obtained a new trial. Court of Appeals recognized that appellant presented a "very thin broth", but concluded that she ladled-up more than a scintilla of evidence on each element of her negligence claim which required it to reverse and remand. Case tried before a jury who after deliberating for less than an hour returned a defense verdict.
5. **In Re Weekley Homes** 985 S.W.2d 111  
Although appellant initially failed to meet condition precedent to arbitration as expressed in its contract, it did not waive its right to arbitrate. Purchase agreement required parties to attend mediation before invoking arbitration

clause. When appellant filed its first appeal, regarding denial of its motion to compel arbitration, it had not attended mediation. However, appellant did attend mediation at a later date, but the dispute remained unresolved. Appellant filed a second motion to compel arbitration. The trial court denied it, stating that appellant waived its right to arbitrate during the first appeal. However, arbitration rights must be intentionally waived. The purchase agreement in question did not imply or expressly state that waiver occurred by failure to meet the condition precedent of mediation. The Court of Appeals held that appellant consistently asserted its arbitration rights during the first appeal and no waiver occurred. Conditional writ of mandamus granted.

6. **Green Tree Financial Corp. v. Garcia** 988 S.W.2d 776

Objection to omitted jury instruction regarding predicate requirements for punitive damages was preserved by appellant corporation at charge conference. Trial court erred in not submitting requested jury charge to specifically require jury finding on corporation's liability for its employees' acts. Evidence was legally and factually sufficient to support actual damage award, but it was not conclusive as to punitive damages. Entire judgment reversed so that second jury, upon remand, could hear all evidence in order to determine whether appellant committed alleged tortious acts with malice.

7. **Jones v. Beech Aircraft Corp.** 995 S.W.2d 767

Using an abuse of discretion standard, the Court of Appeals reversed the trial court granting of a special appearance. It held that defendant corporation exercised dominance and control over its subsidiaries, because all entities had common officers and directors. In other words, the parent corporation and its subsidiaries were effectively acting as one entity. This finding combined with several other factors, such as an interactive web page, established general jurisdiction for purposes of minimum contacts. Additionally, traditional notions of fair play and substantial justice were satisfied, partly because the burden on defendant was weak due to its relationship with its subsidiaries.

The standard of review issue was revisited by the Texas Supreme Court, in *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789. The Court expressly disapproved all cases applying an abuse of discretion standard when reviewing a trial court's order granting a special appearance.

8. **In the Matter of S.F., a Juvenile** 2 S.W.3d  
389
- Case overturned based on procedural distinction between juvenile and criminal law. Adult criminal proceedings allow a defendant to stipulate to evidence and enter a guilty plea while simultaneously preserving his right to appeal the trial court's denial of his motion to suppress. At the time, Texas Juvenile law, however, did not provide a similar procedural safeguard. All parties in this case, including the trial court, mistakenly believed that the juvenile preserved his right to appeal the suppression point. Court of Appeals held that defendant had, in fact, waived his right to appeal when he entered a plea of true. Consequently, the juvenile's plea was involuntary, because it was based on an erroneous belief regarding his right to appeal.
9. **Eubanks v. LDDS Communications Inc.** unpublished 1999WL511519
- Former employee sued for gender discrimination, retaliatory discharge, and defamation. Trial court granted summary judgment for employer. Appeals court affirmed all but the discrimination claim. Review under a no evidence summary judgment only requires the appeals court to find that the non-movant presented more than a scintilla of evidence. In this case, the trial court had granted a motion by the employer to strike a deposition presented by plaintiff based on failure to identify the witness during discovery, and that her affidavit was conclusory, speculative, and based on hearsay. The appeals court found the affidavit admissible and considered the affidavit in their review. On this basis, the appeals court found sufficient evidence to raise a question of fact.
10. **Reveron v. Reveron** unpublished  
2001WL 1230520
- Texas resident files for divorce from a Georgia resident. The couple's minor child is also a Georgia resident. Trial court grants wife's special appearance and dismisses the petition for divorce based on lack of personal jurisdiction. Husband appeals. Appeals court affirms the special appearance but reverses the dismissal. The appeals court found that the trial court had subject matter jurisdiction over the divorce action. Texas Family Code provides jurisdiction if either party is domiciled in the state for the six months preceeding the time a suit

is filed. The husband satisfied this requirement. Further, the appeals court found that the trial court had jurisdiction to enter a child support order based on a prior Georgia consent order, even though the minor child was not subject to personal jurisdiction in Texas, and neither he nor his mother had ever resided in Texas.

11. **Lonza AG v. Blum** 70 S.W.3d 184

Former employee of domestic subsidiary brought actions for wrongful termination, fraud, conversion and intentional infliction of emotional distress against Swiss parent corporation. The trial court denied parent corporation's special appearance to contest personal jurisdiction. Parent corporation appealed. The Court of Appeals held that parent corporation was not subject to personal jurisdiction in Texas because; it insufficient contacts with the state, had never sold its products to any customers in Texas, had never employed plaintiff, and could not be held to general jurisdiction due to voluntarily waiving personal jurisdiction in another case in a different district in Texas. In so holding the Court of Appeals disregarded undisputed evidence that Lonza AG had plead guilty to and paid a substantial fine in the Northern District of Texas for an antitrust violation, an offense that had the requisite element of presence in the State of Texas during the relevant time period which also was the relevant period in the underlying lawsuit.

12. **In Re Escamilla** unpublished 2002WL1022945

In ongoing child custody proceedings incident to divorce, former wife filed petition for writ of mandamus seeking to vacate the temporary orders granting former husband's petition for modification of custody. The Court of Appeals held that: (1) evidence was insufficient to support trial court's finding that children were endangered in former wife's custody; (2) former husband's speculation as to potential harm to children arising out of former wife's residence with unrelated adult male was insufficient to establish necessity of custody change; and (3) former wife lacked appellate remedy. Writ was conditionally issued.

13. **Changing Surface, Inc. v. Crum** unpublished 2002WL1972078

This is an interlocutory appeal from an order granting a temporary injunction enforcing certain restrictive (no compete clauses) covenants in an employment contract. Although the trial court granted injunctive relief to the employer, it did not grant the complete relief sought. The employer, Changing Surface, Inc., perfected this appeal to challenge the limited scope of the temporary injunction granted by the trial court. The appeals court found that the trial court's grant of limited temporary relief failed to maintain the status quo because it did not restrain the defendant from working for competitors of the plaintiff. The appeals court reversed and remanded for further proceedings.

14. **In Re Kenwood Communications Corp** 2003 Tex. App. Lexis 2101

The defendant sought mandamus to vacate the trial court's order denying its motion to compel arbitration. Original Master Dealer Agreement executed by the plaintiff but not by defendant contained a broad arbitration clause. California law was controlling. Plaintiff claimed that because the contract was not duly executed in California, defendant had waived its right to the arbitration provision contained therein. KCC maintained the condition that it execute the contract in California was waived, and, because both parties intended to be bound and performed under the contract, the arbitration agreement was enforceable. The Court held that defendant, the party protected by the arbitration clause, had the right (under California law) to and did waive this condition precedent to the formation of a binding contract. Therefore the parties were bound to arbitration. Writ was conditionally granted and all proceeding stayed pending the arbitration.

15. **Maldonado v. State Farm Lloyds** 13-97-504- CV, 13<sup>th</sup> Court of Appeals District, unpublished

Appeal from a motion granting summary judgment that the Texas standard homeowner's insurance policy did not provide coverage for damage due to foundation movement. While the case was pending the Texas Supreme Court issued an opinion where it found that the policy did provide such coverage and the case was remanded to the trial court.

16. **Britton v. Quintanilla** 04-95-00221-CV, 4<sup>th</sup> Court of Appeals District, unpublished

Parents of three middle school students sued Britton a vice-principal for allegedly using excessive force in disciplining students and for negligence. The trial court denied Britton's motion for summary judgment based upon the defense of qualified immunity.

The Court held that Britton's actions in conducting a strip search of the three students while looking for money missing from a fundraising event did not constitute discipline and therefore she was entitled to the defense of qualified immunity.

17. **Spain vs. Montalvo** 921 S.W. 2d 852

Mandamus relief sought after trial court disqualified plaintiff's attorney to prevent violation of disciplinary rule of professional conduct prohibiting a lawyer from being a material witness and trial attorney in the same case. The order disallowed representation in any professional capacity. Mandamus instructed trial court to reform the disqualification order to allow counsel to assist plaintiff in the preparation of the case; otherwise, the disqualification order remained unchanged.

15. (4) Citations for Opinions on Federal or State Constitutional Issues

1. **In the Matter of B.J.** 960 S.W. 2d 216

Trial court attempted, but failed to give proper admonishments to twelve-year-old boy charged with serious alleged sexual offenses. Reversed due to fundamental error. Additionally, questions arose concerning the youth's mental competency to stand trial. A fitness hearing was ordered upon remand. (Attach. A no. 2)

2. **Jones v. Beech Aircraft Corp.** 995 S.W. 2d 767

Using an abuse of discretion standard, the Court of Appeals reversed the trial court granting of a special appearance. It held that defendant corporation exercised dominance and control over its subsidiaries, because all entities had common officers and directors. In other words, the parent corporation and its subsidiaries were effectively acting as one entity. This finding combined with several other factors, such as an interactive web page, established general jurisdiction for purposes of minimum contacts. Additionally, traditional notions of fair play and

substantial justice were satisfied, partly because the burden on defendant was weak due to its relationship with its subsidiaries. (Attach. A no. 7)

The Texas Supreme Court, in *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, revisited the standard of review issue. The Court expressly disapproved all cases applying an abuse of discretion standard when reviewing a trial court's order granting a special appearance.

3. **In the Matter of S.F., a Juvenile** 2 S.W.3d 389

Juvenile's plea of true violated due process, because it was based on a mistaken belief regarding his right to appeal, and therefore, involuntary. Case overturned based on procedural distinction between juvenile and criminal law. Adult criminal proceedings allow a defendant to stipulate to evidence and enter a negotiated guilty plea while simultaneously preserving defendant's right to appeal the trial court's denial of his motion to suppress. At the time, Texas Juvenile law, however, did not provide a similar procedural safeguard. All parties in this case, including the trial court, mistakenly believed that the juvenile preserved his right to appeal the suppression point. Court of Appeals held that defendant had, in fact, waived his right to appeal when he entered a plea of true. Consequently, the juvenile's plea was involuntary, because it was based on an erroneous belief regarding his right to appeal. (Attach A no.8)

4. **Lonza AG v. Blum** 70 S.W.3d 184

Former employee of domestic subsidiary brought actions for wrongful termination, fraud, conversion and intentional infliction of emotional distress against Swiss parent corporation. The trial court denied parent corporation's special appearance to contest personal jurisdiction. Parent corporation appealed. The Court of Appeals held that parent corporation was not subject to personal jurisdiction in Texas because; it insufficient contacts with the state, had never sold it's products to any customers in Texas, had never employed plaintiff, and could not be held to general jurisdiction due to voluntarily waiving personal jurisdiction in another case in a different district in Texas. In so holding the Court of Appeals disregarded undisputed evidence that Lonza AG had plead guilty to and paid a substantial fine in the Northern District of Texas for an antitrust violation, an offense that

had the requisite element of presence in the State of Texas during the relevant time period which also was the relevant period in the underlying lawsuit. (Attach A no.11)

5. In the Matter of M.R.R., Jr., A Juvenile 2 S.W.3d 319

Defendant appealed a guilty finding of delinquent conduct for committing the offense of capital murder of a four year old child, asserting that the trial court erred in admitting his written confession. Upon his confession to a drive by shooting, defendant was charged with delinquent conduct for the commission of capital murder. A jury found defendant guilty and assessed a determinate sentence of 40 years' imprisonment. On appeal, defendant challenged the admissibility of his written confession, which was obtained in the absence of Miranda warnings and without compliance with the requirements for detaining and processing juveniles. The court affirmed, concluding that neither the lack of Miranda warnings nor the non-compliance with the requirements of the Texas Family Code for detaining and processing juveniles rendered the confession inadmissible. Applying an objective standard, the court found that defendant was not in custody when he gave his statement because police informed him that he was not under arrest and was not restrained from leaving. Further, the court found that the statement was voluntary where he voluntarily went to the police station and police reminded defendant that he was not obligated to talk. Finally, the trial court erred by admitting the co-conspirator's confession, which contained references to defendant. The error, however, was harmless in light of the admission of defendant's confession and other untainted damaging evidence. (Attach. A no.18)

6. In the Interest of Digges 981 S.W. 2d 445

The Appeals Court held that a Judicial writ of withholding procedure did not violate divorced father due process rights to fundamental fairness based on absence of limitations period and on the limited number of defenses he was permitted to raise. Trial court had discretion to consider whether the order would impose undue financial burden on father. (Attach. A no. 19)



7. In the Matter of S. P.

9 S.W. 3d 304

The Appeals Court held that juvenile claims that he had inefficient assistance of counsel because counsel did not use peremptory challenges on two venire persons, elicited favorable testimony from state's witnesses, failed to develop his theory of the case, failed to request an updated psychological evaluation before disposition and did not bring up alleged jury misconduct at the motion for new trial failed to prove that his counsel was deficient. (Attach. A no.20)

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

I have not held public office other than judicial office. Nor, have I had any unsuccessful candidacies for elective office.

17. Legal Career:

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

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk; **Not Applicable**
2. whether you practiced alone, and if so, the addresses and dates; **Not Applicable**
3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

Following my graduation from law school, I continued working as an Automotive Safety Engineer for General Motors. On February 1<sup>st</sup>, 1988, I joined the law firm of Groce, Locke & Hebdon, 1200 Frost Bank Tower, 100 E. Houston St., San Antonio, Texas, as an Associate Attorney and remained there until the end of July 1991. At that law firm, my practice primarily involved the litigation and trial of complex products liability cases, on the defense side. The practice also included the litigation and trial of general negligence and consumer law cases.

From August 1<sup>st</sup>, 1991, to December 31, 1994, I practiced with the law firm of Ball & Weed, 745 E. Mulberry, Suite 500, San Antonio, Texas, 78212, as an Associate Attorney. The areas of practice remained unchanged. I was sworn in as Judge of the 288<sup>th</sup> Judicial District Court on January 1<sup>st</sup>, 1995.

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

My practice primarily involved the litigation and trial of complex products liability cases, on the defense side. The practice also included the litigation and trial of general negligence and consumer law cases. It did not change over the years.

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

Typical former clients included automotive manufacturers and liability insurance defense policyholders.

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

During the time I was engaged in the practice of law, I appeared in court frequently. There were no variances in the frequency of appearances over those years.

2. What percentage of these appearances was in:
  - (a) federal courts; **20%**
  - (b) state courts of record; **80%**
  - (c) other courts.

3. What percentage of your litigation was:
  - (a) civil; **100%**
  - (b) criminal.

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

Tried approximately 12-13 cases to a jury verdict and 3-5 cases that settled during jury selection or mistried and settled subsequently. I was sole/chief counsel in about five of those cases.

