

**CONFIRMATION HEARINGS ON FEDERAL
APPOINTMENTS**

HEARINGS

BEFORE THE

**COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

JULY 22, JULY 30, SEPTEMBER 3, SEPTEMBER 17, AND OCTOBER 1, 2003

Serial No. J-108-1

PART 4

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NOMINATIONS OF STEVEN M. COLLOTON, OF IOWA, NOMINEE TO BE CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT; P. KEVIN CASTEL, OF NEW YORK, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK; SANDRA J. FEUERSTEIN, OF NEW YORK, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF NEW YORK; RICHARD J. HOLWELL, OF NEW YORK, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK; H. BRENT MCKNIGHT, OF NORTH CAROLINA, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF NORTH CAROLINA; R. DAVID PROCTOR, OF ALABAMA, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ALABAMA; AND STEPHEN C. ROBINSON, OF NEW YORK, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK

TUESDAY, JULY 22, 2003

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

The Committee met, pursuant to notice, at 10:05 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Jeff Sessions presiding.

Present: Senators Sessions, Grassley, and Schumer.

**OPENING STATEMENT OF HON. JEFF SESSIONS, A U.S.
SENATOR FROM THE STATE OF ALABAMA**

Senator SESSIONS. Good morning. We are delighted you are here today, and we have a nice agenda of nominees. I am glad to have as Ranking Member for this Committee today Senator Chuck Schumer with us. He is the Ranking Member of the Courts Sub-

committee also, on which we have worked together on a number of issues.

Our tradition, since we have Members of Congress here, would be to start with the Senate Members, and I see Senator Shelby, my colleague from Alabama, here and I know that you have some remarks to make about the nominee for the district court in Alabama. So I would recognize my colleague, Senator Richard Shelby.

PRESENTATION OF R. DAVID PROCTOR, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ALABAMA, BY HON. RICHARD SHELBY, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SHELBY. Chairman, Senator Schumer, I will be very brief, but I think this is very important. I want to commend you, Mr. Chairman, for getting this hearing together.

I appreciate the opportunity to appear before the Committee today to introduce David Proctor, the President's nominee for the United States District Court for the Northern District of Alabama. Concentrating in labor and employment law, David is an experienced and skilled attorney with an impressive record of trying cases in both the Federal and State courts. He has served a broad range of individual and corporate clients while also representing the State of Alabama, my State, in various matters.

David is also active in the community, having served on the board of Alabama Goodwill Industries for a dozen years, while also remaining active in his church and the lives of his wife, Teresa, who is here with him today, and his three children. Luke is here; he is 12 years old. Jake is 8. And Shelly Grace is 5, but tomorrow, Mr. Chairman, will be her birthday; she will be 6 years old tomorrow.

I and all who know David Proctor have high regard for his intellect and integrity, and I believe that he will make a fine addition to the Federal bench. Most importantly, Mr. Chairman, David Proctor is a man of the law. He understands and respects the constitutional role of the judiciary and specifically the role of the Federal courts in our legal system. I am confident that he would serve honorably and apply the law with impartiality and fairness and, thus, I support his confirmation without any reservation.

Again, Mr. Chairman, I thank you for holding today's hearing on David Proctor's nomination. I urge the Committee to expeditiously report this nomination to the full Senate where we can hopefully move it. And, Mr. Chairman, I have some other meetings, and if I could leave at this time, I appreciate the time of both of you. Thanks.

Senator SESSIONS. Thank you, Senator Shelby.

Senator GRASSLEY, would you like to make comments on the Iowa nominee?

Senator GRASSLEY. Yes, I sure do, obviously.

Senator SESSIONS. You are sitting at that table. You could be sitting up here on my right where you normally sit on this Judiciary panel.

Senator GRASSLEY. Don't take it personally.

Senator SESSIONS. All in all, it is better on this side than down there, normally. Trust me.

**PRESENTATION OF STEVEN M. COLLOTON, NOMINEE TO BE
CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT, BY HON.
CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE
OF IOWA**

Senator GRASSLEY. Thank you, Mr. Chairman, Senator Schumer. I am pleased to be here today to introduce Steve Colloton, who has been nominated by President Bush to be a Federal judge on the U.S. Circuit Court of Appeals for the Eighth Circuit. He is an outstanding individual with an extensive record of public service and an impressive legal career. Steve Colloton will make an excellent Federal judge, and I am happy to support his nomination. He is here with family members and friends who are extremely proud of the work that he has done throughout his lifetime in the law and in community service, and they are here to support him.

I have known some of the family for a long, long period of time, and he comes from a sound background that is also probably as much to do with his capabilities of being a good judge as his understanding of the law.

He hails from Iowa City, Iowa, a graduate of Princeton and Yale Law School. I have never held that against him.

[Laughter.]

Senator GRASSLEY. He went on to serve as a law clerk to Judge Laurence Silberman, U.S. Court of Appeals, D.C., and then as a law clerk to Hon. William Rehnquist, Chief Justice. After that, he worked as an attorney with the Office of Legal Counsel at the Justice Department, and then as Assistant U.S. Attorney in the Northern District of Iowa 8 years, with a brief detail as an associate independent counsel in the Office of Independent Counsel. He went on to become a partner in a prominent law firm in Des Moines where he managed a wide range of civil litigation.

Steve Colloton returned to Government service right after the 9/11 terrorist attacks when he was unanimously confirmed by the Senate to the position of U.S. Attorney in the Southern District of Iowa. In that job, he has focused on making sure that we get the bad guys, but at the same time, he has made sure to protect the civil liberties that are so dear to us.

In addition to fighting terrorism, Steve has focused his efforts on combating crime and enforcing drug laws. Specifically, under Steve Colloton's direction, the Iowa U.S. Attorney's office has worked hard to implement the Project Safe Neighborhood Program to reduce gun violence and has conducted extensive training for prosecutors and local law enforcement regarding the prohibition of firearms possession by domestic abusers. Steve Colloton has also made child support enforcement a top priority, forming a task force with State and Federal child support recovery workers and investigators.

In addition to his stellar legal experience and remarkable public service, Steve Colloton has many strong supporters. Let me give you some examples of the support he has received from fellow Iowans.

Twenty-seven past presidents of the Iowa State Bar wrote, "The exceptional quality of Mr. Colloton's experience, together with its relevance to this position, uniquely qualifies him to represent Iowa on the United States Court of Appeals."

A member of the Polk County Chiefs of Police and Sheriffs Association wrote, and I quote, “Steve Colloton is the right choice for the Eighth Circuit judge position, and we fully endorse President Bush’s nomination.”

The interim president of the University of Iowa wrote, and I quote, “Mr. Colloton is a person of highest ethical standards and integrity and would be”—and I continue to quote then—“a superb member of the Court of Appeals for the Eighth Circuit.”

Drake University Professor of Law Gregory Sisk wrote, “Steve Colloton is one of the brightest and most thoughtful, hardworking, scholarly, and yet simultaneously practically minded attorneys likely to be nominated for any judicial position in this State.”

Even people who have worked on the other side of Steve Colloton think highly of him. For example, the attorney for Jim Guy Tucker, George Collins, wrote the Judiciary Committee, and I quote, “I am convinced Steve Colloton is an honorable man and that when cases come before him, he will call them as he sees them. I do not think that a conservative litigant demonstrably as such will have any better chance before him than any other litigant. I believe that his cases will be decided on the law and, to the extent applicable, the facts. I respect Steve Colloton and hope that your Committee will also respect him and approve the appointment.”

These letters of support show how much confidence people have that Steve Colloton will make a great Federal judge.

As I have said on many occasions in the past, there are a number of things that I look for when I assess whether an individual should be a Federal judge. I asked whether the judicial nominee has the requisite intellect, knowledge, integrity, and judicial temperament to serve on the Federal bench. In addition, I ask whether a particular judicial nominee will follow the law. That is the text and intent of the Constitution and the statutes ratified and enacted. I believe that Steve Colloton has all of these qualifications. I believe that he will follow the law and have a healthy respect for case precedent. And I also believe that he understands the role of a judge is to interpret the law rather than create it.

In sum, I strongly believe that Steve Colloton will make an excellent judge of the Eighth Circuit. I urge my colleagues to join me in supporting this excellent candidate for the Federal bench.

Senator SESSIONS. Thank you, Senator Grassley.
Senator Harkin?

**PRESENTATION OF STEVEN M. COLLOTON, NOMINEE TO BE
CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT, BY HON. TOM
HARKIN, A U.S. SENATOR FROM THE STATE OF IOWA**

Senator HARKIN. Thank you very much, Mr. Chairman, for holding this hearing, and I am pleased to be here with my Iowa colleagues to introduce Steve Colloton, who has been nominated to serve on the Eighth Circuit Court of Appeals.

Steve Colloton, as my colleague has said, is a Yale Law School graduate, has been Iowa’s U.S. Attorney in Des Moines since November of 2001. Before then, he practiced law for Belin, Lamson, McCormick, Zumbach, and Flynn in Des Moines. He has also served as an Assistant U.S. Attorney in Cedar Rapids for 6 years.

Early in his legal career, he clerked for Supreme Court Chief Justice William Rehnquist.

As Senator Grassley has said, I have known his family in Iowa City for a number of years. Mr. Chairman, I supported Steve Colloton's nomination to be U.S. Attorney in 2001, and I urge the Committee to give his nomination to the Eighth Circuit Court of Appeals full and fair and expedient consideration. And I hope and I trust, Mr. Chairman, that this Committee and the United States Senate will treat Mr. Colloton more fairly and judiciously than it did the last nominee from the State of Iowa to the Eighth Circuit Court of Appeals, Bonnie Campbell, who was not even given the privilege of a vote on the Senate floor. I hope this nominee will be treated more fairly.

This concludes my statement, and I want to again thank the Chairman for holding this hearing.

Senator SESSIONS. Thank you, Senator Harkin.
Congressman Leach?

**PRESENTATION OF STEVEN M. COLLOTON, NOMINEE TO BE
CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT, BY HON. JIM
LEACH, A REPRESENTATIVE IN CONGRESS FROM THE
STATE OF IOWA**

Representative LEACH. Well, thank you, Mr. Chairman, Mr. Schumer. Let me just say I am honored to be with my two colleagues from Iowa. I will be very brief.

I come before the Committee not only as not a member of the body but not a member of the Judiciary Committee and not trained in the field of law. But I do want to give a sense of community support for Steve Colloton. Steve and I come from the same home town, myself more recently than he, but I have known Steve for some 20 years. He comes from one of the most respected families in Iowa. He as an individual has an exceedingly high intellect, great integrity, decency of judgment, fair-mindedness, common sense, respect for the law, and I am truly impressed with, in my knowledge of Steve, what a natural judicious temperament he has. I personally believe he is one of the strongest court nominees in memory and will embellish the court, and I would hope the Committee gives Steve every benefit of the doubt.

Thank you all.

Senator SESSIONS. Thank you, Congressman Leach, for those good words, and we appreciate your service to the country, and we are glad that you could join us today.

Representative Myrick, it is a delight to have you with us. I know you want to share your thoughts about the nominee.

**PRESENTATION OF H. BRENT MCKNIGHT, NOMINEE TO BE
DISTRICT JUDGE FOR THE WESTERN DISTRICT OF NORTH
CAROLINA, BY HON. SUE MYRICK, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF NORTH CAROLINA**

Representative MYRICK. Yes, thank you very much, Chairman and Senator Schumer. I appreciate the opportunity to be here. Both of our North Carolina Senators are out of town today, and so I have the honor of introducing to you Brent McKnight and his family and

his friends. He has been nominated for a Federal judgeship in North Carolina from the Charlotte area.

Brent has a very impressive resume, which I am sure you have seen and I will not go into detail, but I will just simply say to you he was a Rhodes Scholar, which I found very, very helpful for what he does right now. He is a friend in the sense that I have known Brent for a long time. He is one of those people that you would be very hard pressed to find anybody in our community who has bad things to say about him. He is extremely well respected throughout the community, not just the judicial community, because he currently serves as a judge, but the community as a whole. And he has impeccable character, and he has a very strong intellect. But the thing that impresses me about him is he has common sense as well, and he gets along very well with people. Brent relates well with people, which is very important with what he does as a judge.

He also very carefully evaluates his opinions, and you will find again in our community that the people who work in the judicial system will tell you he is impartial in his decisions. He does what is best.

