

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.

A guiding principle in my professional and personal life has been a commitment to fairness. To this end, my teaching, writing, and lecturing have emphasized a commonsense approach to the law that makes justice accessible to all in our society. Since graduating from law school three decades ago, my professional life has been devoted to government service (in the Executive, Legislative, and Judicial Branches) and to teaching and education.

Throughout my career, without compensation and frequently for non-profit entities, I have participated in discussions and given lectures on a variety of public policy subjects. (See, a.g., the answer to question 12c in Section I.) I have also worked, without compensation, for and with various government entities and private foundations on particular public interest projects. For instance, I served as a member of the Harvard-Ford Foundation Steering Committee on the "Inquiry into Public Policy Concerning Children in America." As a trustee of the University of Massachusetts, I worked to ensure that educational opportunities were available to all, regardless of background. In the late 1970s, I appeared pro bono before the Massachusetts Public Service Commission to urge that the telephone company should not be permitted to cut off phone service without fairly notifying users and providing them with an opportunity to challenge their termination or to improve their credit situation.

I have also been a trustee of the Dana Farber Cancer Institute. As a member of the White House Fellows regional selection committee, I have attempted to help provide leadership in supporting success of individuals from a broad spectrum of backgrounds and providing opportunities based on merit.

I have also participated, while a judge, in numerous efforts to encourage pro bono bar activities.

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. Please list all business clubs, social clubs or fraternal organizations to which you belong or have belonged since graduating from law school, and for each such club or organization, please state:

- a. the dates during which you were a member and approximate number of members the club or organization had during that period;
- b. the purpose of the club or organization (e.g., social, business, fraternal or mixed), the frequency with which you used the facilities, and whether you used the club or organization for business entertainment;
- c. whether, while you were a member of such club or organization, it did or did not include members of all races, religions, and both sexes;
- d. if the club or organization did not do so,
 - (1) state whether this was the result of a policy or practice of the club or organization;
 - (2) if so, describe in full the reasons for this policy or practice and any actions you took to change that policy or practice;
 - (3) if you were a member of such club or organization while serving as a U.S. Circuit Judge, please give your opinion as to whether the club or organization practiced invidious discrimination within the meaning of the ABA Code of Judicial Conduct, and give the reasons for your opinion.

Harvard Club

member since 1981
 number of members: approximately 6500
 used for occasional meals

Cambridge Tennis Club

family membership since 1970s
 number of members: approximately 300
 rarely used by me

The following informal discussion groups are not "clubs" in a traditional sense of the word, and thus are not strictly called for in answer to this question, but I include them in order to give as full an answer as possible to the question.

Nisi Prius Club

member since 1981
number of members: 35
lunch and discussion

Lawyers' Club

member since 1981
number of members: 12
informal dinner and discussion

Saturday Club

member since 1985
number of members: 50
lunch and discussion

Curtis Club

member since 1993
number of members: 40
dinner and discussion

The Harvard Club has had members of all races and religions and both sexes since I have been a member. The Cambridge Tennis Club has members of all races and religions and both sexes. The Nisi Prius Club has African-American members, as well as members of various religions and both sexes. The Lawyers' Club, an informal group that meets for dinner at individuals' homes six times a year, has members of various religions and both sexes, but no African-American members. The Saturday Club has African-American members, as well as members of various religions and both sexes. When I joined in 1985, it had women members but no African-Americans. The Curtis Club has had members of all races, religions, and both sexes since I have been a member.

3. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). List all interviews or communications you had with the White House staff or the Justice Department regarding this nomination, the dates of such interviews or communications, and all persons present or participating in such interviews or communications.

With regard to the Supreme Court vacancy created by Justice Blackmun's announcement of his retirement, I had one conversation with Lloyd Cutler, Special Counsel to the President, on April 15, 1994. At his request, I sent him

follow-up information about our payment of Social Security taxes for our cleaning person. On May 13, 1994, I received a telephone call from the President in which he expressed his intention to nominate me.

4. Has anyone involved in the process of selecting you as a judicial nominee (including but not limited to any member of the White House staff, the Justice Department, or the Senate or its staff) discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, please explain fully. Please identify each communication you had during the six months prior to the announcement of your nomination with any member of the White House staff, the Justice Department or the Senate or its staff referring or relating to your views on any case, issue or subject that could come before the United States Supreme Court, state who was present or participated in such communication, and describe briefly what transpired.

No.

5. Please discuss your views of the judiciary in our governmental system and the following criticism of "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 our constitutional system of government, it is the task of the courts to resolve the controversies that come before them by applying the relevant law -- statutes, common law, regulations, or constitutional law -- to the facts of the specific cases they must consider. Criticism of so-called "judicial activism" raises questions of both the legitimacy and the competence of the courts in particular areas.

Historically, under our tri-partite system of constitutional government, we have assigned the initiative for proactive, affirmative, widespread reform and problem-solving to our legislatures, both federal and state, and, increasingly, to the executive branch. Nevertheless, if the legislature or the executive either acts or fails to act in a manner that results in a violation of individual rights, the courts' role must include the difficult and sensitive task of defining an appropriate judicial remedy. In deciding cases and defining remedies, courts must be always mindful of the appropriate role of the judiciary.

In addition to the question of legitimacy, the judiciary is ill-equipped to make broad reaching policy determinations. A judge seeking to solve a general social problem is less likely to have available all the relevant facts than a legislature or executive entity. Judges, moreover, do not have the resources that are available to administrators and are, therefore, less able to engage in effective management and administration.

That said, in order to be fair in this assessment, one must recognize that legislatures and executive entities have sometimes failed to address problems until constitutional violations resulted. It would be vastly preferable for all branches of government -- and for the public -- if the political branches were able to resolve such issues and render their determination through judicial adjudication unnecessary.

6. Approximately how many individuals have been employed by you as law clerks and support staff since you have been a United States Circuit Judge?

State separately the numbers, and describe briefly the duties of (1) women, (2) African-Americans, and (3) members of other racial minority groups, whom you so employed.

law clerks: 46

secretaries: 6

The law clerks include 12 women, 2 of whom are Hispanic; 2 Hispanic men; and 1 Pakistani man. As for secretaries, all 6 were women.

Of the 8 law clerks to whom I have extended circuit court clerkship offers for the next two years (and who have accepted), 3 are women (one of whom is African-American), one is an Asian-American man, and one is a Hispanic man.