5. What percentage of these trials was:
  - (a) jury; **100%**
  - (b) non-jury

18. **Litigation:** Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:
- (a) the date of representation;
  - (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
  - (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

**Victoria Way and Mike Way v. Freightliner Corp.**, 45<sup>th</sup> District Court, Bexar County, Texas, Docket No: 86-CI-20326. The case was tried before Judge Carol Knight-Sheen. Co-counsel Jack Hebdon (Mr. Hebdon is now retired, 8 Garden Square, San Antonio, Texas, 210-826-1854) and I represented Freightliner, counsel for plaintiffs were Norman C. Dean (P.O. Box 311176, New Braunfels, Texas 78131-1176, 830-606-0855) and Doug Chavez (802 N. Carancahua St., Corpus Christi, Texas, 78470-0700, 361-888-9392). This case involved defect allegations in the design of the brakes of a Freightliner tractor. I handled the majority of the pre-trial litigation and shared the trial responsibilities with co-counsel. The case was tried to a jury verdict in 1989.

**Norma Valento v. BMW, A.G. Et. Al.**, 150<sup>th</sup> District Court, Bexar County, Texas, Docket No: 91-ci-16112. The case was tried before Judge Carleton Spears. Co-counsel for BMW, A.G. was Michael Myers, (745 East Mulberry, Suite 500, San Antonio, Texas, 78212. 210-731-6300. Opposing counsel for plaintiff were Franklin Houser (Mr. Houser is now retired, 251 Blue Bonnet Blvd. San Antonio, Texas 78209, 210-824-5497) and Buddy Rake, Jr. (1313 E. Osborn Rd. Suite 100, Phoenix, Arizona, 85014, 602-248-3000). This case involved crashworthiness defects allegations resulting in injuries to plaintiff's decedent. I assisted with the pre-trial litigation and shared the trial responsibilities with co-counsel. This case was tried to a jury verdict in 1993.

**Trinity Retirement Living Foundation, Inc. v. Sikes Construction Co., Et. Al.** 73<sup>rd</sup> District Court, Bexar County, Texas, Docket No: 88-CI-04785. I represented the finish architect in this multimillion-dollar construction defect case. The case settled on the eve of trial without any contribution from client. Lead counsel for plaintiff was Lewin Plunkett, Plunkett & Gibson, Renaissance Plaza, 70 NE Loop 410, Suite 1100, San Antonio, Texas, 78216, 210-734-7092.

**Leal v. General Motors Corporation**, Brownsville division, U. S. District Court Southern District of Texas, Docket No: 1:88cv00029. I represented General Motors in this complex products liability case involving crashworthiness defect allegations that resulted in the death of members of the Leal family. I handled the totality of the pretrial proceedings and settlement negotiations. Opposing counsel for plaintiff were Richard Schechter, (11 E. Greenway Plaza, Suite 2010, Houston Texas, 77046, 713-623-8919) and Albert Villegas (1324 E. 7<sup>th</sup> Street, Brownsville, Texas, 78520-7241, 956-544-3352).

**Perales v. Russell E. Friel Et. Al.**, 111<sup>th</sup> District Court, Webb County, Texas, (Docket number unavailable) Judge Antonio Zardenetta presiding, (Judge Zardenetta is retired, 1338 Canyon Brook, San Antonio, Texas, 78248, 210-493-7538). Represented the driver and trucking company in a lawsuit resulting from a tractor-trailer/bicyclist accident. I handled all of the pre-trial proceedings and settlement negotiations. Counsel for plaintiff was Steve T. Hastings, 101 N. Shoreline, #420, Corpus Christi, Texas, 78401, 361-888-5273.

**Helen Ditmore v. General Motors**, El Paso division, U. S. District Court Western District of Texas Judge Harry L. Hudspeth presiding, Docket No: EP86CV214. I assisted co-counsel David M. Prichard (10101 Reunion Place, San Antonio, Texas 78216, 210-477-7401) and Ray A. Weed (745 East Mulberry, Suite 500, San Antonio, Texas 78212) with the pre-trial litigation and jury trial. This case involved product defect allegations that resulted in a house fire and serious injuries to plaintiff. Lead counsel for plaintiff was Michael Cohen, P. O. Box 1021, El Paso, Texas, 79946, 915-577-0757. The case was tried to a jury verdict in 1988.

**Hoeffert v. Alamo Rental, Inc.**, San Antonio division, U. S. District Court Western District of Texas Judge Edward C. Prado presiding, Docket No: SA91CA541. Served as counsel for Alamo Rental Inc. with Ray A. Weed (745 East Mulberry, Suite 500, San Antonio, Texas 78212, 210-731-6300). Handled the pre-trial litigation and trial preparation, case settled shortly before trial. It

involved product defect allegations in a vehicle manufactured by General Motors and rented by Alamo. Plaintiff's alleged that those defects caused the wrongful death of her husband. Plaintiff's counsel were Rene Diaz (1506 Bexar Crossing, San Antonio, Texas, 78232, 210-979-0100) and James L. Branton (One Riverwalk Place, 700 N. St. Mary's St. Suite 1700, San Antonio, Texas, 78205, 210-224-4474).

**Tobias v. General Motors**, 346<sup>th</sup> District Court, El Paso County, Judge Jose Baca presiding, Docket No: 89-6669. Represented General Motors together with David M. Prichard (10101 Reunion Place, San Antonio, Texas 78216, 210-477-7401). Actively involved in the pre-trial litigation and jury trial. This case involved allegations of manufacturing defect in a tire and wheel assembly causing a vehicle accident and injuries to plaintiffs. The case was tried to a jury verdict in 1991.

**Alvarado v. Hyundai Motor Company, Et. Al.**, 229<sup>th</sup> District Court, Duval County, Texas, Judge Benjamin Euresti Jr. Together with David M. Prichard (10101 Reunion Place, San Antonio, Texas 78216, 210-477-7401) represented defendant Hyundai Motor America, during pre-trial litigation and trial of this case. The lawsuit arose from injuries sustained by plaintiff Mario Alvarado in a single vehicle rollover accident. Plaintiffs alleged that the seat belt design was unreasonably dangerous. The case originated in Webb County and plaintiff non-suited the case after a partial motion for summary judgment was granted. That part of the case was ultimately resolved by the Texas Supreme Court, in *Hyundai v. Alvarado*, 892 S. W. 2d. 853, wherein the Court held that a non-suit after the granting of a partial motion for summary judgment is entered results in a dismissal with prejudice as to the issues decided in the summary judgment. The case was re-filed in Duval County. I was involved in all of the pre-trial and trial proceedings in both the Webb and Duval County actions. Lead counsel for plaintiffs was Steve T. Hastings, 101 N. Shoreline, #420, Corpus Christi, Texas, 78401, 361-888-5273. Counsel for other defendants were Eduardo R. Rodriguez, P. O. Box 2155 Brownsville, Texas, 78522, 956-542-7441 and Darrell L. Barger, North Tower, 800 N. Shoreline Blvd., Suite 2000, Corpus Christi, Texas, 78401, 361-866-8009. The case settled after the Duval County jury trial.

**Carol Quick, Et. Al. v. John DeSalme Et. Al.**, 37<sup>th</sup> Judicial District Court, Bexar County, Texas, Judge John Cornyn (currently serving as U. S. Senator for the state of Texas) presiding, docket No. 88-CI-10660. This case arose from an

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.  
Upon turning age sixty (60) I will qualify to receive a retirement pension from the Texas County and District Retirement System due to having more than eight years of continued service to Bexar County, Texas.
2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.  
I cannot identify any current or previous activity or association of mine that would pose a potential conflict of interest with my service in the Federal Judiciary. Should any such conflict, actual or perceive, were to arise, it can be resolved by following the ethical guidelines for the Federal Judiciary.
3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court?  
If so, explain.  
I do not.
4. List sources and amounts of all income received during the calendar year preceding nomination and for the current calendar year, including all salaries, fees dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)  
See attached financial disclosure report.

5. Please complete the attached financial net worth statement in detail.

See attached net worth statement.

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

I have not held a position or played a role in a political campaign other than my own.



## III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

In 1988, helped with a program at the local parish, that assisted undocumented residents with Immigration Amnesty applications. Assisted the individual applicants in filling the forms and working their way through the legal requirements to make valid applications. This took place over several months.

From 1989 until the end of 1994, served as a volunteer pro-bono mediator during Settlement Week. Settlement Week a program of the Bexar County Judiciary, initiated in the fall of 1989, to promote settlement of cases through mediation. There are two such weeks every year.

From 1992 to 1994, served as member of the Grievance Committee, the entity created by state law to hear grievances about attorneys. Between attending hearings and studying the materials provided by the State Bar of Texas in anticipation of same, it took about eight to ten hours a month.

Throughout the years I have been actively involved in educating the public about the legal system. For example, I speak four or five times a year to groups across Bexar County, interested in learning about the mediation process and how to avail themselves of the services of the Bexar County Dispute Resolution Center. Also, for the past six years I have served as a speaker to the classes of the Inter American Air Forces Academy of Lackland Air Force Base. Public Law 101-511 created the IAAA and it is mandated to provide concentrated instruction in democratic government and human rights to its students that come from most of the Latin American countries. Just last week I spoke to a group of Latin American visitors attending the American Bar Association annual conference on mediation.

As a fluent Spanish speaker, I am called on a regular basis to assist individuals, the vast majority of which are of limited resources, to orient them about Courthouse services and access to justice. This happened as an attorney and continues as a Judge, my role is different but the needs addressed are the same.

In 1999, helped implement a program to assist pro se litigants with limited resources who come to the Bexar County Courthouse seeking assistance. The main focus of the

program was assistance in family law cases. Upon the determination of a judge, if the matter pending before the bench was deemed too complicated to be handled without a lawyer, the litigant was directed to the Pro Bono Coordinator at the San Antonio Bar Association to determine whether the person qualified for pro bono assistance. If the applicant met the financial criteria, the case would be reviewed by the Civil District Courts Staff Attorney for assignment to a volunteer lawyer with the program.

The program had 195 volunteer lawyers who submitted their name and agreed to consider taking a pro bono case. The program continued until late 2002 when a larger program was undertaken in conjunction with Texas Rural Legal Aid. The main focus of that program is also pro bono assistance in family law cases.

In 2001, helped create a system to expedite the hearings on individuals arrested on civil arrest warrants (capias). Most of these persons do not have counsel or the means to hire one. The system was implemented to expedite their appearance before a Judge after arrest and the appointment of counsel if needed. It avoided having someone in jail without a hearing for a period longer than allowed by statute.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?  
I have never belonged to any such organization.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).  
Yes, there is a selection commission that recommended my nomination. I was interviewed by a commission, composed of persons selected by the U.S. Senators for the state of Texas. Following the commission's recommendation Senators Cornyn and Hutchison interviewed me. Upon the Senators recommendation to The White House, the White House Counsel, Hon. Alberto Gonzalez, the F. B. I., and the Department of Justice interviewed me.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.  
No one has done that.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Under the separation of powers structure set forth in the Constitution, the power to fashion public policy lies not with the judiciary, but with the legislative and executive branches of government. The role of a District Court is to decide cases or controversies that are within its jurisdiction through the application of the Constitution, laws passed by Congress and administrative enactments of the Executive. Strict adherence to precedent (stare decisis) is the best known way to provide stability in the law. It is the District Court's role to decide cases or controversies; not to implement policies to correct perceived injustices.

Self-restraint by a federal judge means fidelity to the principle of stare decisis and strict adherence to higher court rulings.

Senator CORNYN. Judge Montalvo, I must be getting very old if you are having grandchildren.

[Laughter.]

Senator CORNYN. I am not going to comment on your age, but I must be getting old.

Justice Rodriguez, we would be pleased to hear from you.

**STATEMENT OF XAVIER RODRIGUEZ, NOMINEE TO BE  
DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TEXAS**

Justice RODRIGUEZ. Thank you, Mr. Chairman. It's an honor to be here, and I appreciate the opportunity.

I would like to first of all thank Senator Hutchison for her kind introduction of me and her recommendation of me to the White House, as well as you, Mr. Chairman, for your support and recommendation of me to the White House. And I also would like to thank the President for this great opportunity to again enter into public service with this nomination.

Thank you so much.

[The biographical information of Justice Rodriguez follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)  
**Xavier Rodriguez**
2. Address: List current place of residence and office address(es).  
**Residence:**  
**San Antonio, Texas**  
  
**Office:**  
**300 Convent, Suite 2200**  
**San Antonio, Texas 78205**  
**210/224-5575**
3. Date and place of birth.  
**September 20, 1961**  
**San Antonio, Texas**
4. Marital Status (include maiden name of wife, or husband's name): List spouse's occupation, employer's name and business address(es).  
**Married to Raenell Woytek Rodriguez**  
**Homemaker**
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.  
**The University of Texas School of Law**  
**Dates of attendance: 1983-1987**  
**Degree received: Juris Doctor granted August 1987**  
  
**The University of Texas School of Public Affairs**  
**Dates of attendance: 1983-1987**  
**Degree received: Master of Public Affairs granted August 1987**  
  
**Harvard University**  
**Dates of attendance: 1979-1983**  
**Degree received: Bachelor of Arts granted June 1983**
6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

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November 2002-Present  
Fulbright & Jaworski L.L.P.  
Partner  
300 Convent, Suite 2200  
San Antonio, Texas 78205

September 2001 – November 2002  
Supreme Court of Texas  
Justice  
201 West 14<sup>th</sup> Street  
Austin, Texas 78701

January 1996 – September 2001  
Fulbright & Jaworski L.L.P.  
Partner, Associate, August 1987 – December 1995  
Law Clerk, July 1986 – August 1986  
Law Clerk, May –1985 – August 1985  
300 Convent, Suite 2200  
San Antonio, Texas 78205

June 1983 – November 1993  
United States Army Reserve  
2LT, 1LT, Captain  
321<sup>st</sup> Civil Affairs Group & 1<sup>st</sup> JAG Detachment  
1920 Harry Wurzbach Hwy.  
San Antonio, Texas 78209

July 1986  
Plunkett, Gibson & Allen  
Law Clerk  
San Antonio, Texas

May 1986 – June 1986  
Groce, Locke & Hebdon  
Law Clerk  
San Antonio, Texas

1985 – 1987  
Kazen & Price, Attorneys at Law  
Law Clerk to Dan R. Price (now deceased)  
Austin, Texas

May 1984 – August 1984  
United States Department of State  
Graduate Student Intern, Office of Politico-Military Affairs  
Washington, D.C.