So North Carolina would be very fortunate to have him as a Federal judge, and I hope this Committee will see its way able to send the nomination forward to the full Senate. And, again, I appreciate the opportunity to be here today, and I am going to take leave, if that is permissible with you.

Senator SESSIONS. That will be fine, Representative Myrick. And I would note, I wonder if you would agree with Senator Elizabeth Dole, likewise highly complimentary of Mr. McKnight, and she submitted a statement for the record noting that, yes, he was a Rhodes Scholar, but perhaps even impressive to those in North Carolina, a Morehead Scholar at the University of North Carolina, Chapel Hill, which is quite a prestigious event, too.

Representative MYRICK. Very, very important in our State and nationally. Thank you for mentioning that.

Senator SESSIONS. Thank you very much. I will offer to put her statement in the record.

Senator SCHUMER, would you like to make any opening comments?

**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 all of our colleagues in the House and Senate and you, Mr. Chairman, for holding these hearings.

Before I begin, Senator Edwards could not be here to introduce Brent McKnight, and he expresses his regrets. And I would ask unanimous consent that his statement in favor of Mr. McKnight be put in the record.

Senator SESSIONS. Without objection, yes.

Senator SCHUMER. And also Senator Leahy's statement on the nominees be put in the record.

Senator SESSIONS. Without objection, they will be made a part of the record.

Senator SCHUMER. Thank you, Mr. Chairman. And now I want to thank you for holding this hearing today and agreeing to put the

four New York nominees on the agenda. This is a fine day for New York. Normally we abide by a rule that requires a week from completion of paperwork to a nominee being eligible for a hearing. But you and Senator Leahy were willing to waive the rule so that these four outstanding nominees could appear before us today.

The rule could be waived because these four nominees are not only excellent and moderate and diverse—those are my three standards for choosing judges—but because they have broad bipartisan support, including, most importantly, support from their two Senators, myself and Senator Clinton, the White House, and our Governor, Governor Pataki. So this is a bipartisan day, and that is how it ought to be when we choose judges. It is a stark contrast between the pitched battles we are fighting over nominees from other parts of the country.

Stephen Robinson, Kevin Castel, Richard Holwell, and Sandra Feuerstein are very moderates. When you look at these four nominees' records, you have a hard time identifying even one remark that looks like it comes from an ideologue or an extremist.

As I said, I do not believe ideologues, whether from the far left or the far right, are good fits for the bench. Ideologues tend to want to make the law, not interpret the law, as the Founding Fathers in their—I think this is a statement usually used in reference to the deity, but in their infinite wisdom. I am so impressed with the Founding Fathers the more I am around that it comes close.

Anyway, that is what they wanted judges to do, interpret the law, not make law. And when you have people at the extremes, they feel with passion, God bless them, that is part of America. But they do not tend to make good judges because they want to impose their views on what the law should be. These judges meet my three criteria for the judges that I am involved in selecting: excellence, legal excellence, all four have it. Moderation, as I said, none are at the extremes. And diversity, they are not—each individual is not diverse, but as a group of four, they are quite diverse, Mr. Chairman. And so this gang of four gets high marks on all categories.

Mr. Chairman, over the past several weeks, Governor Pataki, Counsel Gonzales, and I have been able to put the finishing touches on an agreement that ensures that all of New York's current and immediately forthcoming vacancies will be quickly filled and with judges who will do justice for all New Yorkers. If you compare our agreement to a trade between baseball teams, it is one of those deals where everyone wins, most particularly and most importantly, the people of New York.

These four fine candidates will be followed by two more who have already been nominated, two we have all already agreed upon, and a fifth judge to be named later. And every one of them will be great additions to New York's Federal bench.

Now, first I want to mention that Senator Clinton had a scheduling conflict that prevents her from being here today, but I have talked to her and I know she joins me in thanking the White House and Governor Pataki for not playing politics with New York's bench. And I am proud to have played a role in putting these four candidates on the court.

Mr. Chairman, I would note that the Senate has now confirmed 138 of President Bush's judicial nominees. By the end of the week,

it could add up to 145. And before the August recess, if we are lucky, all four of these New Yorkers will be confirmed, and our total for President Bush will be over 150. So for those keeping score back home, we have confirmed 150; we have blocked two. We may block a few more, but even so, Yankee fans would be envious of that kind of win-loss record. And we are doing pretty good this year, except for those Atlanta Braves. I don't know if you root for them from the State next door.

Senator SESSIONS. Yes, I do.

Senator SCHUMER. We have the next best record in baseball.

Anyway, when you look at those numbers and you look at the quality of the nominees we have produced in New York, you have got proof positive there is no obstruction going on from our side of the aisle. We are working hard to fill the Federal judiciary with the best judges out there, but we have to draw the line at nominees who want to make law, not interpret it.

These four nominees are the best evidence of what happens when a bipartisan process works right. Let me introduce each of them briefly and present their credentials to the Committee.

Richard J. Holwell, 56, has practiced for over three decades as a litigation attorney with White and Case in New York, where he acts as the executive partner in charge of the firm's global litigation practice. Mr. Holwell is a 1967 graduate of Villanova University and a 1970 cum laude graduate of the Columbia Law School. After law school, he studied at Cambridge University on the Columbia-Cambridge fellowship in criminology, and he received a diploma in criminology from Cambridge University in 1971. He is currently a member of the American Bar Association, the New York State Bar Association, and the Law Society in London. He currently serves as chairperson of a panel of the New York State Supreme Court Departmental Disciplinary Committee. He is married, his wife is here, and he has two daughters.

P. Kevin Castel celebrates his 53rd birthday in 2 weeks and was born in Jamaica, New York. That means Queens. He received his B.S. and J.D. both from St. John's, also in Queens. He began his professional career as a law clerk to Hon. Kevin Duffy in the Southern District of New York, before joining the law firm of Cahill, Gordon and Reindel, where he has been a partner since 1983, serving for several years as the firm's administrative partner. Over the years, Mr. Castel has been involved in an array of civic activities, including service on the Legal Aid Board of Directors. He and his wife, Patricia, have been married for 26 years, and they have two lovely daughters who we are fortunate to have with us here today.

Stephen C. Robinson, 46, was born in Brooklyn—that is a very good credential, as far as I am concerned—and received both his B.A. and J.D. from Cornell. After spending several years in private practice, he joined the U.S. Attorney's Office for the Southern District of New York. Mr. Robinson went on to spend a few years as managing director and associate general counsel of Kroll Associates before being tapped to be principal deputy counsel and special assistant to the Director of the FBI. From 1995 to 1998, he was counsel and chief compliance officer at Aetna Insurance. With the support from Senators Dodd and Lieberman, President Clinton then

made this great New Yorker the U.S. Attorney for the District of Connecticut, where he served from 1998 to 2001. Mr. Robinson's wife, Kathleen Sullivan, was a professor at Yale Law School, and she passed away a few years ago. He has done—and I know this because I have talked with him personally about it—a wonderful job raising their daughter as a single dad, and I know that Kathleen would be tremendously proud of the job Stephen has done as a father and that she is smiling down on us today.

And, finally, Sandra J. Feuerstein has spent 15 years as a judge in the courts of New York State. She has a distinguished record of judicial service in New York. Since 1999, Judge Feuerstein has served as an Associate Justice of the New York State Supreme Court Appellate Division. From 1994 to 1999, she served as a Justice of the New York State Supreme Court, and from 1987 to 1993 as a judge in the Nassau County District Court. Since 1998, Justice Feuerstein has served as an adjunct professor of law at Hofstra University School of Law. Prior to joining the State bench, Justice Feuerstein served for 2 years as a law clerk to Hon. Leo H. McGinity. He is administrative judge of the State Supreme Court in Nassau County.

In addition to all that legal experience, she was a public school teacher in the New York State Public Schools from 1966 to 1971. She attended the University of Vermont and Benjamin N. Cardozo School of Law, where she graduated cum laude.

Justice Feuerstein has a distinguished record of service as a judge beyond her work on the bench. In addition to her other major roles, she has served as the president of the Nassau County Women's Bar Association and vice president of the New York State Women's Judges Association. Among other honors, she has been named Judge of the Year by the Long Beach Lawyers Association and Woman of the Year by the Merrick Chamber of Commerce.

All four of the nominees—Stephen Robinson, Kevin Castel, Richard Holwell, and Sandra Feuerstein—are here with their families and friends. I want them all to know how proud we all are of their accomplishments and how honored I am to have played a role in their ascending to New York's Federal bench.

Thank you, Mr. Chairman.

PRESENTATION OF R. DAVID PROCTOR, 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, Chuck, and those were good words indeed. And I know that the New York bench will benefit from having four new judges there. You have a lot of important cases in that district, and always have over the years, and it is always maintained a reputation of legal excellence.

I hope that my colleague does not believe that an advocate who has fought for truth and justice is not a moderate and, therefore, cannot be a judge. But the nominee—

Senator SCHUMER. Any particular names in mind?

Senator SESSIONS. Well, I have one in mind who I believe has stood firm for truth and justice, and I do not think he is in any way an ideologue or unqualified for the bench.

But the nominee that I would like to call our attention to today and speak of highly is, maybe more in your style, not someone that has been involved politically or active in any way of that kind, but he has all the necessary traits to make an outstanding jurist on the Federal bench. I have known David Proctor for a number of years, and I have followed his career. He is one of the more respected lawyers in the Birmingham legal community and throughout the State, really, on all sides of the bar. He is a working, practicing lawyer. This is undoubtedly attributed to his excellent work ethic, honesty, and dedication to the rule of law.

Attorneys that I have personally spoken with describe him as level-headed, fair-minded, trustworthy, and highly intelligent. He will prove to be an invaluable asset to the very busy Northern District of Alabama and to our country.

David's past offers strong evidence of his future promise. He received his bachelor's degree from Carson-Newman. In 1986, he graduated with honors from the University of Tennessee School of Law, where he was a member of the Law Review. Immediately after graduating from school, he clerked for Hon. H. Emory Widener, Jr., on the Fourth Circuit Court of Appeals. So, in addition to practicing in the Federal district courts, he has learned from firsthand experience the role a Federal judge must play in the appellate level and in maintaining a docket. This experience cannot be gleaned from any other source.

After his clerkship, he spent 6 years with one of Alabama's finest law firms, Sirote and Permutt. Thereafter, he began his own firm, Lahr, Middlebrooks, Price and Proctor. For almost 20 years, David has served numerous clients and handled a wide range of challenging civil issues. David understands the Federal courtroom, having litigated approximately 300 cases in Federal court alone, some of which proceeded to verdict after full trial.

From all these experiences, he has learned how lawyers and litigants should be treated at trial, and this is important to me. This conclusion is confirmed by the broad support David has earned for his nomination.

I would like to quote from a letter submitted to me by one of the State's most successful trial lawyers, a strong Democrat, Jerry Beasley, a leading trial lawyer in the State and one of the most successful in the Nation. Although Mr. Proctor is a defense lawyer and was generally arguing in positions in opposition to Mr. Beasley, Mr. Beasley had this to say about David Proctor: "I have known David Proctor for several years, and he will make an outstanding addition to the Federal bench. He is a man of high moral character and unquestioned integrity. His evenhanded temperament and keen knowledge of the law make him well suited for the position."

The praise does not end there. Andrew Allen, a prominent civil rights lawyer in Birmingham, offered the following support: "Although I am a lifelong Democrat and though I have litigated against David Proctor and his firm for almost 15 years, I write this letter on behalf of David in support of his nomination to serve as United States District Judge for the Northern District of Alabama. I strongly support his nomination because he is a man of high

moral character, unquestioned integrity, keen intellect, even temperament, and superior work ethic.”

Those are good qualities in a judge. In sum, I believe he will make an outstanding addition to the Federal bench and that he will ensure an even playing field for all who come before him. He has deep roots in the community, which from 1989 to 2000 he served on the board of the Alabama Goodwill Industries, which provides employment opportunities for persons with disabilities. He has also volunteered countless pro bono hours for A Baby’s Place, a home for HIV-positive children. Still other charitable organizations have benefited from his dedication, and he is a deacon at Briarwood Presbyterian Church. His involvement in the community demonstrates a commitment to public welfare, a trait that will serve him well as a judge. He has a reputation for integrity, and I believe he will be a welcome addition to a bench that needs some additional support at this time. And I think he is a professional, is experienced, he works well with people. He can manage a caseload, as all of you judges are going to be called upon to do, and that strong work ethic.

At one time, Mr. Chairman, you know, people thought you could be a Federal judge and maybe ease off into retirement. But it is a busy, tough job today. If you are not prepared to work, you do not need the job.

All right. Anything else we need to do? I would call up—well, no. First, U.S. Attorney Steve Colloton, since he is the court of appeals nominee, we will start with you first, if you will raise your right hand and take this oath. Do you swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. COLLOTON. I do.

Senator SESSIONS. All right. You may take a seat.

If you would like to make an opening statement or introduce your family, we would be pleased to hear from you at this time.

**STATEMENT OF STEVEN M. COLLOTON, NOMINEE TO BE
CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT**

Mr. COLLOTON. Thank you, Mr. Chairman. I have no formal statement, but I do want to thank the Committee for convening this hearing. I would like to thank Senator Grassley and Senator Harkin and Congressman Leach for introducing me here this morning.

I would, if I may, like to introduce my family. I am joined today by my wife, Deborah, my sisters, Laura and Ann. My parents came out from Iowa, John and Mary Ann Colloton, and my brother-in-law, Chip and my sister-in-law Wendy are here.

Senator SESSIONS. Maybe they will stand for us. We just want to see you all.

Senator SCHUMER. Very nice.

Senator SESSIONS. We are glad you are here from Iowa, and other places I assume.

Anything else?

Mr. COLLOTON. No, that is all. Thank you for that opportunity, Mr. Chairman.

[The biographical information of Mr. Colloton follows:]

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

1. **Name:** Full name (include any former names used).
Steven Michael Colloton
2. **Position:** State the position for which you have been nominated.
United States Circuit Judge
United States Court of Appeals for the Eighth Circuit
3. **Address:** List current office address and telephone number. If state of residence differs from your place of employment, please list the state where you currently reside.

Office of the United States Attorney
110 East Court Avenue, Suite 286
Des Moines, Iowa 50309
(515) 284-6420
4. **Birthplace:** State date and place of birth.

January 9, 1963
Iowa City, Iowa
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.

Deborah June Colloton (nee: Stone)
Television Producer
ABC News Network
147 Columbus Avenue, 8th Floor
New York, NY 10023
Also works from home office in Des Moines.

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.

Yale Law School
Attended: Fall 1985 through Spring 1988
Received J.D. degree in 1988

Princeton University
Attended: Fall 1981 through Spring 1985
Received A.B. degree, *summa cum laude*, in 1985

University of Iowa
Attended: Summer 1982
No degree received

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

United States Attorney for the Southern District of Iowa
110 East Court Avenue, Suite 286
Des Moines, Iowa 50309
October 2001 to present

Member
Belin Lamson McCormick Zumbach Flynn, A Professional Corporation
666 Walnut Street, Suite 2000
Des Moines, Iowa 50309
October 1999 to October 2001

Adjunct Lecturer
University of Iowa College of Law
Boyd Law Building
Melrose & Byington
Iowa City, Iowa 52242
Spring 2000

Assistant United States Attorney
Northern District of Iowa
400 1st Street, SE, Suite 400
P.O. Box 74950

Cedar Rapids, Iowa 52407-4950
October 1991 to September 1999
(away from office on temporary detail during 1995-96)

Associate Independent Counsel
Office of Independent Counsel Kenneth W. Starr
10825 Financial Centre Parkway, Suite 134, Little Rock, Arkansas 72211
1001 Pennsylvania Avenue, NW, Suite 490N, Washington, DC 20004
January 1995 to November 1996
(occasional consultation after 1996, including a brief period in Washington in early 1998)

Special Assistant to the Assistant Attorney General
Office of Legal Counsel
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20004
1990-91

Law Clerk
Honorable William H. Rehnquist
Chief Justice
United States Supreme Court
One First Street, NE
Washington, DC 20543
1989-90

Law Clerk
Honorable Laurence H. Silberman
United States Circuit Judge
United States Court of Appeals for the D.C. Circuit
333 Constitution Avenue, NW
Washington, DC 20001
1988-89

Summer Associate
Covington & Burling
1201 Pennsylvania Avenue, NW
Washington, DC 20004
Summer 1987

Summer intern
Honorable Edward R. Becker
United States Circuit Judge

United States Court of Appeals for the Third Circuit
19613 United States Courthouse
601 Market Street
Philadelphia, PA 19106
Summer 1986

Summer Associate
Bell, Boyd & Lloyd
Three First National Plaza
70 West Madison Street
Chicago, IL 60602
Summer 1986

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.

Special Achievement Award in official recognition of achievements and contributions to the United States Department of Justice (1999)

Certificate of Appreciation from the U.S. Drug Enforcement Administration for outstanding contributions in the field of drug law enforcement (1998)

Graduate, Leadership Iowa Program, Iowa Association of Business and Industry (1994-95)

Special Achievement Award, United States Department of Justice, in appreciation and recognition of sustained superior performance of duty (1993)

Central Intelligence Agency Seal Medallion in recognition of exceptional service to the national security (1991)

Potter Stewart Prize, Yale Moot Court competition (1988)

Phi Beta Kappa, Princeton University (1985)

10. **Bar Associations:** List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the

titles and dates of any offices which you have held in such groups.

Iowa State Bar Association

Polk County, Iowa, Bar Association

C. Edwin Moore Inn of Court, Des Moines, Iowa

The Supreme Court Historical Society

Southern District of Iowa Branch of the Historical Society of United States Courts in the Eighth Circuit

District of Columbia Bar

U.S. Department of Justice Appellate Working Group, 8th Circuit representative, 1999

The Federalist Society for Law & Public Policy Studies, co-chair, Criminal Rules and Procedure subcommittee, Criminal Law Practice Group, 2000-01

Linn County, Iowa, Bar Association

Dean Mason Ladd Inn of Court, Cedar Rapids, Iowa

In my capacity as United States Attorney, I have been a member of the following entities or committees:

Executive Board, Midwest HIDTA (High Intensity Drug Trafficking Area) Program, Office of National Drug Control Policy, 2002 to present

Steering Committee, Department of Justice Weed & Seed program site, Des Moines, Iowa, 2002 to present (combined during a portion of 2002 with an Enterprise Community Steering Committee in Des Moines)

Subcommittee on Sentencing Guidelines of the Attorney General's Advisory Committee, United States Department of Justice

Polk County, Iowa, Chiefs Association

Omaha-Council Bluffs Metropolitan Chiefs Association

Policy Advisory Group, FBI Federal Gang Task Force and Metropolitan Enforcement Group Task Force, Quad Cities of Iowa and Illinois

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.

Illinois, 1988

District of Columbia, 1990

Iowa, 1994

Supreme Court of the United States, 1996

United States Court of Appeals for the Eighth Circuit, 1990

United States Court of Appeals for the First Circuit, 1990

United States Court of Appeals for the Federal Circuit, 1999

United States District Court for the Northern District of Iowa, 1995

United States District Court for the Southern District of Iowa, 1999

United States District Courts for the Eastern and Western Districts of Arkansas, 1995

I do not believe that any of these memberships has lapsed. My membership in the Illinois bar is currently on "inactive" status, and previously was classified as an "out of state" membership during some period of time. My status in the D.C. Bar is also "inactive" at this time.

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

I understand this question to include a request for organizations to which I belong or have belonged only by virtue of a financial contribution. I am a member, or have formerly been a member, in the following organizations since graduation from college:

American Automobile Association of Minnesota/Iowa
American Red Cross, Grant Wood Area Chapter, Honor Society Level
Brown-Camp Lofts Homeowners Association, Des Moines, Iowa
Des Moines A.M. Rotary Club
Des Moines Embassy Club (spouse is member)
Friends of Princeton Basketball
Hancher Silver Circle, Hancher Auditorium, Iowa City, Iowa
The Ivy Club, Princeton, New Jersey, graduate member (member of board of governors, 1985-88)
Mothers Against Drunk Driving, Polk County, Iowa, Chapter
National Multiple Sclerosis Society, Iowa Chapter
Phi Beta Kappa Society
Polk County, Iowa, I-Club
Polk County, Iowa, Republican Central Committee
Princeton University Alumni Association of Iowa, Schools Committee
St. Augustin Catholic Church, Des Moines, Iowa; member of St. Augustin Choir and Perpetual Adoration worshiper
University of Iowa I-Club
University of Iowa Presidents Club
YMCA of Greater Des Moines

Additional information regarding The Ivy Club: The Ivy Club is an eating club for undergraduate students at Princeton University. However, every undergraduate member in good standing upon graduation from college is automatically a "graduate member" of the club, and I have thus been a graduate member from 1985 to the present. I also served on the club's board of governors from approximately 1985 to 1989. As of 1985, the club was all male. Since

approximately 1990, the club has admitted both male and female undergraduate students. I resigned from the club's board of governors in 1989.

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.

"Supreme Court Highlights," *The Federalist Paper*, July 1993

Student note, "Freedom of Association: The Attack on Single-Sex College Social Organizations," 4 *Yale Law & Policy Review* 426 (1986)

During my tenure as United States Attorney, I have been asked to make remarks in a variety of forums. I typically have not spoken from a formal prepared speech. On some occasions, I have displayed slides from a PowerPoint presentation while speaking. The following is a list of occasions on which I made remarks as United States Attorney:

- Remarks at Iowa Federal Public Defender seminar (11-8-01)
- Remarks at Investiture as United States Attorney (11-19-01)
- Remarks at Iowa State Bar Association's Federal Practice Seminar regarding USA Patriot Act (12-14-01)
- Remarks at Iowa Celebration for Victim Rights Week (4-22-02)
- Remarks to Corporate Counsel section of Iowa State Bar Association regarding Justice Department guidelines on prosecution of corporations (5-28-02)
- Remarks to Iowa County Attorneys Association regarding Justice Department priorities (6-11-02)
- Remarks on panel of U.S. Attorneys at 13th Annual Regional Law Enforcement Training Conference, hosted by Community Relations Service and Overland Park, KS, Police Department (8-15-02)
- Remarks to Iowa Association of Criminal Defense Lawyers regarding federal policies and procedures (8-28-02)
- Remarks at meeting of Dean Mason Ladd Inn of Court regarding anti-terrorism efforts in Iowa (10-10-02)
- Remarks at seminar for Iowa government attorneys regarding ethics and communicating with the media (11-1-02)
- Remarks at CLE seminar for Business section of the Iowa State Bar Association regarding Sarbanes-Oxley Act and DOJ initiative against corporate fraud (11-8-02)
- Remarks at Kiwanis Club luncheon regarding work of U.S. Attorney's Office (11-27-02)
- Remarks at Iowa Law Enforcement Academy graduation ceremony (12-20-02)

Remarks at Polk County Bar Association Luncheon regarding recent legal developments concerning terrorism (1-14-03)

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 last physical examinations was on January 7, 2003. My physician described my health as excellent, and certified that I was fit for a judicial position.

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.

October 2001 to present: United States Attorney for the Southern District of Iowa
Appointed by President George W. Bush, by and with the advise and consent of
the United States Senate.

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

Yes. During the 2000 presidential election campaign, I was designated executive director of Lawyers for Bush-Cheney in Iowa. My responsibilities were primarily to identify attorneys in Iowa who wished to join the group, and to recruit attorneys to assist as campaign volunteers. During the Iowa Caucuses in January 2000, I participated in a caucus training program for the Bush campaign. In August 2000, I sold several tickets for a table at a fundraising event for the Republican Party of Iowa at which then-Governor Bush was the featured speaker. I also attended two county canvass meetings in Iowa in November 2000 to monitor the tabulation of votes in the presidential election on behalf of the Republican Party of Iowa.

As a college student in the 1980s, I worked as a volunteer on a campaign of former United States Representative Cooper Evans of Iowa. My responsibilities included the distribution of campaign materials.

I performed minimal volunteer work on other campaigns in Iowa prior to age 18.

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

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

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

-- Law Clerk, The Honorable William H. Rehnquist, United States Supreme Court, 1989-90

-- Law Clerk, The Honorable Laurence H. Silberman, United States Court of Appeals for the District of Columbia Circuit, 1988-89

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

Not applicable.