**June 1983 – August 1983**  
**U.S. Representative Henry B. Gonzalez**  
**Staff Asst.**  
**Federal Building**  
**San Antonio, Texas**

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

**June 1983 – November 1993**  
**United States Army Reserve**  
**2LT, 1LT, Captain 457-78-6625**  
**321<sup>st</sup> Civil Affairs Group & 1<sup>st</sup> JAG Detachment**  
**1920 Harry Wurzbach Hwy.**  
**San Antonio, Texas 78209**  
**Honorable Discharge**

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

**Elected membership to American Law Institute December 2001 – Present**

**Elected Fellow Texas Bar Foundation 2001 – Present**

**Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization**

**Recognized by the SAN ANTONIO BUSINESS JOURNAL as one of 40 Rising Stars (1996)**

**Military Awards – Army Commendation Medal, Army Reserve Components Achievement Medal, Reserve Officers Association of the United States 1985-1986 and 1986-1987 Reilly Memorial Graduate Scholarship; Distinguished Military Graduate MIT ROTC Program 1983**

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

**State Bar of Texas**

**1987 – present**

**Former Chair, Labor & Employment Law Section 2000-2001**

**Former Chair, Standing Committee on Legal Assistants 1999-2000**

**American Bar Association**

**Member, Standing Committee on Legal Assistants 1999-2002**



**Member, Labor & Employment Law Section, Equal Employment Opportunity Committee 2003-present**

**San Antonio Bar Association  
Member**

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

**None.**

Please list all other organizations to which you belong.

**State of Texas, Board for Educator Certification, Former Vice-Chair (1999-2001)**

**National Assoc. For the Advancement of Minorities in Technology, Board Member (2001 – present)**

**St. Mary's University School of Law, Dean's Advisory Council (1999 – present)**

**San Antonio Area Foundation, Board Member (2000-2001 and 2003 to present)**

**South San Antonio Chamber of Commerce, Past Chairman of the Board (1997)**

**Respite Care of San Antonio, Inc., Past President (1994-1995)**

**Harvard Club of San Antonio, Past President**

**University of Texas at San Antonio, College of Social and Behavioral Sciences, Former Advisory Council Member**

**Abiding Presence Lutheran Church, Former Chair, Building Project Management Committee (1993-1999)**

**Mayor's Task Force on Kelly Privatization, Former Member**

**City of San Antonio Board of Review for Historic Districts, Former Member (1991- 1992)**

**Leadership San Antonio Alumnus and Former Committee Member, Greater San Antonio Chamber of Commerce (1989-1990)**

11. Court Admission: List all courts in which you have been admitted to practice, with dates

of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Texas, 1987 – present

United States Court of Appeals for the Fifth Circuit 1990 – present

United States Court of Military Appeals 1990

(now known as the U.S. Court of Appeals for the Armed Forces – I did not seek license to practice in the newly renamed Court since my honorable discharge from the U.S. Army)

United States District Courts:

Western District of Texas, 1988 – present

Northern District of Texas 1998 – present

Southern District of Texas 1988 – present

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. None. If there were press reports about the speech, and they are readily available to you, please supply them.

*Employment Discrimination Law, 2000 Cumulative Supplement*  
(contributor)(Bureau of National Affairs)

*Written Employment Contracts, TEXAS EMPLOYMENT LAW* (co-author)(James Publishing, Inc.)

*Independent Contractors, DEFENSE RESEARCH INSTITUTE EMPLOYMENT LAW BASICS* (author)

*Texas Legal Assistant Handbook, Member, Editorial Advisory Board*  
(James Publishing, Inc.)

*The Employment At-Will Doctrine, TAB EMPLOYMENT LAW HANDBOOK* (author)

*Fifth Circuit Update, in STATE BAR OF TEXAS PROF. DEV. PROGRAM, Advanced Employment Law Course* (2003) (author)

*Employment Law Cases and State Supreme Courts, in Southern Methodist University School of Law 20th Annual Multi-State Labor & Employment Law Seminar* (2002) (author and speaker)

*Supreme Court Update*, in STATE BAR OF TEXAS PROF. DEV. PROGRAM, *Advanced Evidence & Discovery Course* (2002) (speaker)

*Employment Law Cases and the Texas Supreme Court*, in University of Texas School of Law 9th Annual Labor & Employment Law Conference (2002) (author and speaker)

*Effective Oral Argument*, Travis County Bar Association, Bench Bar XII (2002) (speaker)

*Supreme Court Update*, in SOUTH TEXAS COLLEGE OF LAW, *Advanced Civil Trial Law Conference* (2002) (speaker)

STATE BAR OF TEXAS PROF. DEV. PROGRAM, *Advanced Employment Law Course* (2002) (course director)

*Paralegal Overtime: Yes, No or Maybe?* American Bar Association GP Solo, Vol. 19, No. 1 (January/February 2002)

*Employment Medical Issues: The Family and Medical Leave Act, the Americans with Disabilities Act, and the Texas Worker's Compensation Act*, in SAN ANTONIO HUMAN RESOURCES MANAGEMENT ASSOCIATION, *Employment Law Update* (2001) (author and speaker)

*Employment Law Torts*, in STATE BAR OF TEXAS PROF. DEV. PROGRAM, *Advanced Personal Injury Law Course* (2001) (speaker)

*But Wait We're a Non-Union Employer: How the NLRA Affects You* in SAN ANTONIO MANUFACTURER'S ASSOCIATION 2001 LEGAL UPDATE (2001) (author and speaker)

*Arbitration of Employment Law Cases*, in STATE BAR OF TEXAS, ALTERNATIVE DISPUTE RESOLUTION SECTION, *Mid-Year CLE Program* (2001) (speaker)

*State Statutory/Contract Update*, in STATE BAR OF TEXAS PROF. DEV. PROGRAM, *Advanced Employment Law Course* (2001) (author and speaker)

*Employment Law Torts*, in STATE BAR OF TEXAS PROF. DEV. PROGRAM, *Advanced Personal Injury Law Course* (2000) (speaker)

*Privacy in Today's Workplace - Electronic Monitoring and Other Issues*, in SAN ANTONIO HUMAN RESOURCES MANAGEMENT ASSOCIATION, *Employment Law Update* (2000) (author and speaker)

*Hiring and Firing*, in STATE BAR OF TEXAS PROF. DEV. PROGRAM, *State Bar College Summer School* (2000) (author and speaker)

*Remedies*, in UNIVERSITY OF TEXAS 7TH ANNUAL CONFERENCE ON LABOR AND EMPLOYMENT LAW (2000) (author and speaker)

*Recruiting Tactics, Employment Agreements and Temporary Employees* in TEXAS SOCIETY FOR HEALTHCARE HUMAN RESOURCES ADMINISTRATION 2000 LEGAL UPDATE (2000) (author and speaker)

*Managing Affirmative Action Programs -- A Guide for Texas Employers*, in The Texas Labor Letter (February 2000)

*Using Employment Agreements to Protect Business Assets*, Texas Lawyer (February 7, 2000)

*Paralegal Overtime: Yes, No or Maybe?* 63 Tex. Bar J.266 (March 2000)

*State Law Resurgent*, in STATE BAR OF TEXAS PROF. DEV. PROGRAM, *Advanced Employment Law Course* (2000) (author and speaker)

*Implementing Progressive Discipline Policies*, in COUNCIL ON EDUCATION IN MANAGEMENT PROGRESSIVE DISCIPLINE, COACHING AND TERMINATION LAW (2000) (author and speaker)

*Employee Benefits and Retention*, in The Labor Letters *Managing A Workforce in 2000* (2000) (speaker)

*Developments in the Substantive Law: Employment Law*, Texas Lawyer (December 20, 1999)

*Common Mistakes Employers Make*, in ANNUAL SAN ANTONIO CPA CE SYMPOSIUM (1999) (author and speaker)

*Emerging Employment Law and Risk Management Trends*, in RISK AND INSURANCE MANAGEMENT SOCIETY, INC., SOUTH TEXAS CHAPTER (1999) (author and speaker)

*Managing Affirmative Action to Avoid Reverse Discrimination Claims*, in TEXAS EMPLOYMENT LAW COUNCIL'S EDUCATIONAL CONFERENCE AND ANNUAL MEETING (1998) (author and speaker)

*Employment Litigation Risks and Employment Trends in the Coming Millennium*, in TEXAS SOCIETY FOR HEALTHCARE HUMAN RESOURCES ADMINISTRATION 1998 LEGAL UPDATE (1998) (author and speaker)

*Avoiding Employment Law Claims*, in UNIVERSITY OF HOUSTON ADVISING SMALL BUSINESS OWNERS (1998) (author and speaker)

*Independent Contractor vs. Employee*, in CLE INTERNATIONAL EMPLOYEE HANDBOOK CONFERENCE (1998) (author and speaker)

*1997 Labor and Employment Law Highlights*, in RISK AND INSURANCE MANAGEMENT SOCIETY, INC., SOUTH TEXAS CHAPTER (1998) (author and speaker)

*1997 Labor and Employment Law Highlights*, in TEXAS ASSOCIATION OF DEFENSE COUNSEL, 1997 FALL MEETING (1997) (author and speaker)

*Wrongful Discharge Claims under the Texas Worker's Compensation Act*, in STATE BAR OF TEXAS, LABOR AND EMPLOYMENT LAW SECTION, *Basics of Labor and Employment Law* (1997) (author and speaker)

*Legal Issues in the Electronic Era*, in NATIONAL COUNCIL OF STATE HOUSING AGENCIES, *Annual Spring Meeting* (1997) (author and speaker)

*Avoiding Retaliation Claims in Texas: Disciplining and Terminating Employees Out on Comp*, in COUNCIL ON EDUCATION IN MANAGEMENT WORKERS' COMP UPDATE (1994 and 1997) (moderator, author and speaker)

*Update on Federal Law*, in STATE BAR OF TEXAS PROF. DEV. PROGRAM, *Advanced Employment Law Course* (1996) (author and speaker)

*Discipline and Discharge*, in TEXAS SOCIETY FOR HEALTHCARE HUMAN RESOURCES ADMINISTRATION (1996) (author and speaker)

*Age Discrimination and Title VII*, in STATE BAR OF TEXAS ANNUAL LABOR & EMPLOYMENT LAW UPDATE (1996) (author and speaker)

*Survey of Recent Federal and State Cases*, in COUNCIL ON EDUCATION IN MANAGEMENT PERSONNEL LAW UPDATE (1996) (moderator, author and speaker)

*Rule 26: Confusion and Dissolution*, in STATE BAR OF TEXAS PROF. DEV. PROGRAM, *Advanced Employment Law Course* (1995) (author and speaker)

*How to Avoid Employment-Related Torts*, in LORMAN BUSINESS CENTER, INC.'S EMPLOYMENT DISCHARGE AND DOCUMENTATION SEMINAR (1995) (author and speaker)

*Survey of Recent Workers' Compensation Cases*, in COUNCIL ON EDUCATION IN MANAGEMENT WORKERS' COMP UPDATE (1995) (moderator, author and speaker)

*Wrinkles in the Law: Age Discrimination in the 90s*, in STATE BAR OF TEXAS ANNUAL LABOR & EMPLOYMENT LAW UPDATE (1995) (author and speaker)

*Age Discrimination or Voluntary Quit?*, in COUNCIL ON EDUCATION IN MANAGEMENT PERSONNEL LAW UPDATE (1994) (speaker)

*Demonstrative Evidence*, in TEXAS ASSOCIATION OF DEFENSE COUNSEL SEMINAR (1994) (author and speaker)

*Avoiding Employment Discharge Claims*, in UNIVERSITY OF HOUSTON EMPLOYMENT LAW INSTITUTE (1992, 1993, 1994 and 1995) (author and speaker)

*Avoiding Liability for Sexual Harassment*, in COUNCIL ON EDUCATION IN MANAGEMENT TEXAS PERSONNEL LAW UPDATE (1994) (author and speaker)

*Legal Liability for Workplace Violence*, in COUNCIL ON EDUCATION IN MANAGEMENT TEXAS SAFETY & HEALTH UPDATE (1994) (author and speaker)

*High-Tech Privacy Issues*, in COUNCIL ON EDUCATION IN MANAGEMENT PERSONNEL LAW UPDATE (1993) (author and speaker)

*Americans With Disabilities Act; How Will a Jury Evaluate Reasonable Accommodation*, in COUNCIL ON EDUCATION IN MANAGEMENT PERSONNEL LAW UPDATE (1993) (speaker)

*Avoiding Employment Discharge Claims*, in UNIVERSITY OF HOUSTON HEALTH LAW INSTITUTE (1992 and 1993) (author and speaker)

*Damages: An Overview of Recent Developments*, in STATE BAR OF TEXAS PROF. DEV. PROGRAM, *Texas Torts in the 90's Course* (1992) (author and speaker)

*Workers' Compensation Employment Issues*, TEXAS ASSOCIATION OF BUSINESS (1992) (author and speaker)

*Workplace Defamation*, in LORMAN BUSINESS CENTER, INC.'S EMPLOYMENT LAW PROGRAM (1991) (speaker)

*The Law of Wrongful Discharge, Protected Concerted Activity, and Federal and State Laws Governing the Employment Relationship*, in PROFESSIONAL EDUCATION SYSTEMS, INC.'S LEGAL ISSUES IN SUPERVISING NURSES (1990 and 1991) (speaker)

*Drugs and Alcohol: Policies and Testing in the Workplace*, in TEXAS ASSOCIATION OF BUSINESS EMPLOYMENT AND LABOR LAW SYMPOSIUM (1990) (author and speaker)

W. Wendell Hall, Xavier Rodriguez and Carol Jenson, *Wrongful Termination and Erisa Preemption*, in S.M.U. SCHOOL OF LAW, MODERN TRENDS IN BUSINESS TORTS LITIGATION SEMINAR (1990) (co-author)

*Legal Issues: Confidentiality, Discrimination and Testing Considerations*, in UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER AT SAN ANTONIO AIDS EDUCATIONAL SYMPOSIUM (1989) (co-author and speaker)

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

Good, annual physical examination done December 2002.

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

Justice, Supreme Court of Texas. September 2001 – November 2002, appointed. The Supreme Court of Texas has statewide, final appellate jurisdiction in all civil and juvenile cases. In addition, the Court has administrative responsibilities, including, but not limited to, promulgating rules of civil procedure, policies regarding the Office of Court Administration, the Commission on Judicial Conduct, and the State Bar of Texas.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written;

*Department of Transportation v. Garza*, 70 S.W.3d 802 (Tex. 2002)

The issue was whether a 45 mile per hour speed-limit sign, accurately reflecting the legal speed limit, but allegedly too high for its proximity to a school zone, was a “condition or use of tangible personal or real property” thereby causing a waiver of TxDot’s governmental immunity in a lawsuit by parents of a student killed by a car. Texas Civil Practice and Remedies Codes § 101.060(a)(2) permits waiver of sovereign immunity for the absence, condition or malfunction of a road sign if it is not corrected by the responsible governmental unit within a reasonable time after receiving notice. The Texas Supreme Court held that plaintiffs’ allegations do not come within the Tort Claims Acts’ waiver of sovereign immunity for a “condition” of a traffic sign.

*Southwest Key Program, Inc. v. Gil-Perez*, 81 S.W. 3d 269 (Tex. 2002)

The Court concluded that Southwest Key’s failure to provide protective equipment for use during a football game was the only alleged causal nexus underlying each theory of negligence. The Court held that the evidence was legally insufficient to support the jury’s findings that the organizer’s negligence proximately caused Gil-Perez’s injury. None of the

medical experts' testimony established that more probably than not Gil-Perez would not have been injured had he been wearing ordinary protective gear. Accordingly, Gil-Perez failed to establish that Southwest Key's negligence was a proximate cause of his knee injury.

*In Re Swepi, L.P.*, 85 S.W.3d 800 (Tex. 2002)

The issue in this case was whether a county probate court abused its discretion by transferring a lawsuit alleging underpaid royalties from a Harris County District Court on grounds that the suit was "appertaining to" or "incident to" an estate administration the probate court supervised. The Court held that the Harris County suit, seeking a declaration involving royalty calculations by one company involved in Colorado operations, involves interest in the estate that already passed to descendants. Any possible recovery in that suit would not effect estate property. Accordingly, the "controlling issue" in the Harris County suit cannot be said to be the settlement, partition, or distribution of the estate property. The Court conditionally granted mandamus because, by erroneously transferring the Harris County case, the Denton County Court interfered with the Harris County Court's jurisdiction.

*Lubbock County, Texas v. Trammel's Lubbock Bail Bonds*, 80 S.W.3d 580 (Tex. 2002)

The issues in this case were: (1) whether Lubbock County's bail-bond service charge is unlawful because it is not authorized by any statute; (2) whether the Presentment Statute under Texas Local Government Code § 89.004(a) is jurisdictional; and (3) whether the Presentment Statute delays accrual of a claim for the reimbursement of funds against a county until the claim has been presented to and rejected by the County Commissioners. The Texas Supreme Court concluded that fact questions remained regarding the extent to which the bail-bond service charge was used for providing copies to the bail-bond companies and was thus authorized by statute. The court reaffirmed that the Presentment Statute was not jurisdictional and did not delay the accrual of a cause of action against the county for reimbursement of unauthorized charges.

*Argonaut Ins. Co. v. Baker*, 87 S.W.3d 526 (Tex. 2002)

The issue was whether a worker's compensation insurer can be reimbursed from a settlement with a person who caused an accident for the amount of the deductible the employer paid as well as what the insurer paid in worker's compensation benefits to the injured employee. The Court concluded that the Texas Insurance Code provision forbidding payment of an employer's worker's compensation deductible does not bar an insurer from recovering by its subrogation right the settlement amount it paid that included the employer's deductible. Texas Labor Code § 417.002 states that the net amount recovered by a claimant in a third party action shall be used to reimburse the insurance carrier "for benefits...that have been paid for the compensable injury." Section 417.002 does not limit the carrier's right to reimbursement to those provisions made in excess of the deductible amount.

*Dow Chemical Co. v. Bright*, 89 S.W. 3d 602 (Tex. 2002)

The issue was whether Dow retained sufficient control over a subcontractor's (Bright's)



work to impose a duty on the company, the premise's owner, to protect an independent contractor's employee from the contractor's negligence. The Court held that Dow did not owe a duty to Bright under either a contractual right to control or actual control of the contractor's work. Dow's contract with the independent contractor did not delegate to Dow the right to control means, methods or details of the contractor's work nor did it grant Dow the power to direct the order in which the work should be done. By requiring the contractor to comply with safety regulations, Dow owed the contractor's employees a narrow duty that its safety requirements and procedures do not unreasonably increase the probability and severity of injury. The independent contractor assigned Bright his duties and Dow did not instruct him how to perform his job and was not involved in how or when to secure the pipe that fell on him. Dow's safe-work permit system did not unreasonably increase the probability and severity of Bright's injury and is not evidence that the contractor and Bright were not free to do work in their own way or that Dow controlled the work method or its operative details.

*State v. Hodges*, 92 S.W.3d 489 (Tex. 2002)

The issues in this direct appeal were: (1) whether Texas Election Code § 162.015(a)(2), which prohibits a person from appearing on the general election ballot as a candidate for a political party, other than the party holding the primary in which the person voted or was a candidate, can reasonably be construed to permit Judge David Hodges to appear as a Democratic party candidate in the November 2002 general election even though he voted in the March 2002 Republican party primary; and (2) whether § 162.015(a)(2) is unconstitutional as applied to Hodges. The Court concluded that Hodges' interpretation of the section was not reasonable because it conflicts with the election code's overall structure. Hodges' construction of § 162.015(a)(2) would allow a prospective candidate who lost a party's nomination in the primary to seek the same office as a candidate for another political party – an interpretation antithetical to the statute's purpose, which is to prevent candidates from having more than one candidacy for the same office in a single election cycle. In addition, the Court concluded that the section did not violate either the Texas or United States Constitutions. The Court concluded that strict scrutiny was not required because the burden on Hodges' right to vote was not severe. The Court further found that the statute was constitutional because it is reasonable, non-discriminatory and advances the state's important and compelling interest in maintaining the integrity and stability of the political process.

*In re Jane Doe 10*, 78 S.W. 3d 338 (Tex. 2002)

The issue in this case was whether a trial court's failure to enter findings of fact or conclusions of law on a statutory factor allowing a minor to get an abortion without telling her parents must result in automatically granting the application. In this case, a trial judge hearing an application for a "judicial bypass" left blank a space next to one factor that would permit an abortion without parental notification. The Court concluded that the trial court's failure to issue findings of fact or conclusions of law on the question whether notification may lead to physical, sexual or emotional abuse of a minor is deemed a finding in the girl's favor if some evidence exist in the record that notification may lead to any of these types of abuse.

*Board of Adjustment of City of San Antonio v. Wende*, 92 S.W.3d 424 (Tex. 2002)

The issue in this case was whether, under a city zoning ordinance, the Board of Adjustment improperly allowed quarrying as non-conforming use on two tracts that, before they were annexed and zoned for housing, had been leased for quarrying but not yet used for it. The Court agreed with the City of San Antonio's Board that pre-existing leases established non-conforming – use rights under the City's development ordinances. The City's adoption of its ordinances fall within its legislative discretion.

*Texas Home Management, Inc. v. Peavy*, 89 S.W.3d 30 (Tex. 2002)

The issue in this case was whether the operator of a home for the mentally retarded owed a duty of care to a murder victim killed by one of its residents. The Peavy's claim that THM was negligent when it allowed one of its residents unsupervised visits to Houston, Texas. The Court held that THM did not establish as a matter of law that it had no duty. In this case a right to control arises from THM's contract with the state. Further, the danger could be foreseen, based on the resident's previous history of assaults.

(2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and

*Southwest Key Program, Inc. v. Gil-Perez*, 81 S.W. 3d 269 (Tex. 2002). Dissent argued that there was some evidence to support the jury's causation finding.

*Argonaut Ins. Co. v. Baker*, 87 S.W.3d 526 (Tex. 2002). Dissent argued that employee was being required to pay a deductible amount in contravention of the worker's compensation scheme.

*Texas Home Management, Inc. v. Peavy*, 89 S.W.3d 30 (Tex. 2002). The dissent disagreed that THM exercised "control" over its resident and disagrees that it was reasonably foreseeable that the resident would murder an innocent victim.

(3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

*State v. Hodges*, 92 S.W.3d 489 (Tex. 2002)

The issues in this direct appeal were: (1) whether Texas Election Code § 162.015(a)(2), which prohibits a person from appearing on the general election ballot as a candidate for a political party, other than the party holding the primary in which the person voted or was a candidate, can reasonably be construed to permit Judge David Hodges to appear as a Democratic party candidate in the November 2002 general election even though he voted in the March 2002 Republican party primary; and (2) whether § 162.015(a)(2) is unconstitutional as applied to Hodges. The Court concluded that Hodges' interpretation of the section was not reasonable because it conflicts with the election code's overall structure. Hodges' construction of § 162.015(a)(2) would allow a prospective candidate who lost a party's nomination in the

primary to seek the same office as a candidate for another political party – an interpretation antithetical to the statute’s purpose, which is to prevent candidates from having more than one candidacy for the same office in a single election cycle. In addition, the Court concluded that the section did not violate either the Texas or United States Constitutions. The Court concluded that strict scrutiny was not required because the burden on Hodges’ right to vote was not severe. The Court further found that the statute was constitutional because it is reasonable, non-discriminatory and advances the state’s important and compelling interest in maintaining the integrity and stability of the political process.

If any of the opinions listed were not officially reported, please provide copies of the opinions.

**Not applicable.**

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

**State Board for Educator Certification  
1999-2001 Appointed by then Gov. George W. Bush**

**City of San Antonio Board of Review for Historic Districts, Former Member  
(1991- 1992). Appointed by Mayor Nelson W. Wolff and City Council.**

17. **Legal Career:**

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

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

Not applicable.

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

Not applicable.

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

**Fulbright & Jaworski L.L.P.  
Partner, November 2002-present**

300 Convent, Suite 2200  
San Antonio, Texas 78205

Supreme Court of Texas  
Justice, September 2001 – November 2002  
201 West 14<sup>th</sup> Street  
Austin, Texas 78701

Fulbright & Jaworski L.L.P.  
Partner, January 1996 – September 2001  
Associate, August 1987 – December 1995  
300 Convent, Suite 2200  
San Antonio, Texas 78205

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

**I concentrate my practice on the areas of labor and employment law and general litigation, where I represent both corporations and individuals who have been sued by their present or past employees based on alleged discrimination, harassment, retaliation, breach of contract, or breach of a noncompetition agreement. I also provide counseling and investigative assistance to clients to assist in their compliance with state and federal labor and employment laws. I have extensive experience in general litigation (personal injury defense, commercial litigation, defamation, contractual disputes and insurance bad-faith litigation).**

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

**I am board certified in labor and employment law by the Texas Board of Legal Specialization. Representative clients include: Universal Health Services, Inc., H.E. Butt Grocery Company, State Farm Insurance Company, National Instruments, SONY and Motorola.**

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

**Frequent court appearances in both federal and state courts.**

2. What percentage of these appearances was in:
- (a) federal courts;  
**Approximately 40% of my practice is before federal courts**
  - (b) state courts of record;  
**Approximately 60% of my practice is before Texas courts**
  - (c) other courts.  
0%

3. What percentage of your litigation was:
- (a) civil;  
100%
  - (b) criminal.  
0%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.  
**12 as lead counsel, 1 as second chair**

5. What percentage of these trials was:
- (a) jury;  
90%
  - (b) non-jury.  
10%

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

- a. the date of representation;

- b. the name of the court and the name of the judge or judges before whom the case was litigated; and
- c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

*Deal v. State Farm County Mutual Ins. Co. of Texas*, 5 F.3d 117 (5<sup>th</sup> Cir. 1993). Action was brought against insurance company and owner of insurance agency, alleging violations of Title VII and Age Discrimination in Employment Act (ADEA). The District Judge dismissed for lack of jurisdiction. Plaintiff appealed. The United States Court of Appeals held that: (1) for purposes of Title VII and ADEA, insurance company was not "employer" of plaintiff, who worked for agency, and (2) owner of insurance agency, while an insurance agent, was not "agent" of insurance company within meaning of Title VII and ADEA provisions defining "employer." I represented State Farm as lead attorney in the district court and assisted in the handling of the appeal.

Trial Court: Southern District of Texas, Corpus Christi Division  
 Trial Judge: Hon. Hayden Head

**Plaintiff's Counsel: William J. Kolb**  
 Law Office of William J. Kolb  
 500 Texas Commerce Plaza  
 Corpus Christi, Texas 78470  
 Telephone: (361) 661-1662

**Co-Defendant's Counsel: M. Colleen McHugh**  
 Bracewell & Patterson, L.L.P.  
 2000 One Shoreline Plaza, Suite 800  
 Corpus Christi, Texas 78401-3700  
 Telephone: (361) 882-6644

*Texas Employers' Ins. Ass'n v. Guerrero*, 800 S.W.2d 859 (Tex. App. – San Antonio 1990, writ denied). Employee brought suit for worker's compensation benefits. The district court entered judgment on a jury verdict awarding worker benefits for total and permanent disability, and carrier appealed. On motion for rehearing, the Court of Appeals held that incurable reversible error occurred as result of employee's counsel's appeal for ethnic unity in his closing jury argument. I was junior counsel in the underlying trial and argued the appeal before the San Antonio Court of Appeals.

Trial Court: 293<sup>rd</sup> Judicial District Court in Zavala County, Texas  
 Trial Judge: Hon. Alex Gonzalez  
 Court of Appeals: San Antonio Court of Appeals

**Plaintiff's Counsel: Rene R. Barrientos**  
**Law Office of Rene R. Barrientos**  
**First National Bank Building**  
**750 E. Mulberry, Suite 402**  
**San Antonio, Texas 78212**  
**Telephone: (210) 733-3399**

*Saucedo v. Rheem Mfg. Co.*, 974 S.W.2d 117 (Tex. App. – San Antonio 1998, pet. denied). Employee brought breach of contract, promissory estoppel, fraud, defamation, and intentional infliction of emotional distress action against employer and supervisor. The District Judge entered summary judgment for employer. Employee appealed. The Court of Appeals held that: (1) publication of information did not provide basis for defamation claim; (2) employee failed to show extreme and outrageous conduct by supervisor as would support claim for intentional infliction of emotional distress; (3) employee's promissory estoppel claims were barred by statute of frauds; (4) employee could not maintain fraud claim; and, on rehearing (5) employer's representation as to annual salary did not alter-at-will status. I represented Rheem as lead attorney in the district court and argued the appeal before the San Antonio Court of Appeals.

Trial Court: 341<sup>st</sup> Judicial District Court, Webb County, Texas  
 Trial Judge: Hon. Elma Salinas Ender  
 Court of Appeals: San Antonio Court of Appeals

**Plaintiff's Counsel: Carlos M. Zaffirini, Sr.**  
**Zaffirini, Castillo & Pellegrin**  
**1407 Washington Street**  
**P. O. Box 627**  
**Laredo, Texas 78042-0627**  
**Telephone: (210) 724-8355**

*Rogers v. City of San Antonio, Texas*, 211 F. Supp. 2d 829 (W.D. Tex. 2002). This is an action for declaratory, equitable, and injunctive relief brought by fifteen military reservists who are currently (or retired from) working for the City of San Antonio Fire Department. The plaintiffs challenge a number of the policies and practices of the City's Fire Department as being discriminatory under the provisions of the Uniform Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. §§ 4301 *et seq.* (2000). The challenged employment practices at issue concern, for instance, how military leave is excluded from the "twenty-seven" hour cap imposed on lost overtime, "bonus day" leave, "perfect attendance" leave, unscheduled overtime compensation and upgrading opportunities. In sum, plaintiffs argue the City, in implementing these employment practices, unlawfully discriminate against them by deeming them "absent" from work whenever they are on leave fulfilling their military reserve duties, as opposed to viewing them as "constructively present at work." Plaintiffs contend that the City's practices have resulted in disparate treatment

discrimination on the basis of their military reserve status. I represented the City of San Antonio as lead attorney during the initial cross motions for summary judgment. This lawsuit is pending before the trial court on other issues.