- (3) the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.
- Special Assistant to the Assistant Attorney General, Office of Legal Counsel, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20543, 1990-91
 - Assistant United States Attorney, Northern District of Iowa, 425 2nd Street, SE, Suite 950, and 400 1st Street, SE, Suite 400, Cedar Rapids, IA, 1991-99 (away on temporary detail in 1995-96)
 - Associate Independent Counsel, In re: Madison Guaranty Savings & Loan, 10825 Financial Centre Parkway, Suite 134, Little Rock, Arkansas 72211, and 1001 Pennsylvania Avenue, NW, Suite 490N, Washington, DC 20004, 1995-96
 - Member, Belin Lamson McCormick Zumbach Flynn, A Professional Corporation, 666 Walnut Street, Suite 2000, Des Moines, IA 50309, 1999-2001
 - United States Attorney for the Southern District of Iowa, 110 East Court Avenue, Suite 286, Des Moines, Iowa 50309, October 2001 to 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.
- As a law clerk from 1988 to 1990, my work consisted primarily of conducting legal research, preparing memoranda about pending cases and petitions for certiorari, and assisting in the preparation of opinions authored by Chief Justice Rehnquist and Judge Silberman.
 - As an attorney with the Office of Legal Counsel at the Department of Justice, most of my practice involved the preparation of legal opinions for agencies of the Executive Branch. I also briefed and argued one case before the United States Court of Appeals for the First Circuit on behalf of the Department of Transportation. I also helped to prepare comments on pending legislation, and assisted in the process of judicial selection.
 - As an Assistant United States Attorney and Associate Independent Counsel from 1991 to 1999, I practiced federal criminal law on behalf of the United States. My practice involved grand jury investigations,

negotiations with defense counsel, pretrial hearings, jury trials, plea hearings, contested sentencing hearings, and appellate litigation.

-- As a partner at the Belin Law Firm from 1999 to 2001, I practiced general civil litigation on behalf of a range of commercial clients. My practice involved the discovery process of written interrogatories, document productions, and depositions upon oral examination, the briefing and arguing of dispositive motions, and the negotiation of settlement agreements.

-- As United States Attorney from October 2001 to present, I have been responsible for managing an office of approximately 25 Assistant United States Attorneys and 60 total employees. Much of my work as United States Attorney has been management. I have worked in the Southern District of Iowa to implement initiatives of the Department of Justice such as the anti-terrorism task forces, the Project Safe Neighborhoods initiative to reduce gun violence, and the OCDEF program to combat major drug trafficking. I have personally engaged in review of proposed indictments and appeals to the United States Court of Appeals arising in the Southern District of Iowa. I have represented the office at various law enforcement functions and strategy meetings. I have personally conducted a substantial criminal investigation in the district, and I have personally handled two affirmative appeals to the United States Court of Appeals, one of which is pending.

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

-- As a federal prosecutor, I have worked in conjunction with several "client" agencies, including the Federal Bureau of Investigation, the Drug Enforcement Administration, the Bureau of Alcohol, Tobacco, and Firearms, the Internal Revenue Service, the Postal Inspection Service, and the Immigration and Naturalization Service. I also worked with a variety of state and local agencies, including the Iowa Division of Narcotics Enforcement, the Iowa Division of Criminal Investigation, and various county sheriffs and local police departments. For several years, I handled primarily cases involving violations of the federal drug trafficking and firearms laws.

I also specialized in appellate litigation, serving as the Appellate Coordinator for the United States Attorney's Office in Northern Iowa at the end of my tenure with that office. In that capacity, I was responsible for reviewing all appellate briefs filed by Assistant United States Attorneys

in the United States Court of Appeals, and I was assigned certain appeals by the United States Attorney or supervisory Assistant United States Attorney to litigate personally. In 1999, I was selected as the Assistant United States Attorney representative from the 8th Circuit for the U.S. Justice Department's Appellate Working Group. I resigned from that group after brief service when I accepted a position at a private law firm.

-- In the private practice, I remained a generalist, handling a range of matters in civil litigation. I represented relatively large national and international clients such as Meredith Corporation of Des Moines, Iowa; General Growth Properties, Inc., of Chicago, Illinois; Unisys Corporation of Blue Bell, Pennsylvania; and Amylum, N.V. of Belgium. I also represented Iowa companies, such as Bankers Trust Company of Des Moines, Iowa, and Vermeer Manufacturing Company of Pella, Iowa, as well as smaller out-of-state businesses, such as Laundry Link, L.L.C., of Birmingham, Alabama.

- (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 an attorney with the Office of Legal Counsel at the Justice Department, most of my work involved providing counsel within the Executive Branch, although I argued one appeal before the United States Court of Appeals for the First Circuit.

-- As an Assistant United States Attorney, I appeared frequently in United States District Court and the United States Court of Appeals. As an Associate Independent Counsel, I appeared in court occasionally, but less frequently, because much of my practice was devoted to investigative work.

-- In private practice, I appeared in court on several occasions, but with less frequency than as an Assistant United States Attorney, because much of my practice involved the civil discovery process and motion practice.

-- As United States Attorney, I have appeared in court only occasionally, as most of my work has been devoted to management of the United States Attorney's Office and supervision of approximately 25 Assistant United States Attorneys and 60 total employees.

- (2) Indicate the percentage of these appearances in

- (A) federal courts;
Approximately 95 percent.
- (B) state courts of record;
Approximately 5 percent.
- (C) other courts.
None.

(3) Indicate the percentage of these appearances in:

- (A) civil proceedings;
Approximately 20 percent, including 100 percent of my litigation from 1999 to 2001.
- (B) criminal proceedings.
Approximately 80 percent, including 100 percent of my litigation from 1991 to 1999.

(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 approximately 13 federal criminal cases to verdict. I was sole counsel in 11 cases, and associate counsel in two cases. I have also been sole counsel in numerous evidentiary hearings in federal criminal cases, including hearings on motions to suppress evidence, and contested sentencing hearings to determine the appropriate sentence for defendants who pleaded guilty. I have litigated four civil cases to judgment, although each was resolved based on a dispositive motion rather than by trial. I have argued approximately 18 cases in the United States Courts of Appeals, and briefed as sole counsel four others that were resolved without oral argument. I have participated as co-counsel in the briefing of at least three other substantial appeals before the United States Court of Appeals, the Iowa Supreme Court, and the Iowa Court of Appeals, respectively.

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

All of the trials were jury trials. All of the contested evidentiary hearings were conducted before a United States District Judge or United States Magistrate Judge without a jury. All of the dispositive motions in civil cases were heard by a judge without a jury.

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

I was co-counsel with Kenneth W. Starr on a Brief for the United States in Opposition to petitions for writs of certiorari filed in Nos. 95-2008, 95-2013, and 95-2070, captioned *William J. Marks, Sr., v. United States*; *Jim Guy Tucker v. United States*; and *John Haley v. United States*, respectively. The petitions were denied.

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

During my time in the private practice of law from 1999 to 2001, I volunteered as an intake attorney with the Polk County Legal Aid Society. A member of my law firm volunteered for one morning each week, and I did so approximately two or three times per year. Prior to 1999, and since October 2001, I have devoted my legal career to public service, and I believe that much of my work in public service benefited the victims of crime, many of whom are among the disadvantaged in society.

I have volunteered as a judge for moot court competitions at the University of Iowa College of Law, evaluating and providing suggestions to students presenting argument. I have volunteered time to serve as a faculty advisor with respect to the preparation of student law review notes, and to participate in events regarding career options for students graduating from law school in Iowa. I have also volunteered in other civic activities outside the legal area, such as the American Heart Association's Heartwalk and the Schools Committee of Princeton University.

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.

-- *United States v. Dustin Lee Honken*, No. CR 96-3004 (N.D. Iowa); 184 F.3d 961 (8th Cir.), *cert. denied*, 528 U.S. 1056 (1999).

I litigated this case as an Assistant U.S. Attorney from approximately 1997 to 1999. This case involved a prosecution for methamphetamine trafficking, and a sentencing hearing that included evidence of obstruction of justice. Mr. Honken was charged with methamphetamine trafficking charges, and I was one of two prosecutors who conducted an investigation and litigated a contested sentencing hearing in the new criminal case. Mr. Honken pleaded guilty to drug charges, but several contested issues were litigated in a lengthy sentencing hearing. I prepared written briefs for the district court, and presented evidence at the sentencing hearing along with my co-counsel.

I was appellate counsel for the United States before the Eighth Circuit. I prepared the briefs of the United States, and argued the appeal. The court of appeals reversed a decision by the district court to grant a sentencing reduction for acceptance of responsibility. The court's decision established the standard that a district court must apply when determining whether to award an adjustment for acceptance of responsibility to a defendant who also obstructed justice during the criminal case.

The case was prosecuted in the United States District Court for the Northern District of Iowa before the Honorable Mark W. Bennett. The appeal was considered by a three-judge panel of the United States Court of Appeals for the Eighth Circuit, composed of Judges Theodore McMillian, John R. Gibson, and David Hansen.

My co-counsel was Patrick Reinert, P.O. Box 74950, Cedar Rapids, Iowa 52407-4950, telephone: (319) 363-6333.

Counsel for Mr. Honken was Alfredo Parrish, 2910 Grand Avenue, Des Moines, Iowa 50312, telephone: (515) 284-5737.

United States v. Tucker, Marks, and Haley, No. 4:1995cr00117 (E.D. Ark.); 78 F.3d 1313 (8th Cir. 1996), *reh'g denied*, 82 F.3d 1423 (8th Cir. 1996), *cert. denied*, 519 U.S. 820 (1996).

This was a tax fraud investigation and prosecution conducted by the Office of Independent Counsel Kenneth W. Starr, where I was an Associate Independent Counsel. After succeeding an attorney on the staff of regulatory independent counsel Robert Fiske, I conducted investigative work, including the presentation of evidence to the federal grand jury. I had a substantial role in preparing legal briefs on issues raised in pre-trial litigation, including the jurisdiction of the independent counsel, before the district court and the court of appeals. Due to the significance of the jurisdictional issue for the investigation, Independent Counsel Starr personally argued the case before the United States District Court and the United States Court of Appeals.

The Independent Counsel's appeal to the Eighth Circuit addressed the question whether a decision of the Attorney General of the United States to "refer" a matter to an independent counsel on the ground that it was "related" to matters within the jurisdiction of the independent counsel is subject to judicial review. The appeal also discussed whether, assuming the issue was reviewable, the pending indictment was "related" to the independent counsel's original jurisdictional mandate. Finally, the appeal addressed whether the matter should be reassigned to a different district judge on remand from the court of appeals.

The court of appeals reversed the decision of the district court to dismiss the indictment, and remanded the case with directions that it should be reassigned to a different district judge. The case was delayed for years by appellate litigation, the health of a defendant, and other issues. All three defendants pleaded guilty after I left the Office of Independent Counsel. I worked on this case during 1995 and 1996.

The case was prosecuted in the United States District Court for the Eastern District of Arkansas. The case was heard initially by the Honorable Henry Woods. The case was later reassigned to the Honorable Stephen Reasoner. The government's appeal in 1996 was considered by a three-judge panel of the United States Court of Appeals for the Eighth Circuit, comprised of Judges Pasco M. Bowman III, C. Arlen Beam, and James Loken.

My co-counsel included Kenneth W. Starr, 655 15th Street, NW, Washington, DC 20005, telephone: (202) 879-5130, W. Hickman Ewing, Jr., 1500 Cobblestone Cove, Germantown, TN 38138, telephone: (901) 754-4116, and Timothy Mayopolous, 277 Park Avenue, New York, NY 10172, telephone: (212) 892-2201.

Counsel for Mr. Tucker were George B. Collins and James J. Lessmeister, One North LaSalle Street, Suite 2235, Chicago, Illinois 60602, telephone: (312) 372-7813. Counsel for Mr. Marks were Robert Davis and Van Van Bebbler, 1717 Main Street, Suite 2800, Dallas, Texas 75201, telephone: (214) 939-5500, and H. Campbell Zachry, Jenkins & Gilchrist, 1445 Ross Avenue, Suite 3200, Dallas, Texas 75202, telephone: (214) 855-4500. Counsel for Mr. Haley were Ted Boswell, P.O. Box 798, Bryant, Arkansas, 72089-0798, telephone: (501) 847-3031, and Curtis Bowman, Cauley, Geller, Bowman & Coates, LLP, 11311 Arcade Drive, Suite 200, Little Rock, Arkansas 72212, telephone: (501) 312-8500.

United States v. Kenny Homer Bevard III, 44 Fed.Appx. 748 (8th Cir. 2002), *pet. for cert. filed*, No. 02-7699 (Nov. 22, 2002).

This was an appeal of a sentence in a criminal case arising under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1). The appeal raised a constitutional question resolved in favor of a criminal defendant by the United States Court of Appeals for the Ninth Circuit in *United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001), but in favor of the government by the district court in this case. Because the case had the potential to create a conflict of authority in the circuit courts on a matter of constitutional law, I personally briefed and argued the appeal for the United States.

The primary issue raised by the defendant's appeal was whether a district court may constitutionally enhance a defendant's sentence, including the statutory maximum sentence, based on a prior juvenile adjudication, or whether the rule of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), requires that the prior juvenile adjudication be charged in an indictment and proved to a trial jury by proof beyond a reasonable doubt. The United States argued that the Supreme Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and subsequent precedent of the Eighth Circuit establishes that a prior juvenile adjudication is the equivalent of a "prior conviction" or a "sentencing-related circumstances of recidivism" that may be found by the district court.

Shortly before oral argument in *Bevard*, the Eighth Circuit decided the same issue in favor of the government in *United States v. Smalley*, 294 F.3d 1030 (8th Cir. 2002), *cert. denied*, 123 S. Ct. 870 (2003). The court reaffirmed *Smalley* in the *Bevard* decision. *Bevard*, 44 Fed.Appx. 748, 2002 WL 1968337. The petition for certiorari in *Bevard* is pending before the Supreme Court.

The appeal in *Bevard* also raised issues whether there was sufficient evidence to support the district court's finding that Bevard had sustained three prior violent felonies within the meaning of the Armed Career Criminal Act, and whether the

district court correctly applied enhancements under the United States Sentencing Guidelines. The court of appeals affirmed the district court's finding that Bevard sustained three qualifying felonies under the statute, but agreed with the government that the district court had misapplied the sentencing guidelines. Accordingly, the case was remanded for resentencing.

The case was prosecuted in the United States District Court for the Southern District of Iowa by Assistant United States Attorney Ed Kelly. The district judge was the Honorable Ronald E. Longstaff. The appeal was heard by a panel of the United States Court of Appeals for the Eighth Circuit comprised of Chief Judge David R. Hansen, and Judges George Fagg and Kermit Bye. I worked on this case during 2001.

Counsel for Mr. Bevard was Assistant Federal Defender James Whelan, 300 Walnut Street, Suite 295, Des Moines, Iowa 50309-2255, telephone: (515) 246-1761.

United States v. Wallace Jackson, et al., No. CR 93-0033 (N.D. Iowa); 67 F.3d 1359 (8th Cir. 1995), *cert. denied*, 517 U.S. 1192 (1996).

The Wallace Jackson case was the principal prosecution in a significant investigation of a conspiracy to distribute crack cocaine and firearms violations in Clinton and Cedar Rapids, Iowa. I conducted the grand jury investigation and prosecution of Jackson and several co-defendants as an Assistant United States Attorney. Jackson was convicted after a jury trial, and sentenced to a term of 360 months imprisonment. Several other defendants pled guilty.

The Jackson prosecution raised various legal issues, including the constitutionality of search warrants, the admissibility of evidence such as co-conspirator statements, firearms, and audiotape recordings, the validity of a subpoena to a state prosecutor, and the appropriateness of certain jury instructions.

The case was prosecuted in the United States District Court for the Northern District of Iowa before the Honorable Michael J. Melloy. I did not represent the United States on appeal, because I had departed the United States Attorney's Office on a temporary assignment. I worked on this case in 1993 and 1994.

Counsel for Mr. Jackson was Wallace Taylor, 118 3rd Avenue, Cedar Rapids, Iowa 52401, telephone: (319) 366-2428.

Counsel for co-defendant Patricia Peters was Thomas J. O'Flaherty, O'Flaherty Law Firm, P.O. Box 520, Swisher, Iowa 52338-0520, telephone: (319) 857-4757. Counsel for co-defendant Katherine Vasquez was David McManus, 118

3rd Avenue, Suite 830, Cedar Rapids, Iowa 52401, telephone: (319) 366-4313. Counsel for co-defendant Tara Barsema was Alfred Willett, Suite 500, 118 Third Avenue, SE, Cedar Rapids, Iowa 52401, telephone: (319) 364-2467. Counsel for co-defendant Rhonda Morris was Karen Volz, 4056 Glass Road, NE, Cedar Rapids, Iowa 52402, telephone: (319) 393-9090. Counsel for co-defendant Damon Julian was Phil MacTaggart, Suite 401, 101 W. 2nd Street, Davenport, Iowa 52801, telephone: (563) 322-8931. Counsel for co-defendant Vaniel Graham was James Bobenhouse, 1120 2nd Avenue, SE, Cedar Rapids, Iowa 52403, telephone: (319) 366-6460.

United States v. Samuel Clark, No. CR 92-3002 (N.D. Iowa); 22 F.3d 799 (8th Cir. 1994)

This was a prosecution for possession with intent to distribute crack cocaine. The principal issue in the case was one of constitutional law. Mr. Clark asserted that the investigating officers violated his rights under the Fourth Amendment when they surreptitiously recorded a conversation between Clark and a companion while the two were left unattended in a marked patrol car. I represented the United States in a suppression hearing in the district court, and I briefed and argued an appeal to the United States Court of Appeals.

The district court granted Mr. Clark's motion to suppress. The primary issue on appeal was whether the defendant had a reasonable expectation of privacy while seated in a patrol car without a law enforcement officer present. The court of appeals agreed with the arguments asserted by the United States that the conduct of the officers did not violate the Fourth Amendment, and that the evidence was admissible. Mr. Clark eventually pled guilty.

The case was prosecuted in the United States District Court for the Northern District of Iowa before the Honorable John A. Jarvey, United States Magistrate Judge, and the Honorable Donald E. O'Brien, United States District Judge. The government's appeal was considered by a three-judge panel of the United States Court of Appeals for the Eighth Circuit, comprised of Judges Richard S. Arnold, C. Arlen Beam, and Andrew Bogue. I worked on this case from approximately 1992 to 1994.

Counsel for Mr. Clark in the district court was Don C. Nickerson, 636 Grand Avenue, Des Moines, Iowa 50309-2565, telephone: (515) 245-4744. Counsel for Mr. Clark on appeal was Ross Hauser, 3rd Avenue Bridge, P.O. Box 5488, Cedar Rapids, Iowa 52406-5488, telephone: (319) 398-3920.

United States v. Kevin Bassham, No. CR 97-0034 (N.D. Iowa); 162 F.3d 1165 (8th Cir.), *cert. denied*, 525 U.S. 942 (1998).

United States v. Andrew Smith, No. CR 97-0029 (N.D. Iowa)

Mr. Bassham and Mr. Smith were charged with a series of robberies, including federal bank robbery, in Cedar Rapids and Marion, Iowa. I conducted the grand jury investigation, prosecuted the two cases for the United States, and briefed the government's response to Mr. Bassham's appeal. Mr. Bassham was convicted after a jury trial, and sentenced to a substantial term of imprisonment. Mr. Smith pled guilty, and was also sentenced to prison. I worked on these cases during 1997-98.

The cases were prosecuted in the United States District Court for the Northern District of Iowa before the Honorable Michael J. Melloy. Mr. Bassham's appeal was considered by a three-judge panel of the United States Court of Appeals for the Eighth Circuit comprised of Judges George Fagg, Myron Bright, and C. Arlen Beam.

Counsel for Mr. Bassham was Anne M. Laverty, 225 2nd Street, SE, Suite 310, Cedar Rapids, Iowa 52401, telephone: (319) 363-2266.

Counsel for Mr. Smith was Lorraine Snead Ingels, P.O. Box 1085, Cedar Rapids, Iowa 52406-1085, telephone unknown.

United States v. Roland Thomson, No. CR 99-0020 (N.D. Iowa)

This was a prosecution for possession of child pornography. Mr. Thomson, whose wife was an elementary school teacher, induced children at the school to pose for photographs. He produced close-up photographs of the clothed private areas of young girls, and the photographs were seized from his residence during execution of a search warrant. I conducted grand jury investigation, litigated pre-trial motions, and negotiated a guilty plea. The guilty plea and sentencing hearing occurred after I departed the United States Attorney's Office.

In a pre-trial motion to dismiss the indictment, Thomson argued that (1) the sexual exploitation statute under which he was charged required the government to prove he had knowledge of the interstate commerce element of the offense, (2) the definition of "sexually explicit conduct" in the statute did not encompass lascivious exhibitions that do not depict nudity or discernible genitals, and (3) various provisions of the Protection of Children Against Sexual Exploitation Act were unconstitutional under the First Amendment or on other grounds. I prepared briefs in opposition to the defendant's motion to dismiss the indictment, and represented the United States at an evidentiary hearing and oral argument on the motion. The district court rejected the defendant's arguments and denied the motion to dismiss.

The case was prosecuted in the United States District Court for the Northern District of Iowa. The pre-trial motions were heard by the Honorable John A. Jarvey, United States Magistrate Judge, and the Honorable Mark W. Bennett, United States District Judge. I worked on this case during 1999.

Counsel for Mr. Thomson was William Kutmus, 604 Locust Street, Suite 618, Des Moines, Iowa 50309, telephone: (515) 288-3339.

Iowa Techniques v. Laundry Link, L.L.C., No. C 00-182 (N.D. Iowa)

I represented Laundry Link, L.L.C., of Birmingham, Alabama, in this action brought by Iowa Techniques, which alleged violations of the Lanham Act. I briefed and argued a motion to dismiss the case for lack of personal jurisdiction, and the motion was granted by the district court.

The principal issue in the motion was whether Laundry Link had sufficient minimum contacts with the State of Iowa to justify the exercise of personal jurisdiction over the company. The plaintiff argued that the exercise of personal jurisdiction would be consistent with the Due Process Clause because Laundry Link had engaged in business in Iowa, and had directed communications to the plaintiff in Iowa. Laundry Link's motion argued that the use of interstate facilities to communicate with the forum was not sufficient to provide the requisite "minimum contacts." The motion also asserted that the mere allegation that the plaintiff felt the effect of alleged tortious conduct in the state was not sufficient to justify personal jurisdiction. After oral argument, the district court granted the motion and dismissed the case. The motion was very important to Laundry Link, because the company is a small one-man operation that could not afford to defend the lawsuit in a distant forum.

The case was litigated in the United States District Court for the Northern District of Iowa before the Honorable Michael J. Melloy. I worked on this matter during 2000 and 2001.

Counsel for Iowa Techniques were Vernon Squires, P.O. Box 2804, Cedar Rapids, Iowa 52406-2804, telephone: (319) 363-0101, and Jason Sawyer, 335 S. Clinton Street, Iowa City, Iowa 52244, telephone: (319) 337-5522.

Roquette America, Inc., et al. v. Gerber, et al., 651 N.W.2d 896 (Iowa App. 2002), *review denied*, No. 00-1076 (Sep. 20, 2002).

This was an appeal by several European companies and individual defendants in connection with a tort action filed in the Iowa District Court for Lee County, Iowa. The corporate parties competed in the business of manufacturing starches

and starch derivatives that are used in the production of a wide range of commercial products. In this action, the plaintiffs alleged that the defendants had breached a covenant not to compete, misappropriated trade secrets, and intentionally interfered with contractual relations. The dispute arose after one of the defendant corporations hired a former employee of one of the plaintiffs. The plaintiffs asserted that the employee disclosed trade secrets while employed by the defendants, and that the defendants used this information to advance their market position in the competition with plaintiffs.

My law firm represented the defendants in the litigation: Laurent Gerber, a French citizen and the former employee in dispute, Amylum Belgium N.V., a Belgian corporation, Amylum Group Services, a Belgian corporation, Amylum France SAS, a French corporation, Amylum SPI Europe, a French corporation, and Carole Piwnica, a Belgian citizen.

I became involved in this matter after the Iowa District Court had denied the defendants' motion to dismiss the case for lack of personal jurisdiction. I was the primary drafter of an application for interlocutory review, pursuant to Iowa Rule of Appellate Procedure 2, filed with the Iowa Supreme Court. The application argued that the case presented a constitutional question of first impression in the Iowa appellate courts, namely: How does the so-called "effects test" for personal jurisdiction, derived from the Supreme Court's decision in *Calder v. Jones*, 465 U.S. 783 (1984), apply to an allegation of business torts in a dispute between corporate entities? The application also emphasized that it would serve the interests of justice to resolve the jurisdictional issue prior to a trial involving parties from France, Belgium, and the United States. The Iowa Supreme Court granted the application for interlocutory review referred the case to the Iowa Court of Appeals.