Trial Court: Western District of Texas, San Antonio Division  
Trial Judge: Hon. Orlando Garcia

**Plaintiff's Counsel: Martha P. Owen**  
**Wiseman, Durst & Owen, P.C.**  
**1004 West Avenue**  
**Austin, Texas 78701**  
**Telephone: (512) 479-5017**

*Rosales v. H.E. Butt Grocery Co.*, 905 S.W.2d 745 (Tex. App. – San Antonio 1995, no writ). Venue challenge in defamation and invasion of privacy action. I represented H.E. Butt Grocery Company as lead counsel in the district court proceedings and argued the matter on appeal.

Trial Court: 365<sup>th</sup> Judicial District Court of Maverick County, Texas  
Trial Judge: Hon. Amado Abascal  
Court of Appeals: San Antonio Court of Appeals

**Plaintiff's Counsel: Rene R. Barrientos**  
**Law Office of Rene R. Barrientos**  
**First National Bank Building**  
**750 E. Mulberry, Suite 402**  
**San Antonio, Texas 78212**  
**Telephone: (210) 733-3399**

*EEOC v. H.E. Butt Grocery Co.*, No. SA-00-CA-0352 (W.D. Texas, San Antonio Division). EEOC filed suit alleging that employer discriminated against a class of applicants on the basis of age. I served as lead counsel for the employer and negotiated a consent decree with the EEOC.

Trial Court: Western District of Texas, San Antonio Division  
Trial Judge: Hon. Fred Biery

**Plaintiff's Counsel: Chris Pittard**  
**U.S. Equal Employment Opportunity Commission**  
**San Antonio District Office**  
**5410 Fredericksburg Road, Suite 200**  
**San Antonio, Texas 78229**  
**Telephone: (210) 281-7636**

*Robertson v. Neutral Posture Ergonomics*, No. 2000-CI-12178. Covenant not to compete action filed against employee. I represented Intervenor in support



of the defendant employee.

Trial Court: 225<sup>th</sup> Judicial District Court of Bexar County, Texas  
Trial Judge: Hon. John Specia, Jr.

**Plaintiff's Counsel:** Malinda Gaul  
Gaul & Dumont  
105 S. St. Mary's Street, Suite 950  
San Antonio, Texas 78205  
Telephone: (210) 225-0685

**Co-Defendant's Counsel:** Lamont Jefferson  
Haynes and Boone, L.L.P.  
112 East Pecan Street, Suite 1600  
San Antonio, Texas 78205-1540  
Telephone: (210) 978-7413

*John Perrott Ent., Inc. v. Kerstein*, 2000 WL 33348247 (W.D. Tex. 2000).  
JPE brought claims sounding in quantum meruit and breach of contract for services it allegedly provided in the development of a game park/tourism development in Mozambique. District Court granted Defendants' motion to dismiss for lack of personal jurisdiction. I represented the executor of Defendant's estate as lead counsel.

Trial Court: Western District of Texas, San Antonio Division  
Trial Judge: Hon. D.W. Suttle

**Plaintiff's Counsel:** Calhoun Bobbitt  
Drought, Drought & Bobbitt, L.L.P.  
112 E. Pecan, Suite 2750  
San Antonio, Texas 78205  
Telephone: (210) 225-4031

*Bunzl de Mexico S.A. de CV v. Knoll, et al.* (AAA arbitration matter).  
Bunzl alleged that two former employees breached their noncompetition agreements and violated fiduciary duties. I successfully defended the two former employees.

**Arbitrator:** Randolph Tower  
Clemens & Spencer, P.C.  
112 E. Pecan, Suite 1500  
San Antonio, Texas 78205  
Telephone: (210) 227-7121

**Plaintiff's Counsel: Ricardo G. Cedillo**  
Les J. Strieber, III  
Davis, Cedillo & Mendoza, Inc.  
McCombs Plaza, Suite 500  
755 E. Mulberry Avenue  
San Antonio, Texas 78212-3129  
Telephone: (210) 822-6666

**Richard E. Jaudes**  
Thompson Coburn LLP  
One Mercantile Center  
St. Louis, Missouri 63101-1693  
Telephone: (314) 552-6431

*Rebecca A. Flores v. State Farm Mutual Automobile Insurance Company*,  
CA No. SA-92-CA-0569. Title VII action with various tort claims, including  
workplace violence issues. I obtained a summary judgment for the employer.

Trial Court: Western District of Texas, San Antonio Division  
Trial Judge: Hon. H. F. Garcia

**Plaintiff's Counsel: James A. Kosub**  
Malinda A. Gaul  
Law Offices of Kosub & Gaul  
105 S. St. Mary's, Suite 2300  
San Antonio, Texas 78205  
Telephone: (210) 225-0685

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

I routinely provide counseling and investigative assistance to clients to assist in their compliance with state and federal labor and employment laws. In addition, I assist employers in implementing "best practices" and securing a productive workplace.

In addition, I have handled hundreds of cases involving alleged violations of Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act and the Texas Labor Code. In such cases I have counseled clients as to their responsibilities under these statutes.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

**Upon my departure from Fulbright & Jaworski L.L.P. there will be an estimated accounting done of my capital account and 80 percent of my account will be disbursed at that time. Thereafter, in April of the following year, there will be a final accounting done and any remaining monies owed will be distributed at that time. Upon my departure from Fulbright & Jaworski L.L.P., monies held in the firm profit sharing plan and retirement accounts will be "rolled over" into my non-firm IRA account.**

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

**I do not own any stocks, therefore I do not foresee any financial arrangements that would cause a conflict of interest. With regard to cases where my current law firm appears as an attorney of record, I will comply with the Code of Judicial Conduct and recuse myself for an appropriate period of time.**

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? **No.** If so, explain. **N/A**
4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

**See attached Financial Disclosure Report.**

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

**See attached net worth statement.**

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

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**I was a candidate for Justice, Supreme Court of Texas (Place 4) in the March 2002 Republican Primary. Minor financial contributor to George W. Bush for President campaign. Minor financial contributor to Tim Bannwolf for Mayor campaign. Precinct Chair, Republican Party, Bexar County of Texas 1999-2001.**

FD-278  
1/2002

**FINANCIAL DISCLOSURE REPORT**  
**Nomination Report**

Report required by the Ethics in Government Act of 1978, as amended (5 U.S.C. App. Sec. 101-111)

<b>1. Person Reporting</b> (Last name, first, middle initial) Iriguez, Xavier	<b>2. Court or Organization</b> West. Dist. Texas	<b>3. Date of Report</b> 05/05/2003
<b>4. Title</b> (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time) S. District Judge - Nominee	<b>5. Report Type (check type)</b> <input checked="" type="checkbox"/> Nomination, Date 05/01/2003 Initial _____ Annual _____ Final _____	<b>6. Reporting Period</b> 01/01/2002 to 03/31/2003
<b>7. Chambers or Office Address</b> 100 Convent Street, Suite 2200 San Antonio, Texas 78205	<b>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.</b>  Reviewing Officer _____ Date _____	

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

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

POSITION	NAME OF ORGANIZATION / ENTITY
<input type="checkbox"/> NONE (No reportable positions)	
Partner	Fulbright & Jaworski L.L.P.
Member, Bd. of Directors	San Antonio Area Foundation

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

DATE	PARTIES AND TERMS
<input type="checkbox"/> NONE (No reportable agreements)	
2003	Fulbright & Jaworski L.L.P. Retirement Plan (to be paid out upon departure from firm)

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

DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
<input type="checkbox"/> NONE (No reportable non-investment income.)		
2002	Supreme Court of Texas	95,210.90
2002	Fulbright & Jaworski L.L.P.	84,800.00
2003	Fulbright & Jaworski L.L.P.	104,000.00

<b>FINANCIAL DISCLOSURE REPORT</b>	Name of Person Reporting	Date of Report
	Rodriguez, Xavier	05/05/2003

**IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.**  
*(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)*

	SOURCE	DESCRIPTION
<input type="checkbox"/>	NONE (No such reportable reimbursements.)	
1	EXEMPT	
2		
3		
4		
5		
6		
7		

**V. GIFTS**  
*(Includes those to spouse and dependent children. See pp. 28-31 of Instructions.)*

	SOURCE	DESCRIPTION	VALUE
<input type="checkbox"/>	NONE (No such reportable gifts.)		
1	EXEMPT		
2			
3			

**VI. LIABILITIES**  
*(Includes those of spouse and dependent children. See pp. 32-33 of Instructions.)*

	CREDITOR	DESCRIPTION	VALUE CODE*
<input type="checkbox"/>	NONE (No reportable liabilities.)		
1	Frost National Bank	Note - for payment of Fulbright Capital Account (to be paid upon closing of Fulbright Capital Account)	M
2			
3			
4			
5			
6			

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

<b>NANCIAL DISCLOSURE REPORT</b>	Name of Person Reporting Rodriguez, Xavier	Date of Report 05/05/2003
	<i>(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)</i>	

**II. Page 1 INVESTMENTS and TRUSTS – income, value, transactions** *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

A. Description of Assets (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amount Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure			
						(2) Date: Month- Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions.)									
1 Fidelity IRA		Dividend	M	T	EXEMPT				
2 Fulbright Profit Sharing Plan		Dividend	J	T					
3 Fulbright 401k Plan		Dividend	J	T					
4 American Express IRA		Dividend	K	T					
5 American Express Cash Reserve		Interest	J	T					
6 USAA Mutual Funds		Dividend	K	T					
7 Fulbright Capital Account		Interest	M	U					
8 Frost Savings		Interest	K	T					
9									
10									
11									
12									
13									
14									
15									
16									
17									

Gain Codes: A=\$1,000 or less  
 B=\$1,001-\$2,500  
 C=\$2,501-\$5,000  
 D=\$5,001-\$15,000  
 E=\$15,001-\$50,000  
 F=\$50,001-\$100,000  
 G=\$100,001-\$1,000,000  
 H1=\$1,000,001-\$5,000,000  
 H2=\$5,000,001 or more

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

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Rodriguez, Xavier	05/05/2003

**VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.**

*(Indicate part of report.)*



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FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Rodriguez, Xavier	05/05/2003

**CERTIFICATION**

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

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

Signature \_\_\_\_\_



Date

MAY 5, 2003

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

**FILING INSTRUCTIONS**

Mail original and three additional copies to:

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

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				Notes payable to banks-secured			
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities-add schedule				Notes payable to relatives			
Unlisted securities—add schedule				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due			
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				Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property							
Cash value-life insurance							
Other assets itemize:							
				Total liabilities	\$388,614.99		
				Net Worth	\$557,909.85		
Total Assets	\$946,524.84			Total liabilities and net worth			
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	No.		
None				Are you defendant in any suits or legal actions?	No.		
On leases or contracts				Have you ever taken bankruptcy?	No.		
None							
Legal Claims							
None							
Provision for Federal Income Tax	0						
Other special debt	none						

See attached.

Firstmark/SATCU Savings	88.69	
Fid IRA Cash Reserves	32.23	FDRXX
Fid IRA Baron Growth	7688.98	293.137 BGRFX
Fid IRA Blue Chip Growth	24814.95	791.293 FBGRX
Fid IRA Dividend Growth	24718.39	1163.766 FDGFX
Fid IRA Equity Income	31568.72	852.978 FEQIX
Fid IRA Govt Income	1276.41	121.911 FGOVX
Fid IRA Low Priced Stock	7777.07	328.84 FLPSX
Fid IRA Mid Cap Stock	12013.3	759.374 FMCSX
Fid IRA Inter Bond	77087.36	7131.116 FTHRX
Fid IRA Weitz Value	13396.91	498.954 WVALX
Fid IRA Oakmark Equity Income	5745.4	326.815 OAKBX
FJ Profit Plan Weitz Value	350.96	13.071
FJ Profit Plan Van Kampen Emer Grth	707.23	24.885
FJ Profit Plan Dreyfus App	694.57	23.261
FJ Profit Plan Fid Puritan	1753.26	115.498 FPURX
FJ Profit Plan Fid Govt Income	726.96	69.433 FGOVX
FJ Profit Plan Fid Retire Mmkt	2156.11	2156.11 FRTXX
FJ Profit Plan Spartan US Eq Index	695.44	23.158 FUSEX
FJ 401k Weitz Value	392.74	14.627
FJ 401k Van Kampen Emrg Grth	199.62	7.024
FJ 401k Dreyfus App	389.23	13.035
FJ 401k Fid Puritan	785.61	51.753 FPURX
FJ 401k Fid Govt Income	1021.15	97.531 FGOVX
FJ 401k Fid Retire Mmkt	1009.84	1009.84 FRTXX
FJ 401k Spartan US Eq Index	195.11	6.497 FUSEX
AXP New Dim A IRA	3299.82	178.465 INNDX
AXP New Dim A	4282.51	231.612 INNDX
AXP Equity Value Fund A IRA	4453.98	690.539 IEVAX
AXP Equity Select Fund IRA	7437.46	820.007 INVPX
AXP Cash Reserve	4354.91	
USAA Growth & Tax	19945.97	1520.272 USBLX
USAA Growth	6108.9	621.455 USAAX
USAA 1st LMR	5334.41	794.994 UFSGX
USAA 1st SMR	5334.41	794.994 UFSGX
2002 Infiniti QX4	25000	
2003 Lexus ES 300	32200	
Frost Market Index Acct (Tax Acct)	54679.49	
.25 X 49.5 acres Lavaca Cty	16042.5	
Personal Property	100,000	
FJ Capital Account	140,000	
Frost Savings LMR	1,752	
Frost Savings SMR	1,292	
Frost Checking	2,246	
Frost XR & RWR Savings	15,474	
18211 Newcliff	280000	
<b>Total Assets</b>	<b>946524.84</b>	
Mastercard	2838.47	
Infiniti	25391.78	
Toyota/Lexus	19299.55	
Frost Note - FJ Cap Acct	134167	

1200

Wells Fargo Newcliff Mortgage	209756.66
Total Debts	388614.99
Net Worth as of Apr. 20, 2003	557909.85

## III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

**I routinely provide pro bono legal services to Respite Care of San Antonio, a non-profit organization that provides varied services to families caring for disabled children. In addition, I have provided pro bono legal services to Any Baby Can, a non-profit organization that provides support and crisis assistance to families of children with special health care needs. In addition, I have participated in a Community in Justice clinic providing pro bono family law assistance. On average, I contribute over 200 hours per year of my time to charitable causes and over 120 hours per year to pro bono matters.**

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? **No.** If so, list, with dates of membership. What you have done to try to change these policies? **N/A**
3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? **Yes.** If so, did it recommend your nomination? **I do not have personal knowledge, but I assume the selection committee recommended me to Senators Hutchison and Cornyn.** Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

**In November of 2002, I was interviewed on one occasion by representatives from the White House Counsel's office. Several month's later I was asked to interview before the Texas Senators' selection committee. Several weeks later I interviewed with both Senators. After the senators forwarded their recommendation to the White House I was interviewed by representatives of the Department of Justice, Office of Legal Policy and the Federal Bureau of Investigation.**

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? **No.** If so, please explain fully. **N/A**

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

**Our Constitution provides for the separation of powers of the three branches of our government. The legislative branch of our government has been elected to consider the needs of our society and legislate accordingly. A judge should not go beyond the traditional role of interpreter of the Constitution and laws and should not assume a policy-maker role. Judges should defer to the political branches of government when they permissibly exercise governmental power. In addition, a judge should apply the law in a manner that is both predictable and uniform. When a judge departs from the philosophy of judicial restraint, predictability and uniformity fall victim. In reviewing statutes, a judge should attempt to ascertain the "plain meaning" of the language in question. If the wording of the statute is unclear, a judge should defer to the legislative intent behind the statute. Similarly, when reviewing the decisions of administrative agencies, a judge should recognize that these agencies were created by the Legislature and accordingly a judge should defer to the enabling legislation of that agency.**

**A judge who adheres to the philosophy of judicial restraint also ensures that a party has standing and has suffered an "injury in fact." The judge also makes certain that the subject matter is ripe for adjudication. Once a case is properly before the court, the corollary to this limited judicial intervention is that a decision is limited to a resolution of the grievance currently before the court.**

Senator CORNYN. Thank you very much. As I indicated earlier, other members of the Committee—and I assure you there are a number of different hearings that are occurring simultaneously with this one, and so Senators are spread kind of thin, but all of their staff is here, and a number of them have submitted statements for the record, and you can anticipate that some will have questions in writing for you after this. But I hope for my part to make this as painless as possible, and non-controversial nominations are actually a good thing. And I expect each of these nominations to be non-controversial.

But I have to ask—and maybe I will just go down the line, starting with Mr. Browning, and ask each of you to comment. I have had the honor of now serving in three branches of Government, as a judge for 13 years, and then as Attorney General in the executive branch of Texas State government for 4 years, before coming to the legislative branch now in the United States Senate. And it is very important to me that judges understand what their role is under our Government of divided and separated powers. And I would be interested to hear, Mr. Browning, what your personal views are on that issue and judges having to render decisions which may be unpopular because, rather than achieving a result that you perhaps yourself might like to achieve, you are interpreting the law and applying it to a set of facts having been determined by a fact finder and having to make a decision perhaps that is not a popular one or perhaps not one you, if given the sole decisionmaking capacity, would have made.

Could you please comment on how you will approach that as a judge, if confirmed?

Mr. BROWNING. Yes, Mr. Chairman. I think it's very important that judges, Federal judges, as they assume the bench, put aside all their personal viewpoints as much as possible, their ideologies, their political beliefs, and try to be as fair and consistent in applying the law as possible.

Our Constitution sets up a divided Government, and judges and courts are to play an important but very unique role within that framework. We are not the legislative branch, but judges, in fact, go about their task in a particular way of trying to apply the law neutrally and fairly and in a principled manner. And so I think it's very important that judges and courts remember their role and play their role within the system as much as possible and not try to make their decisions in a way that the popularly elected branches of Government do.

Senator CORNYN. Thank you.

Judge Cardone?

Judge CARDONE. Well, I obviously concur with Mr. Browning that the separation of powers is important and is to be recognized, and as a Federal trial court judge, it's my intention to do exactly what a Federal trial court judge is to do, which is to listen to the facts and apply the laws to the facts of the case as interpreted by our circuit courts and our Supreme Court. And I think that's a very important role, but it's a very different role than the legislative or the executive branch.

Senator CORNYN. Thank you.

Judge Cohn?

Judge COHN. Judges must be guided by the law and not public sentiment. Judges are not policymakers. Our elected Congressmen and Senators are the policymakers. I recognize that. I value our system of Government and our separation of powers, and I will certainly follow the law.

Senator CORNYN. Thank you.  
Judge Montalvo?

Judge MONTALVO. Mr. Chairman, having spent eight and a half years as a district court judge in Texas, I could not add anything to the eloquence of the three individuals that preceded me. I agree with them. I am not in the business of legislating. The business of dealing with public policy issues is for those in the legislative and executive branches of Government.

Senator CORNYN. Justice Rodriguez, let me mix up that question just a little bit and say assume with me that the Supreme Court has decided an issue in a manner that you disagree with. How do you view your duty as a United States Federal district judge, to follow that ruling or to not follow that ruling?

Justice RODRIGUEZ. A Federal district judge, Mr. Chairman, has a very limited role in that respect, and that is to follow the precedents set forth by the United States Supreme Court or, in my case, the Fifth Circuit Court of Appeals. And as a district judge, I have no discretion but to follow that regardless of my personal beliefs.

Senator CORNYN. Thank you very much.

My next question for each of you has to do with the administrative side of your responsibilities. Some, and I think Congressman Reyes, specifically addressed the challenges of those of you who have courts along the border, whether it is San Antonio—not exactly on the border but close—or perhaps in New Mexico and perhaps the challenges—I know the challenges would have to be similar in Florida as well in terms of the caseloads that you will be assuming. And I would be interested to know your approach to the enormous caseloads that the Federal courts are experiencing, if confirmed. Let me start with Justice Rodriguez and we will move right to left. If confirmed, how do you intend to address the large caseload that you will be assuming?

Justice RODRIGUEZ. I have taken the liberty of trying to get some guidance from the judge that I will be replacing. Judge Edward Prado, who this Committee and this Senate has now confirmed to the Fifth Circuit Court of Appeals, has taken me under his wing these last couple of months to guide me through those administrative hurdles that you have referred to, Mr. Chairman, and indeed, the hurdles are great in the Western District of Texas. And although I will be sitting in the San Antonio Division, the judges of the Western District do share responsibilities and do travel on occasions to both Del Rio and El Paso to help alleviate the tremendous burdens that are there present at our border. So I have done some background preliminary work to familiarize myself with those administrative burdens already.

Senator CORNYN. Thank you.

Judge Montalvo, I believe yesterday when we were visiting in my office, you were commenting on the size of the caseloads in the El



Paso Division where you and Judge Cardone will be serving. Can you please address that same question?

Judge MONTALVO. Yes, Mr. Chairman. The excitement of this nomination is that it's the busiest division in the country, the El Paso Division of the Western District. And I've been in close contact with the two sitting judges there, with Judge Briones and Judge Martinez. So I'm developing a good feel for the work flow in the El Paso Division.

Also, like Judge Rodriguez, I've been in close contact with Judge Prado trying to familiarize myself with the variety of issues involved with keeping the work flow and keeping things up-to-date.

I'm very encouraged by the level of support that the Administrative Office of the Federal Courts will have available to both Judge Cardone and I once—should we be privileged with the confirmation, with the level of support that the office has. In fact, we have already been receiving a lot of material that I'm beginning to review.

So I think there's a lot of work, but there are plenty of resources to address that.

Senator CORNYN. I can imagine that Judges Briones and Martinez are looking anxiously at your arrival, as well as Judge Cardone, for some help.

Judge Cohn, could you address the case management challenges that you will have?

Judge COHN. Yes, sir. I think the only way to handle a large caseload is through hard work. And I have proven in my 8 years as a circuit judge that I'm not afraid of hard work. In 8 years, I've tried over 770 felony jury trials. And with respect to complex litigation, I think it's very important that a judge take a hands-on approach early on in the case, set case management conferences every couple of months, let the lawyers know that the judge himself or herself is going to be actively involved in the litigation. And I would do so with the eye of simplifying the issues and getting as many stipulations to uncontested facts as possible.

Thank you.

Senator CORNYN. Thank you.

Judge Cardone?

Judge CARDONE. Well, if ever I had a strong suit, I think docket management is that. And I believe part of the reason that I have such support of my colleagues in El Paso is because I'm known for my ability to manage a docket.

Congressman Reyes touched on the fact that it was under my leadership that the courts in El Paso specialized their family law courts. And when I became the presiding judge over the 383rd District Court, I took some 9,000 family law cases into my court and pared it down to approximately 4,000 by the time I left the bench.

The purpose behind that was to specialize the system, and so I believe that I have a very good knowledge of docket control and administration.

Senator CORNYN. Thank you.

Mr. Browning?

Mr. BROWNING. Mr. Chairman, I think Judge Cohn had it correct that one of the things that we just have to bring, if we're fortunate enough to be confirmed, is hard work. We can never forget that

what we are being asked to do is to serve the public, serve the lawyers, serve the parties that are before us. And I think as trial judges, what they deserve is an answer, and I think what you try to do is you try to work hard in reading the briefs, setting arguments in a prompt manner so the cases move along. But you owe the parties a decision, and get them a decision because truly justice—or a decision delayed is justice denied.

And so I think that one of the ways that you manage your cases is to set hearings. That forces the judge to read the briefs in advance of the hearing. If he can rule before the hearing, fine. If he or she doesn't get to the ruling, then have the hearing, try to announce those, set days in which motions are heard.

The criminal side tends to take care of itself because of the Speedy Trial Act. You just can't make a mistake there. And so with your courtroom deputy, you just have to make certain that those are moved along. I think the trouble comes on the civil side that if you do not discipline yourself to set hearings and make rulings in a prompt manner, that's where the backlog is created.

And so I would think that would be one way that, if I'm fortunate enough to be confirmed, that's the way I would move the civil side.

Senator CORNYN. Thank you very much.

I know each one of you before you got here today has undergone an extensive application process and evaluation by your home State Senators before your names were sent to the President. I know that you have also undergone a comprehensive investigation by the FBI into your background. You have also been evaluated by the American Bar Association for your professional competence and credentials. And so I won't burden you anymore at this hearing with additional questions. But suffice it to say that you have been tested and found deserving, at least in my opinion, of the important job that you are being given.

I would just ask you, as somebody who has served as a judge for a while myself, the fact that you no longer, those of you who have had to run for election, have to stand for election before the people, I know you will not let your life tenure keep you from constantly focusing on the fact that you are a public servant in every sense of the word, and you owe your job and your duty to that public and the trust that has been reposed in you.

So, with that, I would like to thank each of the nominees for their time. And especially for their family and friends for this happy occasion, thank you for coming to Washington to express your support.

We will keep the record open until 5:00 p.m. on Tuesday, July the 15th, for members to submit any written questions they may have. And, with that, this hearing is adjourned.

[Whereupon, at 3:44 p.m., the Committee was adjourned.]

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

## QUESTIONS AND ANSWERS

James Browning's Responses to Follow-Up Questions  
from Senator Richard J. Durbin  
on  
July 15, 2003

1. You have made statements that suggest you may have a difficult time keeping an open mind in cases involving the separation of church and state. In a lecture you gave at a university you stated: "One of the greatest false myths is that religion and society can be separated." You also stated: "Neutrality is no more practical in politics than it is in religion, law, business, or anything else."

A. What did you mean by these comments?

**RESPONSE:**

These comments were made to a church group that historically has not been active in politics. The comments were, for the most part, made to non-lawyers, and were political science observations, not legal views. In my talk, I attempted to make the point that abstaining from involvement in politics in fact amounts to taking a political position. I hoped to convey to the church group that not being involved in politics in fact has an impact on policy decisions.

B. How do you reconcile these comments with the Establishment Clause?

**RESPONSE:**

These comments were not directed at legal precedent. All citizens, including those of religious faith, should be encouraged to participate in the political process. The Supreme Court, however, has interpreted the Establishment Clause and has made clear that governments -- both state and federal -- cannot do anything to establish a religion. My statements were not intended to conflict with this interpretation as I had no intention to advocate a government sponsorship or establishment of a particular religion.

C. Based on your comments would you feel compelled to recuse yourself from cases involving the constitutional rights of those who have no religious affiliation? Why or why not?

**RESPONSE:**

No. My comments were not intended to address at all the constitutional rights of those who have no religious affiliation. The Supreme Court of the United States had made clear, in a number of First Amendment cases, including in Wallace v. Jaffree, that "the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." As a federal judge, I would be bound by that precedent and would faithfully follow it.

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 from Senator Richard J. Durbin on 7-15-2003  
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2. What is your view on the appropriateness of displaying the Ten Commandments in public arenas such as a state court house?

**RESPONSE:**

The question of the appropriateness of displaying the Ten Commandments in a public arena is necessarily a fact-intensive one. The United States Court of Appeals for the Eleventh Circuit recently held that, under the specific facts before it, the placement in the Rotunda of the Alabama Supreme Court of a two-and a half ton monument depicting the Ten Commandments was a violation of the Establishment Clause. See Glassroth v. Moore (2003). In addition, the Third Circuit recently decided two cases in which it held that a bronze plaque hanging in a county courthouse and depicting the Ten Commandments did not violate the Establishment Clause, nor did attaching "lechis" on utility poles by Orthodox Jews to create an "eruv" and facilitate attendance at synagogue violate the Establishment Clause. See Freethought Society v. Chester County (2003); Tenafly Eruv Association, Inc. v. Borough of Tenafly (2002).

Because such a case might come before me if I were confirmed as a judge, I hesitate to offer my personal views on this subject. If such an issue came before me, I would review the facts presented, the precedents and briefs, and faithfully apply the law as established by the Supreme Court and by the Tenth Circuit to the facts of the particular case.

3. I would like to ask about some of the statements you have made about abortion rights.
- A. You have stated: "For those that are so-called pro-choice, I call upon you then to make the choice of life, not holocaust." Do you believe that abortion is equivalent to the Holocaust? Why or why not?

**RESPONSE:**

I do not believe that Abortion is equivalent to the Holocaust. The Holocaust involved the state intentionally taking human life. Abortion involves the personal decisions of women, often with family, friends, and doctors, to abort. The state is not taking life in an abortion.

- B. You have stated: "Pro-choice seeks to give in effect the most irresponsible in our society the right to take the life of the weakest. Pro-choice is the tyranny of the majority over the minority." What did you mean by these comments?

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 from Senator Richard J. Durbin on 7-15-2003  
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**RESPONSE:**

From a political philosophy point of view, I believe that individual rights can be best explained in terms of majority and minority rights. Because the majority can usually protect itself in the political process, it is important that society protect its minorities and weakest members by recognizing that they have rights that cannot be overridden by the political process.

- C. You have stated: "Let us stop this Herod and the slaughter of innocents that masks itself as contemporary liberal thought." What did you mean by this comment?

**RESPONSE:**

This is a rhetorical reference to the story in Matthew 2: 13-18. I intended to compare the fact that King Herod took the lives of innocent infants two thousand years ago, with the concern that abortion similarly impacts the innocent unborn.