One of my co-counsel and I divided primary responsibility for preparing the briefs of the defendants for submission to the Iowa Court of Appeals. I was the primary drafter of a section concerning the constitutional question whether the exercise of personal jurisdiction over the defendants was consistent with the Due Process Clause of the Fourteenth Amendment. The brief discussed how the *Calder* "effects test" had been applied to business torts in other jurisdictions and distilled the applicable requirements for the exercise of personal jurisdiction. Under that doctrine, a plaintiff is required to show that (1) the defendant's acts were intentional, (2) the actions were expressly aimed at the forum, and (3) the brunt of the harm was suffered in the forum state. The brief argued in part that because the disputed employee was hired in Europe, and the primary competition between plaintiffs and defendants occurred in Europe, the allegedly tortious acts were not expressly aimed at Iowa, and the brunt of any harm was suffered largely in Europe.

The case was argued orally by my co-counsel after I was appointed United States Attorney. In a published opinion, the Iowa Court of Appeals determined that the district court erred in its application of the *Calder* effect test, and held that the Iowa district court did not have personal jurisdiction over the defendants. The Iowa Supreme Court denied an application for further review.

The case was litigated in the Iowa Supreme Court on a petition for interlocutory review, and in the Iowa Court of Appeals before a panel comprised of Judges Robert Mahan, Van Zimmer, and Larry Eisenhower. I worked on this matter during 2000 and 2001.

My co-counsel were Mark E. Weinhardt and Mark McCormick, 666 Walnut Street, Suite 2000, Des Moines, Iowa 50309, telephone: (515) 243-7100, and Jonathan K. Cooperman and Frank C. DiPrisco, 101 Park Avenue, New York, New York 10178, telephone: (212) 808-7800, and James P. Hoffman, 3550 270th Avenue, Keokuk, Iowa 52632.

Counsel for the plaintiffs were Oleg Rivkin, Eric Lindquist, and Kristen Perrault, 825 Third Avenue, 11th Floor, New York, NY 10022, telephone: (212) 480-4800, and Joseph R. Gunderson and Edward C. Poulsen, 317 Sixth Avenue, Suite 600, Des Moines, Iowa 50309, telephone: (515) 288-9205.

Ward v. Skinner, 943 F.2d 157 (1st Cir. 1991), *cert. denied*, 503 U.S. 959 (1992).

This was an appeal by an interstate truck driver who challenged a Department of Transportation safety rule that disqualified those with a history of epilepsy from driving trucks in interstate commerce. As a Justice Department lawyer, I prepared the briefs, subject to supervision and approval by the Civil Division of the Justice Department, and argued the appeal for the DOT. The court of appeals, in an opinion by then-Judge Stephen Breyer, ruled in favor of the Department, upholding the regulation.

Mr. Ward's basic claim on appeal was that Section 504 of the Rehabilitation Act required the DOT to grant him a waiver from the general rule that prohibited him from driving trucks. The Rehabilitation Act prohibits discrimination against persons "with handicaps" (in this case, epilepsy) if the individual is "otherwise qualified" to perform the activity in question (in this case, to drive). The DOT, relying on the recommendations of medical task force, had concluded that it was not safe to grant a waiver to persons with a history of epilepsy who use anti-convulsant drugs.

Judge Breyer's opinion for the court held that there was sufficient law to apply to review the DOT's decision. Applying Supreme Court precedent, the court then

held that an agency, in treating handicapped persons, may sometimes proceed by way of general rule or principle, at least where (1) the agency behaves reasonably in doing so, (2) a more individualized inquiry would impose significant additional burdens upon the agency, and (3) Congress, as well as the agency, has expressed some kind of approval of the general rules or principles concerned. Applying this standard, the court held that the conclusion of the DOT medical task force was reasonable, and that the DOT could rely upon the task force's general, recommended rule in denying a waiver to the appellant.

The case was heard by a three-judge panel of the United States Court of Appeals for the First Circuit, comprised of then-Judge Stephen Breyer, Judge Bruce Selya, and Judge Raymond Pettine. I litigated this matter during 1991.

My co-counsel were Robert V. Zener, 3000 K Street, NW, Suite 300, Washington, DC 20007, telephone: (202) 424-7500. Stuart Gerson, 1227 25th Street, NW, Suite 700, Washington, DC 20037, telephone: (202) 861-0900, was also on the brief as the Assistant Attorney General for the Civil Division.

Counsel for Mr. Ward were Harold L. Lichten, 18 Tremont Street, Suite 500 Boston, Massachusetts 02108, telephone: (617) 367-7200, and Deborah Piltch and Jane K. Alper, 11 Beacon Street, Suite 925, Boston, Massachusetts 02108, telephone: (617) 723-8455.

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 named as a "respondent" in an action captioned *Gary J. Cates v. United States (a Federal corporation) chief judge Michael J. Melloy, magistrate John A. Jarvey, Assistant United States Attorney Steven Colloton, United States Attorney General Janet Reno, Mark C. Meyer, DEA task force officer Peter Wright, and all unknown grand jury members.*

Mr. Cates was a criminal defendant whose case I prosecuted as an Assistant United States Attorney in the Northern District of Iowa. Mr. Cates labeled the action a "Writ of Quo Warranto" and purported to file it in the United States Court of Appeals for the District of Columbia Circuit on or about May 6, 1998. The matter apparently was transferred to the United States District Court for the Northern District of Iowa, and given case number C 98-0072-MWB. On May 21, 1998, Judge Mark W. Bennett dismissed the action without prejudice on the ground that the Plaintiff submitted neither the filing fee nor an application to proceed *in forma pauperis*.

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.

To resolve any potential conflict of interest, I expect to follow the guidance set forth in the Code of Conduct for United States Judges. In particular, I expect to draw on the procedure set forth in the "Checklists for Financial and Other Conflicts of Interest" published by the Administrative Office for U.S. Courts.

The categories of litigation and financial arrangements that are most likely to present potential conflicts of interest during my initial service as a United States Circuit Judge include (1) cases involving parties in which my wife or I have a financial interest, such as entities in which one of us may own stock, (2) cases in which the United States Attorney for the Southern District of Iowa is a party or in which my former law firm represents a party, (3) cases in which my wife's employer is a party, and (4) cases in which a third degree relative of mine or my wife's has an interest as an attorney or a party.

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 do not have any plans, commitments or arrangement to pursue outside employment. I have enjoyed law teaching in the past, and I would consider such an arrangement in the future if it were approved by the chief judge of the Court and otherwise in accordance with governing rules and regulations.

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

See Financial Disclosure Report.

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

See attached financial net worth statement.

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

Senator Charles E. Grassley has established a committee to interview and evaluate candidates for nomination to the federal courts.

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

After the committee completed its review process, Senator Grassley recommended me and three other candidates from Iowa to President Bush.

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

When Senator Grassley announced that Chief Judge David R. Hansen would assume senior status on April 1, 2003, and that Senator Grassley would consider applicants from Iowa for the upcoming vacancy on the United States Court of Appeals for the Eighth Circuit, I sent a letter of interest to Senator Grassley. I was contacted by Senator Grassley's office and invited to an interview with Senator Grassley's committee. My interview with the committee concerned primarily my professional qualifications for the position.

After Senator Grassley recommended me to President Bush for consideration, I was invited to the White House for an interview with the Counsel to the President, members of his staff, and a representative from the Department of Justice. My interview concerned primarily my interest in serving in the judiciary, my professional experience, and my professional qualifications for the position.

The Department of Justice then notified me that I would move to the next step of the process of consideration for a possible nomination. I completed questionnaires related to my background and signed various waiver forms. I was interviewed by an agent of the FBI. I completed this questionnaire. With the assistance of an accountant, I completed a financial disclosure report. I scheduled a physical examination, and my physician completed medical evaluation forms certifying that I am fit for judicial service. I provided writing samples to the Department of Justice, and I was interviewed by staff of

the Office of Legal Policy at the Department of Justice over the telephone. Shortly before February 12, 2003, I was notified that the President would send my nomination to the Senate. Since then, I have worked to finalize this questionnaire and gather materials requested by the Committee on the Judiciary.

- (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.

AO-10 (w)
Rev. 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)

1. Person Reporting <i>(Last name, first, middle initial)</i> Colloton, Steven M.	2. Court or Organization US Ct. of Appeals - 8th Circuit	3. Date of Report 02/17/2003
4. Title <i>(Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)</i> US Circuit Judge- Nominee	5. Report Type (check type) <input checked="" type="checkbox"/> Nomination, Date 02/12/2003 <input type="checkbox"/> Initial <input type="checkbox"/> Annual <input type="checkbox"/> Final	6. Reporting Period 01/01/2002 to 01/31/2003
7. Chambers or Office Address 110 E. Court Avenue, Suite 286 Des Moines, IA 50309-2053	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 section where you have no reportable information. Sign on the 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 Member	Belin Lamson McCormick Zumbach Flynn, A P.C., Des Moines, IA - Resigned 10/01
2 Co-Chair, Practice Group Subcommittee	The Federalist Society, Washington, D.C. - Resigned 9/01
3	

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 (yours, not spouse's)
<input type="checkbox"/> NONE (No reportable non-investment income.)		
1 2002	American Broadcasting Cos, Inc. - Spouse Wages	
2 2002	Nationwide (FKA Provident) Insurance Company of America - See Section VIII	790
3 2002	TIAA Life Insurance Company - Dividends	460
4		

ANNUAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Colloton, Steven M.	02/17/2003

REIMBURSEMENTS — transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)

<input type="checkbox"/> NONE (No such reportable reimbursements.)	SOURCE	DESCRIPTION
EXEMPT		

GIFTS
(Includes those to spouse and dependent children. See pp. 28-31 of Instructions.)

<input type="checkbox"/> NONE (No such reportable gifts.)	SOURCE	DESCRIPTION	VALUE
EXEMPT			

LIABILITIES
(Includes those of spouse and dependent children. See pp. 32-33 of Instructions.)

<input type="checkbox"/> NONE (No reportable liabilities.)	CREDITOR	DESCRIPTION	VALUE CODE*

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Colloton, Steven M.	Date of Report 02/17/2003
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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 "(X)" 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) 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	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions.)					Exempt				
1 Iowa State Bank and Trust - Checking Account	A	Interest	K	T					
2 Iowa State Bank and Trust - Money Market	A	Interest	N	T					
3 Smith Barney Muni Money Market Fd Cl A	B	Interest	J	T					
4 Smith Barney Bank Deposit Program	A	Interest	J	T					
5 Vanguard Prime Money Market	B	Dividend	M	T					
6 Vanguard 500 Index Fund	A	Dividend							
7 Vanguard Intermediate Term Tax-Exempt Muni Bond Fund	A	Interest	K	T					
8 UNF, St. Bd. of Regents Dorm Rev Bond, 3.375%, Due	A	Interest	J	T					
9 U of IA, St. Bd. of Regents Aca Bldg Bond, 5%, Due 7/20	B	Interest	K	T					
10 U of IA, St. Bd. of Regents Dorm Bond, 6.25%, Due	C	Interest	L	T					
11 ISB Financial Corp, IA City, IA-500 Common	A	Dividend	L	W					
12 401(k) - Spouse									
13 Disney Stock Fund - Spouse	A	Dividend	J	T					
14 Fidelity Magellan - Spouse	A	Dividend	J	T					
15 Putnam New Opps A Fund - Spouse	A	Dividend	J	T					
16 Nationwide Life Insurance Company (Whole Life)	A	Dividend	J	U					
17 TIAA Life Insurance Company (Whole Life Policy)	A	Dividend	J	U					
1 Inc/Gain Codes: A=\$1,000 or less E=\$15,001-\$50,000									
2 Val Codes: J=\$15,000 or less N=\$250,001-\$500,000									
3 Val Mth Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market									

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Colloton, Steven M.	02/17/2003

III. ADDITIONAL INFORMATION OR EXPLANATIONS.

(Indicate part of report.)

Provident Life Insurance Company demutualized during 2002. In this process, Provident became part of Nationwide Life Insurance Company. On October 1, 2002, and as result of demutualization, I received shares of Nationwide Life Insurance Company. On December 17, 2002, I signed a sell order, and received a check dated January 2, 2003, for \$750 for the sale of these shares. These proceeds are included in the gross income of this policy in Section III of this report.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Colloton, Steven M.	02/17/2003

IX. CERTIFICATION

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

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

Signature

Steven M. Colloton

Date 2-17-03

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	339	000	Notes payable to banks-secured		-
U.S. Government securities-add schedule		-	Notes payable to banks-unsecured		-
Listed securities-add schedule	306	000	Notes payable to relatives		-
Unlisted securities-add schedule	18	000	Notes payable to others		-
Accounts and notes receivable:			Accounts and bills due	10	000
Due from relatives and friends		-	Unpaid income tax		-
Due from others		-	Other unpaid income and interest		-
Doubtful		-	Real estate mortgages payable-add schedule	77	000
Real estate owned-add schedule	363	000	Chattel mortgages and other liens payable		-
Real estate mortgages receivable		-	Other debts-itemize:		-
Autos and other personal property	75	000			
Cash value-life insurance	8	000			
Other assets itemize:					
Accrued interest on bonds	2	000			
Thrift Savings Plan	166	000			
401(k) - American Broad. Cos. - Spouse	6	000	Total liabilities	87	000
			Net Worth	1	196 000
Total Assets	1	283 000	Total liabilities and net worth	1	283 000
CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, comaker or guarantor		-	Are any assets pledged? (Add schedule)		No
On leases or contracts		-	Are you defendant in any suits or legal actions?		No
Legal Claims		-	Have you ever taken bankruptcy?		No
Provision for Federal Income Tax	54	000			
Other special debt		-			

Steven M. Colloton
 Financial Statement Net Worth - Supplemental Schedules

Listed Securities

1,075 Shares of McCleodUSA, Inc. Common	1,000
75,000 State Univ. of Iowa, St. Board of Regents Dorm Rev Bonds, 6.25%, due 7/2007	88,000
10,000 UNI, St. Board of Regents Dorm Rev Bonds, 3.375%, due 7/2010	10,000
20,000 State Univ. of Iowa, St. Board of Regents Academic Bldg Rev Bonds, 5%, due 7/2015	20,000
Vanguard Prime Money Market	171,000
Vanguard Intermediate Term Tax-Exempt Muni Bond Fund	16,000
	<u>306,000</u>

Unlisted Securities

500 Shares of ISB Financial Corp, Iowa City, IA Common	18,000
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Real Estate Owned

Residence - Des Moines, IA	213,000
Residence - New York, NY	150,000
	<u>363,000</u>

Real Estate Mortgages

Residence - New York, NY, due to Iowa State Bank and Trust Co., Iowa City, IA	77,000
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Senator SESSIONS. Mr. Colloton, I appreciate the fact that you are a United States Attorney, having had that job myself for a number of years. Do you think that is a good experience for you for the office that you are seeking, the Court of Appeals?

Mr. COLLOTON. I do, Senator. I thank you for the question and appreciate your comments about the United States Attorney job. It has been for me a fine experience in which I have been able to continue my contribution to public service. I have been privy, of course, to a wide range of litigation in both criminal and civil areas in that capacity, and I have also had a better chance to really understand the administration of justice from a management level in that capacity, so I think in all those ways it has been a helpful preparatory experience.

Senator SESSIONS. Were you an Assistant United States Attorney in Iowa, there?

Mr. COLLOTON. I was, Senator.

Senator SESSIONS. How long?

Mr. COLLOTON. From about 1991 to 1999, so about 8 years in the Northern District of Iowa, and now I am the United States Attorney in the Southern District, the partner district in the State.

Senator SESSIONS. Of course, all of your practice as an Assistant United States Attorney was in Federal Court before Federal Judges, or virtually all of it. Tell me about any observations you have about things you would like to do that you think could make the legal system better? Do you have any insights that you have gained over the years?

Mr. COLLOTON. Well, Senator, I think particularly in Iowa where we are fortunate to have a strong Federal bench and a good solid bar, I believe civility among attorneys, civility among the bar is an issue that's always important to lawyers, and I think that we have an opportunity to grow in that area through bar relationships, bench/bar relationships. So that is one area that I would focus on and suggest would be an important area.

Senator SESSIONS. You were the appellate coordinator in the United States Attorney's Office in the Northern District when you were an assistant; is that correct, the appellate coordinator and handled appellate work while you were there? What court was that in, and do you think that experience would be beneficial to you in this job?

Mr. COLLOTON. Yes, Senator, I do. During my service as an Assistant United States Attorney I ultimately was asked to serve in that capacity as the coordinator of appellate litigation for the U.S. Attorney in the Northern District of Iowa. This was toward the end of my service in the late 1990's, and that gave me an opportunity to manage a range of litigation within the office to appear with some regularity before the United States Court of Appeals for the Eighth Circuit, which is the court to which I've been nominated, and I think that among other experiences I've had was a very useful and germane experience in preparing me for this potential service if I'm so fortunate to be approved.

Senator SESSIONS. You have been a litigator. Do you think bringing that experience to the Court of Appeals might be helpful in some instances? Do you think in your experience, have there been

times when you think the appellate court might not have quite captured the essence of what was occurring in the courtroom?

Mr. COLLOTON. Well, far be it from me to say that about a court of appeals, Senator Sessions, but I do think that experience as a member of the practicing bar and for judges sometimes that come from the practicing bar can be an advantage for a court. I have been a practicing lawyer for several years now, and my focus has been on practicing law. It's been sort of a case-by-case incremental law practice, and I've been in the trenches, so to speak, in the District Courts practicing both in the Federal and to some extent in the State courts during my time in the private practice, but particularly in the Federal Courts, and I do hope that if I am fortunate enough to be approved that my recent experience as a member of the practicing bar would bring some insight to the Court of Appeals, yes.

Senator SESSIONS. The Court of Appeals academic grade points are not always determinative in my view, but I think a lawyer who shows an aptitude and an interest and is able to handle written work as well as litigate, that is an asset to you on the Court of Appeals, and your background as an honors graduate from Princeton, and a Yale graduate, having clerked for Judge Silberman on the D.C. Circuit, having clerked for the Chief Justice of the United States, now Chief Justice Rehnquist. Your experience as an appellate lawyer in the U.S. Attorney's Office is a really special background for it, and I think from the reputation you have garnered as a man of integrity and character and good judgment, those combinations make you a really highly-qualified nominee. We are glad to have you.

Mr. COLLOTON. Thank you, Mr. Chairman, for those kind words. I appreciate them.

Senator SESSIONS. I congratulate Senator Grassley and Harkin and the President.

Senator SCHUMER. Mr. Chairman, since I have to leave soon, in the interest of getting on to our next panel, I will just ask consent that I be allowed to submit some questions in writing.

I congratulate the family on their pride in Mr. Colloton getting this far.

Senator SESSIONS. It is a great honor, and one step below the Supreme Court. You will handle a lot of important cases and so far you have received extraordinary support and congratulations.

The good news it here are no more questions, and I thank you very much.

Mr. COLLOTON. Thank you very much. Thank you, Senator.

Senator SESSIONS. Now we will have the next panel. I think we will have room for everybody, do we not?

Senator SCHUMER. We do.

Senator SESSIONS. If you will step up, all the district nominees.

You have taken your seats. I now have to ask you to stand and take your oath. If you would raise your right hand and take this oath.

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

Mr. CASTEL. I do.

Judge FEUERSTEIN. I do.

Mr. HOLWELL. I do.

Judge MCKNIGHT. I do.

Mr. PROCTOR. I do.

Mr. ROBINSON. I do.

Senator SESSIONS. Thank you very much.

Senator Schumer, I know you have got some nominees here, people you care about, and I will yield to you at this time.

Senator SCHUMER. Thank you, Mr. Chairman. I will not ask long questions of the nominees. I will reserve the right to submit other questions in writing, but obviously, I am very familiar with four of the six and have heard good things about the other two. So I have one question for every nominee, and unfortunately, you have to answer it first—

Senator SESSIONS. I normally ask them to tell about their families or if you need to go first—

Senator SCHUMER. No, no. One of the joys I get is seeing the families, so I would like that.

Senator SESSIONS. I guess we can start over here with Mr. Castel. If you want to give a brief opening statement or any comments, then introduce your family, that would be fine.

**STATEMENT OF P. KEVIN CASTEL, NOMINEE TO BE DISTRICT
JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK**

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

I am delighted that at this moment my wife, Patricia, and my daughter, Jeanne, are in New York following this on capitalhearings.org, and my young daughter, Allison is at camp. So I am here today on my own, and very happy to be here.

I have no opening statement.

[The biographical information of Mr. Castel follows:]

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

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

P. Kevin Castel (also Peter Kevin Castel)

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

United States District Judge, Southern District of New York

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.

**Cahill Gordon & Reindel
80 Pine Street
New York, NY 10005
(212) 701-3881**

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

August 5, 1950; Jamaica (Queens County), NY

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 since August 14, 1976 to Patricia A. Castel
(Patricia A. McLemon, Esq.). Patricia formerly
served as law clerk to the Hon Henry F. Werker,
United States District Judge, Southern District of
New York, and thereafter was a practicing lawyer
at Davis Polk & Wardwell; she is currently not
employed outside our home. We have two
dependent children.**

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

St. John's University, School of Law (attended 1972-75),

**J.D. June 1975
St. John's University (attended 1968-72), B.S. June 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.

**Cahill Gordon & Reindel
80 Pine Street
New York, NY 10005
Partner (1983 to present)
Co-Administrative Partner (1985-88)
Associate (1977 to 1983)**

**Law Clerk, Honorable Kevin Thomas Duffy (1975 to 1977)
United States District Court, Southern District of New York
40 Foley Square
New York, NY 10020**

**Willkie Farr & Gallagher
787 Seventh Avenue
New York, NY 10019
Summer Associate (1974)**

**Law Office of Joseph J. Marcheso
1251 Avenue of the Americas
New York, NY 10020
Summer Associate (1973)**

**Canadian National Railways
630 Fifth Avenue
New York, NY 10020
Summer Reservations and Ticket Clerk (1972)**

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.

Co-Recipient (with spouse), Fidelitas Award, St. John's University (2002)
 Best Lawyers in America (2001-02 edition)
 Who's Who in America (Marquis 2001 edition)
 Honoree, St. John's Law Review (2001)
 President's Medal, St. John's University (2000)
 Pietas Medal, St. John's University (1997)
 Distinguished Alumni Award St. Vincent's College of St. John's University (1990)
 St. Thomas More Scholar, St. John's School of Law (full tuition scholarship 1972-75)
 Articles Editor, St. John's Law Review (1975)
 Father Easterly Award (Outstanding Student Service) (1972)

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

Federal Bar Council
 President *Emeritus* (2002-present)
 President and Chairman of Executive Committee (2000-02)
 Officer and/or Trustee (various dates since 1982)

The Legal Aid Society
 Board of Directors (2000-present)

New York State Bar Association
 House of Delegates (1994-95)
 Chair, Commercial and Federal Litigation Section (1993-94)
 Officer and/or Executive Committee Member (various dates since 1989)

St. John's School of Law Alumni Association
 1st Vice President (2002-present)
 Officer and/or Director (various dates since 1990)

New York County Lawyers Association

American Bar Association
 Association of the Bar of the City of New York
 Committee on Professional and Judicial Ethics (1994-97)
 Ad Hoc Committee on Homelessness (1997-98)
 Council on Judicial Administration (1997-99)

Fellow, American Bar Foundation
 Fellow, New York State Bar Foundation
 Supreme Court Historical Society
 American Judicature Society

**Second Circuit Centennial Committee
Second Circuit Judicial Conference Planning Committee
Magistrate Selection Committee, Eastern District of New York**

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 New York (1976)
Southern District of New York (1977)
Eastern District of New York (1977)
Eastern District of Michigan (1991)
United States Court of Appeals for the Second Circuit (1980)
United States Court of Appeals for the Third Circuit (1989)
United States Court of Appeals for the Fourth Circuit (1991)
United States Court of Appeals for the Seventh Circuit (1995)
United States Court of Appeals for the Tenth Circuit (1988)
United States Court of Appeals for the Federal Circuit (1986)
Supreme Court of the United States (1984)**

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.

**Brotherhood of Railway and Airline Clerks
Down Town Association (prior to mid-1980s, did not admit
women members)
Garden City Estates Property Owners' Association
Lawrence Beach Club
Federalist Society
St. John's University Alumni Association
Loughlin Society (St. John's University)
Co-Chair (with spouse) (2000),
Society of Friendly Sons of St. Patrick in the City of New York
(cultural and charitable organization open to males of
Irish ancestry)**

American Society of Heating, Refrigerating and Air-
Conditioning Engineers (corresponding task force
member)
Stichting Akzo Pensioenfonds, Akzo Nobel N.V.
Special Trustee (uncompensated)

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.