- D. You have also said: "Pro-choice, while perhaps popular with the press and sounds liberal, is the manifested excesses of a sinful society. It trades the truth for political expediency. It calls darkness light. And good evil. And it stains the hands of the perpetrator as well as the head of the victim." How could you in good conscience morally reconcile this belief with your judicial responsibility to sustain the Supreme Court's decision in *Roe v. Wade*?

**RESPONSE:**

For our constitutional system to function, it is imperative that a district judge put aside his or her personal and moral views on an issue and follow the precedents of the Supreme Court and the Court of Appeals. I did so as a law clerk for Justice Powell as I assisted him in drafting three opinions on the abortion issue. *Roe v. Wade* is the established law of the land, and, as a district judge, I would be bound in good conscience to do my judicial responsibility and apply and follow that precedent.

4. In *Griswold v. Connecticut*, the Supreme Court for the first time recognized the constitutional right to privacy. It went on to reaffirm and expand this right in *Eisenstadt v. Baird*. Following from these decisions, the Supreme Court then recognized constitutional protections for a woman's right to choose in *Roe v. Wade*.

- A. Do you believe in and support a constitutional right to privacy?

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 from Senator Richard J. Durbin on 7-15-2003  
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**RESPONSE:** Yes.

B. If so, do you believe the constitutional right to privacy encompasses a woman's right to have an abortion?

**RESPONSE:** Yes.

C. I assume that you will follow the law on abortion if confirmed, but will you feel morally bound to restrict the rights established in *Roe* if given that opportunity in cases that came before you?

**RESPONSE:**

No. A federal district judge must at all times fairly and faithfully follow the precedents of higher courts, even those precedents with which the judge may personally disagree.

5. In order to allay any concerns that litigants may have, are you prepared to recuse yourself in cases that came before you involving abortion rights?

**RESPONSE:**

I will follow the Code of Conduct for U.S. Judges and § 28 U.S.C. §455, in making all recusal decisions that came before me. Without being presented with a particular case, I am not prepared to recuse myself in all cases involving abortion rights. My comments about my views on abortion are thirteen years old, were made largely to non-lawyers, were directed at the political philosophy related to the issue, and did not specifically discuss the law. The Supreme Court has consistently reaffirmed the right to abortion over the last thirty years; as a district judge, I would be bound to, and would, faithfully apply those precedents.

6. In a speech to the Federalist Society, you expressed support for repeal of the 17<sup>th</sup> Amendment. Please explain why you believe that this country would be better off without the direct election of U.S. Senators.

**RESPONSE:**

I do not have a view whether this country would be better off without the direct election of U.S. Senators. The point of my talk was that, if federalism is a principle worth protecting, it should be done with structural and political changes, not with judicially created rules that arbitrarily restrict Congress' power under the commerce clause. One possible change is to make Senators more accountable to states qua states, but if that is done, other competing values -- such as a democratic participation -- may suffer.

James Browning's Responses to Follow-Up Questions  
 from Senator Richard J. Durbin on 7-15-2003  
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7. You have stated: "We should not listen to legislators who see a problem within our borders and state it is a problem for the national government and the nation. And we should mock publicly Senators who say Senators can vote one way on national issues and still vote ok on local issues [sic]. If raising the minimum wage \$1.50 an hour in one of the poorest states in the union is a national problem, not a local issue, then we are indeed a society of smoke and mirrors, not substance." What did you mean by these comments?

**RESPONSE:**

New Mexico is one of the most impoverished states in the Nation, and nothing is more important in my state than improving the quality of life for everyone, especially the poor. However, as stated in response to your question No. 6, the point of my lecture was that the courts should not use the Tenth Amendment to create arbitrary limits on Congressional power. If federalism is a principle worth protecting, it should be protected with structural or political solutions, not by the Courts creating restrictions that cannot be neutrally applied. One political solution is that, if the people decide federalism is important, and if they do not want Congress to regulate local issues, they should elect Senators and Representatives who also value federalism and do not apply all regulatory laws to states qua states. But courts should not attempt to restrict Congress under such broad provisions as the Tenth Amendment.

8. You have written: "The federal courts' narrow construction of the Second Amendment contrasts with its liberal interpretation of other provisions of the Bill of Rights, and is at tension with the amendment's plain language, the structure and text of the Constitution, and the history of the amendment's phrases and their meaning." You have stated that "the Second Amendment's limits should constrain the federal government's power when Congress tries to deny its citizens means of self-protection. Unreasonable waiting periods or a complete ban on handguns, which could effectively deny citizens the means of meaningful self-protection, may infringe the protected values."

This year is the 10<sup>th</sup> anniversary of the Brady Handgun Violence Prevention Act. Under this law, an applicant for a firearm may have to wait up to five days before obtaining a firearm, while the National Instant Criminal Background Check System (NICS) ensures that those seeking to purchase firearms are not criminals or other persons prohibited by law from possessing firearms. If a firearms dealer has not been notified by NICS within three business days that an applicant is ineligible to obtain a firearm, the dealer then can legally transfer the firearm to that individual. Although NICS can make an immediate determination for 91 percent of firearm purchases, this three-business-day period has been essential to its success. Since NICS was implemented in November 1998, it has denied over 563,000 firearm transfers to criminals and other prohibited individuals. In your view, how long is an "unreasonable waiting period"? Is this three-business-day period an "unreasonable waiting period"?

**RESPONSE:**

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from Senator Richard J. Durbin on 7-15-2003  
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I note in my article that Congress clearly has the ability to enact reasonable restrictions on gun ownership, and courts have upheld the Brady Act's waiting period. See Koog v. U.S. (1996). Because the question of the reasonableness of a shorter waiting period under the Second Amendment could come before me, I hesitate to offer my personal views on the propriety of a 3-day waiting period. I did not in 1991 have a view of how long an unreasonable waiting period would be, nor do I have one now. That determination might well depend on the facts presented to the court.

9. According to your Senate questionnaire, you are a member of the Federalist Society. Do you agree with the following passage from its mission statement?

*"Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law."*

**RESPONSE:**

The statement is a generalization and may be somewhat dated. I cannot comment with knowledge about other law schools, but my law school, the University of Virginia, enjoyed diversity of views, and I benefited from that diversity. I assume most law schools also enjoy similar diversity, and I think the Federalist Society has contributed to the diversity and exchange of ideas on campuses. I do not think the legal profession is monolithic in its views, but rather benefits from a strong tradition of advocacy of and dissent from a broad spectrum of viewpoints and ideologies.



**James Browning's Responses to Follow-Up Questions  
of July 15, 2003 from Senator Patrick Leahy:**

1. In a speech to a local chapter of the Federalist Society in 1988, you said, "My premise, which is widely shared, is that the structure of our government—not the Bill of Rights—has provided the greatest bulwark against tyranny. Thus we cannot and should not dismiss structural changes that would preserve and promote federalism and, in turn, civil liberties." Please tell me what kind of "structural changes" you were referring to and think are needed today to "preserve and promote federalism."

1. **RESPONSE:** The point of my talk was that I criticized the Supreme Court's use of the Tenth Amendment in National League of Cities (1976) to limit Congress' power under the Commerce Clause. If federalism is a principle worth protecting, as the Supreme Court seemed to believe, it was better protected by changes to the structure of our constitutional government than by the Court creating limitations on Congress' power. The possible structural changes that I suggested for consideration were repeal of the Seventeenth Amendment, election of presidential electors by state legislators, and the election of Senators and Representatives who value federalism as a goal. Also, I do not have a view whether any of these changes are needed today, because some structural changes — such as the repeal of the Seventeenth Amendment — involve a loss of other, competing goals, such as broad participation in the democratic process.

2. In a speech in 1988, before a local chapter of the Federalist Society, you indicated that you believe that the minimum wage is not a national issue that the federal government can address. You said, "If raising the minimum wage \$1.50 an hour in one of the poorest states in the union is a national problem, not a local issue, then we are indeed a society of smoke and mirrors, not substance."

- a. Do you still believe that raising the minimum wage is not something that Congress can regulate under its Commerce Clause power? If so, what is the basis for your view? If not, what made you change your mind?

2a. **RESPONSE:** I did not say nor believe in 1988, and do not believe today, that Congress cannot raise the minimum wage under its Commerce Clause power.

- b. Do you think that Congress can pass laws regulating wages, controlling anti-union discrimination, or other related labor laws consistent with the Constitution?

2b. **RESPONSE:** Yes.

- c. What is your understanding of the scope of congressional power under Article I of the Constitution, in particular, the Commerce Clause?

2c. **RESPONSE:** According to two recent Supreme Court cases, Congress can regulate intrastate economic activity that substantially affects

interstate commerce. See United States v. Lopez (1995); United States v. Morrison (2000).

- d. Last Congress, the House of Representatives passed a bill to prohibit human cloning. Do you see any tension between such legislation and the Court's new restrictions on our powers under the Commerce Clause? In your view, is human cloning more or less "economic" in nature than gun trafficking near schools or gender-motivated crimes of violence?

**Zd. RESPONSE:** I have not read the bill or studied in great detail the Court's recent cases restricting Congress' powers under the Commerce Clause. I thus cannot intelligently comment whether there is a tension. I also have no view on whether human cloning is more or less "economic" than other activities. That determination might well depend on the factual record and evidence developed in a case.

3. Over the past few years, the Supreme Court has struck down a number of federal statutes, most notably several designed to protect the civil rights of Americans, as beyond Congress' power under Section 5 of the Fourteenth Amendment, for example, *Flores v. City of Boerne*, 117 S. Ct. 2157 (1997), *Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000), and *Board of Trustees v. Garrett*, 19 S. Ct. 2240 (1999). What is your understanding of the scope of congressional power under Section 5 of the Fourteenth Amendment?

**3. RESPONSE:** In *Flores v. City of Boerne* (1997), the Supreme Court struck down the Religious Freedom Restoration Act of 1993 ("RFRA"), acknowledging Congress' broad sweep of power under §5, but holding that the RFRA went beyond that sweep to encroach on a state's right to regulate the health and welfare of its citizens. In *Kimel v. Florida Board of Regents* (2000), the Court determined that Congress exceeded its authority under §5 by attempting to abrogate Eleventh Amendment immunity under the Age Discrimination in Employment Act. Likewise, in *Board of Trustees v. Garrett* (2001), the Court held that Congress exceeded its authority by attempting to abrogate Eleventh Amendment immunity in the Americans with Disabilities Act.

4. The New York Times has said that the present Supreme Court has "struck down more Federal laws per year than any Supreme Court in the last half of the century." Are there any federal statutes or sections thereof that have not yet been ruled upon by the Supreme Court that you think go beyond Congress' enumerated powers under the Constitution?

**4. RESPONSE:** If I am fortunate enough to be confirmed, and a litigant in a case before me challenges a federal statute, I will review the facts, applicable law, and briefs of the parties in an attempt to render a fair decision. I am not aware of any such federal statutes or sections.

5. You have practiced law for twenty years, primarily as a private practitioner, and have litigated many complex cases. However, you state in your Senate Questionnaire that 99% of your litigation experience has involved civil matters and that you have little experience litigating criminal matters. As you know, federal court dockets are overflowing with many complex criminal cases. Please tell the Committee whether and how your experience has prepared you to adjudicate these complex criminal cases and manage a busy docket involving such matters. If you are confirmed, how will you get up to speed and respond to the challenge of handling the criminal matters that will be before you?

5. **RESPONSE:** I have been involved in a number of complex cases involving novel or cutting edge issues that required me to learn quickly and thoroughly entirely new areas of law with which I was not previously familiar. Having handled many complex cases, I believe that experience will be valuable in handling other matters: extensive pretrial motion practice, long trials, jury selection, large numbers of exhibits, and multiple legal issues. Under the Speedy Trial Act, criminal cases take priority. The task is to make no mistakes on calendaring and scheduling matters on the criminal side of the docket, and yet keep the civil cases progressing toward resolution. I believe my handling of class actions and other complex cases simultaneously has given me skills that will transfer to managing a busy docket that includes both civil and criminal cases, some of which will be complex. Through study and hard work, I am confident I will be able to handle the criminal matters that will be before me if I am confirmed.

SUBMISSIONS FOR THE RECORD

U.S. Senate Committee on the Judiciary

**Judicial Nominations**

**Statement of U.S. Senator John Cornyn, Presiding**

Wednesday, July 9, 2003, 3 p.m.  
Dirksen Senate Office Building Room 226

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I am very pleased to introduce and to chair the confirmation hearings of three great judges and three great Texans.

Each of them has been nominated to serve on the U.S. District Court for the Western District of Texas. If confirmed, each of them will continue to bolster their records of excellence on the bench.

First, **Judge Kathleen Cardone** of El Paso is a 1979 graduate of my own beloved alma mater, the St. Mary's School of Law, in San Antonio. She began her legal career as a briefing attorney for U.S. Magistrate Judge Philip Schraub in the Southern District of Texas. She then engaged in the private practice of law for nine years, on both civil and criminal matters and in federal and state court.

Earlier this year, the President nominated her to serve in a newly created seat on the Western District. Judge Cardone is no stranger to such an experience, having previously served in a number of judicial positions on newly created courts. In 1983, the City Council of El Paso appointed her to serve on a newly created Municipal Court in El Paso. In 1990, the Council of Judges for the County of El Paso unanimously appointed her to serve as an Associate Judge of the Family Law Court. In 1995, she was appointed by then-Governor George W. Bush to Texas's new 383rd Judicial District Court. And in 1999, she was appointed to Texas's new 388th Judicial District Court, where she presided over a specialized family law court. Since 2001, she has been serving as a visiting judge for the state of Texas.

Judge Cardone is also an active member of her community. She chairs the Board of Directors of the El Paso County Domestic Relations Office, and the Children Cope with Divorce Committee of the YWCA Paso Del Norte Region. In addition, she is a member of the Board of Directors of the Strong Families/Strong Future Committee and of the El Paso Holocaust Museum and Study Center.

**Judge Frank Montalvo** currently serves on the 288th Judicial District Court of Texas, in San Antonio, where I once served as a state district judge. He has been nominated to a newly created seat on the Western District, currently slotted for El Paso.

I'm particularly pleased that Senator Hatch has scheduled this hearing today, because I imagine that, should Judge Montalvo be confirmed to the federal district court, he would prefer to move

his family during the summertime, when his children are out of school. I sincerely hope that we can make that happen.

Judge Montalvo will bring to the federal district bench exceptional and unique qualifications. Before joining the legal profession, he was a crash test safety engineer for General Motors. And as a 2001 article in *Texas Lawyer* noted, Judge Montalvo is "still an engineer at heart. To Montalvo, the law is something to be applied with mechanical precision."

Judge Montalvo was born in Bayamon, Puerto Rico. He received his undergraduate degree from the University of Puerto Rico, and his law degree from Wayne State University Law School. He was engaged in the private practice of law until 1994, when he became Judge of the 288th Judicial District Court. He is a prolific legal writer and speaker, with a particular expertise and emphasis on issues of judicial procedure.

Judge Montalvo is also active in Boy Scout Troop 233 in Leon Spring, and a member of the board of directors of both the Child Guidance Center and the Rape Crisis Center.

Finally, **Justice Xavier Rodriguez** has been nominated to fill the vacancy created by the elevation of Judge Edward Prado to the U.S. Court of Appeals for the Fifth Circuit. I am sure Judge Prado agrees with me that he will be a worthy successor to the federal district bench.

Justice Rodriguez is a native of my hometown of San Antonio. He received his undergraduate degree from Harvard University in 1983, and a Master of Public Affairs degree and a law degree from the University of Texas in 1987. He served as a member of the U.S. Army Reserves until 1993, and practiced law with the prestigious Texas law firm of Fulbright & Jaworski until 2001, when Texas Governor Rick Perry appointed him to the Texas Supreme Court.

He is board certified in Labor & Employment Law, a subject on which he has written extensively. He is a member of the American Law Institute and the San Antonio Bar Association, and a Fellow with the Texas Bar Foundation. He has held leadership positions in the State Bar of Texas.

In addition, Justice Rodriguez is a member of the Board of the National Association for the Advancement of Minorities in Technology. He is a member of the Dean's Advisory Council for the St. Mary's University School of Law, a former chairman of the South San Antonio Chamber of Commerce, and a former president of the Harvard Club of San Antonio and Respite Care of San Antonio.

All three individuals are already exceptional judges, and I am confident that they will continue to serve with excellence if confirmed to the federal district bench.

BOB GRAHAM  
FLORIDA

**United States Senate**

WASHINGTON, DC 20510-0903

**U.S. Senator Bob Graham  
Introduction of James I. Cohn to the Senate  
Judiciary Committee**

**July 9, 2003**

Mr. Chairman, thank you for scheduling this hearing and for this Committee's attention to the needs of the Southern District of Florida, one of the biggest and busiest judicial districts in the country.

Today I introduce to the Committee the Honorable James I. Cohn, who currently serves as a Judge in the State of Florida's Seventeenth Circuit. Judge Cohn is joined by his wife, Kathleen Cohn, and their son William, 8. Kathleen, a registered nurse, is active in the PTA at Nova Eisenhower School, where William is entering the second grade.

I am pleased to introduce you to this nominee not only because he is an able jurist, but also because of Judge Cohn's diverse legal experience. Judge Cohn spent eighteen years in private practice, three years in the Broward County State Attorney's Office, and eight years as Judge in the County Court of Florida's Seventeenth Circuit. During his time on the bench, Judge Cohn has distinguished himself as a hard worker, presiding over 770 jury trials, an average of ninety-six jury trials per year.

Judge Cohn's academic and public service credentials are impressive. A graduate of the University of Alabama and the Cumberland School of Law at Samford University, Judge Cohn has also served his country in the Alabama National Guard, the Florida National Guard, and the United States Army Reserves.

Judge Cohn continually ranks among the top circuit judges in the Broward County Bar Association's annual poll and colleagues describe him as an intelligent, open-minded judge who continually applies the law impartially.

Judge Cohn is an intelligent and dedicated candidate, ready for the challenging work that the federal bench requires.

I appreciate the Committee's consideration of his nomination, and I have every expectation that both this Committee and the full Senate will act on this nomination without delay.



1219



News Release  
**JUDICIARY COMMITTEE**

*United States Senate • Senator Orrin Hatch, Chairman*

July 9, 2003

Contact: Margarita Tapia, 202/224-5225

**Statement of Chairman Orrin G. Hatch  
Before the United States Senate Committee on the Judiciary  
Hearing on the nominations of**

**JAMES O. BROWNING TO BE U.S. DISTRICT JUDGE  
FOR THE DISTRICT OF NEW MEXICO;**

**KATHLEEN CARDONE TO BE U.S. DISTRICT JUDGE  
FOR THE WESTERN DISTRICT OF TEXAS;**

**JAMES I. COHN TO BE U.S. DISTRICT JUDGE  
FOR THE SOUTHERN DISTRICT OF FLORIDA;**

**FRANK MONTALVO TO BE U.S. DISTRICT JUDGE  
FOR THE WESTERN DISTRICT OF TEXAS; AND**

**XAVIER RODRIGUEZ TO BE U.S. DISTRICT JUDGE  
FOR THE WESTERN DISTRICT OF TEXAS**

Today the Committee is considering five extremely well qualified nominees for the federal district court bench. Before we turn to the panel of Senators here to introduce the nominees, I would like to say a few words about each of them and offer my support.

Our first nominee, **James Browning**, has been nominated for the District of New Mexico. Mr. Browning has a great depth of legal experience and will make an excellent addition to the federal bench. He earned his law degree from the University of Virginia, where he served as Editor-in-Chief of the *Virginia Law Review* and was a member of the Order of the Coif. After graduation, Mr. Browning served as a law clerk for Third Circuit Chief Judge Collins J. Seitz and Supreme Court Justice Lewis Powell. He is currently a senior partner and shareholder with the Albuquerque firm of Browning & Peifer. Despite his busy schedule, Mr. Browning nevertheless finds time to volunteer for various pro bono causes, and he currently commits several hours a month to the New Mexico Christian Legal Aid group.

**James Cohn** has been nominated for the Southern District of Florida. For the past seven years, he has served admirably as a judge on the 17<sup>th</sup> Judicial Circuit of Florida.

Prior to his judicial tenure, he worked as both a prosecutor and a public defender. In addition to his legal background, he has been an active member of his community through his participation in the National Guard as well as his membership in the Exceptional Student Education Advisory Council, an organization devoted to special needs children. Judge Cohn's record reflects that of a skilled lawyer, an experienced judge, and an active citizen—characteristics that will make him a valued addition to the federal bench.

We have three nominees for the Western District of Texas here today. **Kathleen Cardone** has served in numerous judicial positions in El Paso County, Texas. She is also an experienced mediator and has lectured widely on the advantages of alternative dispute resolution. A part-time instructor at the El Paso Community College as well as a member of numerous organizations, including the Child Welfare Board and the PTA, Judge Cardone is not only a respected jurist but also an active, engaged member of her community. I am confident that her combined experience as a judge, mediator, practitioner, and engaged citizen has prepared her to be an exceptional federal judge.

Throughout his career, **Frank Montalvo** has demonstrated the intellect, experience and work-ethic required to make an excellent district court judge. As an attorney at the firms of Groce, Locke & Hebdon and later Ball & Weed, Judge Montalvo frequently litigated complex civil liability cases in state and federal courts. In 1994, he was elected to the Texas state district court. As a judge, he has served Texas well, presiding over many complicated cases, several of which have presented novel legal issues. Judge Montalvo speaks Spanish fluently and volunteers his time to help Spanish-speaking individuals navigate the Texas court system.

**Xavier Rodriguez** graduated from the University of Texas School of Law and joined the prestigious firm of Fulbright & Jaworski, where he currently is a partner. In 2001, Justice Rodriguez was appointed to the Texas Supreme Court, where he served until 2002 before returning to private practice. He has served as past president of the South San Antonio Chamber of Commerce, as vice chair of the State Board for Educator Certification, and as an advisory board member to the dean of St. Mary's University School of Law. He was commissioned as an officer in the U.S. Army Reserve in 1983 and served in the Judge Advocate General's Corps.

I am confident that Mr. Rodriguez, and the other four nominees appearing before us today, will make outstanding district court judges. I look forward to their testimony.

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**U.S. SENATOR PATRICK LEAHY**

CONTACT: David Carle, 202-224-3693

VERMONT

Statement Of Senator Patrick Leahy  
Senate Judiciary Committee  
Judicial Nominations Hearing  
July 9, 2003

Today's hearing is the thirteenth nominations hearing the Republican majority has held this year. As of today, the Senate Judiciary Committee has considered 43 of President Bush's judicial nominees. This stands in sharp contrast to the way President Clinton's nominees were treated by the Republican majority. Thirteen is the same number of hearings for judicial nominees as Chairman Hatch allowed in all of 1998, the year he held the most hearings in any of his six full years as chairman during the Clinton Administration. In most of those years, there were far fewer hearings and far fewer nominees.

I recall that, during the entire year of 1996, when vacancies were higher and growing, this Committee held only six hearings all year and those hearings included only five circuit court nominees. That 1996 session, not a single judge was confirmed to the circuit courts -- not one. In all of 1997, the Committee only had nine hearings all year and included only nine circuit court nominees.

In 1999, this committee did not meet to consider a judicial nominee until June 16<sup>th</sup>, and during the rest of 1999, it only held seven hearings to consider judicial nominees. 1999 was the third year of President Clinton's second term. Like 1999, 2003 is the third year of this president's term, but, by contrast, we have already held 11 hearings this year by the time Senator Hatch held his first hearing in 1999. During the entire year of 2000, only eight judicial nominations hearings were held. This year, with a Republican in the White House, the Senate Republican majority has gone from second gear -- the restrained pace it had said was required for Clinton nominees -- to overdrive for the most controversial of President Bush's nominees.

A good way to see how much faster Republicans are processing judicial nominations for a Republican president is to compare where we are in July of this year to July of any year during the last Democratic administration when the Republicans controlled the Senate. Over the last six and one-half years of Republican control under President Clinton, the Republicans held four judicial nominations hearings, on average, by July 9. On this day, in 1995, only six hearings had been held for judicial nominations; in 1996, only four hearings; in 1997, only three hearings; in 1998, only about half as many as this year -- seven hearings; in 1999, only one hearing; and in 2000, only six judicial nominations

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[senator\\_leahy@leahy.senate.gov](mailto:senator_leahy@leahy.senate.gov)  
<http://leahy.senate.gov/>

hearings were held by July 9. Today, we participate in our 13th hearing this year. Republicans have moved two to four times more quickly for President Bush's judicial nominees than for President Clinton's, yet vacancies in the courts stand at half of what they were during many of those years.

This year, the number of judicial vacancies has gone down from the 110 we inherited when Democrats assumed the Senate majority in the summer of 2001 to the lowest level it has been in 13 years. While I was Chairman I was able to cut it from 110 to 60, after 100 were confirmed, despite dozens of new vacancies that occurred during that time. I recall that Senator Hatch said in September of 1997 that 103 vacancies (during the Clinton Administration) did not constitute a "vacancy crisis." He also repeatedly stated that 67 vacancies meant "full employment" on the federal courts. We now stand at 47 vacancies for the entire federal judicial system. We also have more active federal judges on the federal bench than at any time in U.S. history and significantly more federal judges when senior judges are included.

Today, we will hear five nominees to the U.S. District Courts, who come to us with bipartisan support or are consensus nominees. Three of these nominees are filling new seats that will not even become vacant until July 15, 2003, a sign of how expeditiously the Senate is considering this President's nominees.

We will hear from three nominees to the U.S. District Court for the Western District of Texas: Judge Cardone, Judge Montalvo, and Judge Rodriguez. These nominees make the fourth, fifth and sixth of President Bush's nominees considered for the Western District alone. They also make the tenth, eleventh and twelfth of President Bush's district court judges given hearings from the State of Texas. Seven of those judges were given hearings and confirmed during the 17 months I served as Chairman of the Judiciary Committee. That was nearly one judge for Texas every other month, in addition to the four United States Attorneys and three United States Marshals who were reviewed and confirmed in that period of time.

This is in great contrast to the fate of many of President Clinton's nominees from Texas, who were blocked and delayed by the Republican majority, including Enrique Moreno, nominated to the Fifth Circuit Court of Appeals who never got a hearing, never got a vote; Jorge Rangel, nominated to the Fifth Circuit Court of Appeals who never got a hearing, never got a vote, and; Hilda Tagle to the District Court, whose confirmation was delayed nearly two years for no good reason.

On May 1, 2003, the Senate confirmed Judge Edward Prado to the U.S. Court of Appeals for the Fifth Circuit. Today, we will hear from Xavier Rodriguez, who is nominated to fill the vacancy created by Judge Prado's elevation. The Senate Democrats cleared the nomination of Judge Edward Prado to the United States Court of Appeals for the Fifth Circuit without delay. We still do not know who on the Republican side delayed consideration of the consensus nomination of Judge Prado for a month. All Democratic

Senators serving on the Judiciary Committee voted to report his nomination favorably. All Democratic Senators indicated that they were prepared to proceed with the nomination. When Republicans finally turned to it, Judge Prado was confirmed unanimously.

We will also hear today from Judge James Cohn, nominated to the U.S. District Court for the Southern District of Florida. Judge Cohn comes to us with the support of both of his home-state Senators. He was recommended by the Florida Federal Judicial Nominating Commission, a bipartisan commission that Senators Nelson and Graham worked hard to establish. I urge the White House to work with more Senators in forming selection commissions to ensure that we have nominees who are supported in their communities and arrive here with bipartisan support including from both of their home state senators. Under this Administration, we have seen the recommendations of such bipartisan panels rejected or stalled.

Finally, we will hear from Mr. Browning, another very conservative nominee to the U.S. District Court for the District of New Mexico.

As I have noted throughout the last three years, the Senate is able to move expeditiously when we have consensus nominees. Unfortunately, far too many of this President's nominees have records that raise serious concerns about whether they will be fair judges to all parties on all issues.

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**Senate Judiciary Committee Hearing to Consider the Nomination of  
James I. Cohn, to be United States District Judge for the Southern  
District of Florida**

**Submitted Statement of Senator Bill Nelson of Florida  
July 9, 2003**

Mr. Chairman, I'm pleased to support the nomination of James I. Cohn to serve as a Federal District Judge in Florida's Southern District.

As you know, Florida's Southern District is one of the nation's busiest jurisdictions. Identifying and approving qualified candidates to fill the court's vacancies is vitally important to my state.

After interviewing Mr. Cohn, hearing from those who know him best and studying his legal experience, I am confident that he possesses the knowledge, temperament and professional experience necessary to succeed as a federal judge.

Mr. Cohn is a graduate of Samford University, Cumberland School of Law and the University of Alabama. He served his country as a member of the Alabama Army National Guard, the U.S. Army Reserves, and the Florida Army National Guard.

Following law school, Mr. Cohn excelled as a lawyer in both public and private practice in Fort Lauderdale. He practiced law for 20 years before becoming a respected Circuit Judge in Florida's 17<sup>th</sup> Judicial Circuit. During his eight year tenure on the state bench, he has developed a reputation in the legal community as a thoughtful and dedicated jurist who is committed to guaranteeing justice for those who appear before his court.

Based on his significant experience as a lawyer and judge, his demonstrated commitment to public service as a member of the armed forces, and his strong personal character, I believe Mr. Cohn will serve honorably on Florida's Southern District bench.

I appreciate this opportunity to endorse Mr. Cohn and I'm looking forward to working with the Judiciary Committee to secure his confirmation.