Publications

Statement of the Federal Bar Council on Federal Judicial Salaries, New York Law Journal, Nov. 7, 2002, p. 2.

Telling A Client What it Doesn't Want to Hear, Federal Bar Council News, Vol. IX, No. 4 (Oct. 2002).

Mediation: Opportunities and Pitfalls, Journal of the American Society of Heating, Refrigerating and Air-Conditioning, (Sept. 2002) p. 54.

On Trial, Henry Miller's New Work for those Who Would Try Cases, De Novo (St. John's Law Alumni Magazine), (Summer 2002).

John Andre a/k/a John Anderson: Unlawful Combatant, Federal Bar Council News, Vol. IX, No. 2 (Apr. 2002).

Our Senior Judges, Federal Bar Council News, Vol. IX, No. 1 (Feb. 2002).

Some Words of Advice for New Attorneys, De Novo (St. John's Law Alumni Magazine), (Winter 2001).

The Direction: Forward, Federal Bar Council News, Vol. VIII, No. 4 (Oct. 2001).

Council to Participate as Amicus in En Banc Review of Apprendi, Federal Bar Council News, Vol. VIII, No. 3 (June 2001).

Foreword, Second Circuit Redbook (Federal Bar Council June 2001).

Making Strides, Federal Bar Council News, Vol. VIII, No. 2 (April 2001).

Our Future, Federal Bar Council News, Vol. VIII, No. 1 (Feb. 2001).

Some Words of Advice for New Attorneys, De Novo (St. John's Law Alumni Magazine), (Winter 2001).

The Direction: Forward, Federal Bar Council News, Vol. VIII, No. 4 (Oct. 2001).

On Becoming a Federal Litigator, The Forum (St. John's Law Student Newspaper) (May 2000).

Shylock v. Antonio on Appeal: The Deliberations, Law and the Arts, S. Tiefenbrun, Editor (Greenwood Press 1999).

Preface, Representing the Corporation and its Officers in Grand Jury Proceedings (Federal Bar Foundation 1997).

Commercial Litigation Strategy in State and Federal Courts, 2 NY Litigator 11 (1996).

Chapter 29, Motions In Limine, Commercial Litigation in New York State Courts (West Publishing 1995).

Chair's Column, New York State Bar Association, Commercial and Federal Litigation Section, Vol. 1. No. 3 (Mar. 1994).

Commercial Litigators Focus on Federal Rules, New York Law Journal (Jan. 24, 1994).

Foreword, Federal Rules of Civil Procedure: 1993 Amendments. A Practical Guide (New York State Bar Association 1993).

Chair's Column, New York State Bar Association, Commercial and Federal Litigation Section, Vol. 1. No. 2 (Dec. 1993).

Chair's Column, New York State Bar Association,
Commercial and Federal Litigation Section, Vol. 1,
No. 1 (Sept. 1993).

'Bye to Frye': High Court Sets Standards for Admitting
Expert Testimony, New York Law Journal, July 8,
1993, p. 1, col. 1.

'Spectrum': Application of Attorney-Client Privilege to
Corporate Investigations, New York Law Journal,
Nov. 5, 1991, p. 1, col. 1.

Some Things Should Not Pop Out of the Toaster:
Commentary on Product Liability Settlement
Disclosure Proposal, New York Law Journal,
July 25, 1990, p. 2, col. 3.

The Mini-Trial: Bifurcation as an Efficient Device to
Promote Resolution of Civil Cases, 53 Albany L.
Rev. 19 (1988) (Chair and principal author of
published committee report).

Competitive Bidding under the Robinson-Patman Act
(co-authored with A. Daniele), 49 St. John's L.
Rev. 512 (1975).

New York Regulation of Condominiums, 48 St. John's L.
Rev. 974 (1974).

Speeches

Remarks, Investiture of United States Attorney for the
District of Connecticut, Honorable Kevin
O'Connor (Jan. 16, 2003).

Remarks, Unveiling of Portrait of District Judge Kevin
Thomas Duffy (Jan. 6, 2003).

Presentation, Emory Buckner Award to Daniel L.
Greenberg, President of the Legal Aid Society
(Nov. 27, 2002).

Remarks, Unveiling of Portrait of Circuit Judge Joseph M. McLaughlin (June 27, 2002).

Presentation, Learned Hand Award to Chief Judge John M. Walker, Jr. (May 1, 2002).

Remarks, Unveiling of Portrait of Judge Thomas P. Griesa, 181 F. Supp. 2d (2002).

Presentation, Learned Hand Award to Justice Anthony M. Kennedy (May 1, 2001).

Remarks, St. John's Law Review Dinner (Mar. 13, 2001).

Eulogy, District Judge David N. Edelstein (Aug. 21, 2000)

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; October 15, 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.

Departmental Disciplinary Committee of the First Judicial Department (1988-94; 1997-2002); Hearing Panel Member (1988-90), Hearing Panel Chair (1990-93), Policy Committee Member (1997-2002). Appointed by the Presiding Justice of the Appellate Division, First Department. The Departmental Disciplinary Committee is the body responsible for attorney discipline in Manhattan and the Bronx.

Court Special Purpose Fund Committee, Eastern District of New York (2002-present); appointed by Chief Judge. Arbitrator, Eastern District of New York (1986-present); appointed by Chief Judge

Mediator, Southern District of New York (1994-present); appointed by Chief Judge

**4th Congressional District Screening Committee for U.S. Military Academies (1995-96)
appointed by Congressman Dan Friesa (NY).**

**Mayor's Panel on Martin Luther King, Jr.
Institute for Law and Social Justice (1987-89);
appointed by Mayor Edward I. Koch**

Queens Community Board # 2 (approx. 1976-81); appointed by Thomas Manton, City Councilman

- (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;

**Law Clerk, Honorable Kevin Thomas Duffy (1975 to 1977)
United States District Court, Southern District of New York**

(2) 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 affiliated, and the nature of your affiliation with each.

**Cahill Gordon & Reindel
80 Pine Street
New York, NY 10005
Partner (1983 to present)
Co-Administrative Partner (1985-88)
Associate (1977 to 1983)**

(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 field of complex commercial litigation, including securities, antitrust, intellectual property, professional responsibility, employment and products liability litigation.

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

Typical clients are corporations (or their officers or directors) who are parties to complex civil litigation in state or federal court or in arbitration. I do not hold myself out as being specialized in particular types of complex civil litigation.

(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 regularly in Court. I have appeared in state or federal courts in at least a dozen states.

(2) Indicate the percentage of these appearances in

- (A) federal courts; **65%**
- (B) state courts of record; **35%**
- (C) other courts.

(3) Indicate the percentage of these appearances in:

- (A) civil proceedings; **97%**
- (B) criminal proceedings. **3%**

(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.

Eleven trials. Three cases to verdict as lead counsel (opening, summation and all major examinations); one case as co-lead counsel (examining 7 of 11 witnesses); one case to verdict as co-counsel (cross-examining opposing party's CEO); six cases as national co-ordinating counsel (arguing motions in limine, jury instructions). In addition, lead trial counsel in three arbitrations before the American Arbitration Association.

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

72%

(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.

From November 2000 through February 2003, I served as counsel to the maternal aunt and "psychological mother" of a child whose mother is deceased in a custody dispute in Queens Family Court. I have spent in excess of 100 hours on this matter. I have personally appeared in Court on this matter on eleven occasions.

In 1997, I served as guardian ad litem to a mentally impaired homeless person who was in the process of being evicted from a shelter which was closing. I spent approximately 40 hours on this matter.

In approximately 1980, I represented a prisoner (and later his estate) in a suit against a governmental authority concerning the lawfulness of his arrest. I spent in excess of 100 hours on this matter.

Presently, I serve as a member of the Board of Directors of Legal Aid Society which renders legal services without charge to the poor.

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.

Kingscroft Insur. Co. Ltd., et al. v. American Centennial Insur Co., et al., 604780/98, Supreme Court, New York County (June 2001). Co-lead counsel in jury trial representing over 80 excess insurers on

claim for allocation of defense costs between primary and excess insurers (examined 7 of 11 trial witnesses). Jury agreed that the primary insurers' allocation formula was wrong but disagreed with the excess carriers on the allocation amount. No appeal was pursued by the excess carriers and the judgment was paid.

Judge: Hon. Ira Gammerman. Opposing Counsel: Paul R. Koepff, Esq., O'Melveny & Myers LLP, Citigroup Center, 153 East 53rd Street, New York, NY 10022, (212) 326-2000 and Peter Hoenig, Esq., Biedermann, Hoenig, Massamillo & Ruff, P.C., 90 Park Avenue, New York, NY 10016, (212) 697-6555. Co-counsel: Dean Nicyper, Esq., Flemming, Zulack & Williamson, LLP One Liberty Plaza, New York, NY 10006, (212) 412-9500.

In re Corel Securities Litigation, 00CV1257(AB), United States District Court, Eastern District of Pennsylvania. Lead counsel for defendant Corel Corporation in consolidated class action securities litigations alleging false and misleading statements by the corporation and its then chief executive officer concerning quarterly results and future prospects. The case remains pending. Judge: Hon. Anita Brody. Lead Opposing Counsel: Robert P. Frutkin, Esq., Law Offices of Bernard M. Gross, P.C., 1515 Locust Street, 2nd Floor, Philadelphia, PA 19102, (215) 561-3600, and Paul J. Scarlato, Esq., Weinstein Kitchenoff Scarlato & Goldman Ltd, 1608 Walnut Street, Suite 1400 Philadelphia, PA 19103, (215) 545-7200. Co-counsel: Jay A. Dubow, Esq., Wolf, Block, Schorr and Solis-Cohen LLP, 1650 Arch Street, 22nd Floor Philadelphia, Pennsylvania 19103, 215-977-2000 and Peter N. Wang, Esq., Friedman, Wang & Bleiberg, P.C., 90 Park Avenue, New York, NY 10016, 212-682-7474. Case is pending. See 147 F. Supp. 563 (E.D. Pa. 2001), 206 F.R.D. 533 (E.D. Pa. 2002).

Anchor Glass Container Corp. v. Owens-Illinois, Inc., No. 8:01-CV-1849-T-24TBB, United States District Court, Middle District of Florida, Tampa Division. Co-Lead Counsel to plaintiff Anchor Glass Corporation in antitrust suit brought against Owens Illinois, Inc. Suit alleged an attempt to monopolize by blocking a sale of Anchor to a competitor of Owens-Illinois. The case was settled. Judge: Hon. Susan C. Bucklew. Opposing Counsel: Joseph F. Tringali, Esq., Simpson Thacher & Bartlett, 425 Lexington Avenue New York, NY 10017, (212) 455-2000, and Richard M. Blau, Esq., Holland & Knight LLP, Post Office Box 1288, Tampa, FL 33601, (813) 227-8500. Co-counsel: Chris S. Coutrulis, Esq., Carlton Fields, P.A., 777 South Harbour Island Boulevard, Tampa, FL 33601, (813) 223-7000.

In re Corel Securities Litigation, 98 Civ. 1296 (DRH), United States District Court, Eastern District of New York. Lead counsel for defendants Corel Corporation and Michael C. Cowpland in consolidated class action securities litigations alleging improper accounting resulting in a restatement of earnings and alleging insider trading. Negotiated a settlement of all class claims (for the sum of approximately \$5.2 million) which was approved by the court. Judge: Hon. Denis R. Hurley, Sr. Lead Opposing Counsel: Robert I. Harwood, Esq., Wechsler Harwood LLP, 488 Madison Avenue, 8th Floor New York, NY 10022, (212) 935-7400 (while there were numerous other listed counsel, none other than Mr. Harwood actively participated). Co-Counsel: Peter N. Wang, Esq., Friedman, Wang & Bleiberg, P.C., 90 Park Avenue New York, NY 10016, (212) 682-7474.

General Conference Corporation of Seventh-Day Adventists v. W.R. Grace & Company, Civil No. 74365, Circuit Court, Montgomery County, MD (Feb. 1993). Lead trial lawyer for defendant W.R. Grace & Co. in jury trial (13 trial days) of \$8.5 million claim by church group for the costs of

removing materials from worldwide headquarters. All claims for punitive damages were dismissed and the jury awarded compensatory damages of approximately \$4 million. Judge: Hon. L. Leonard Ruben. Opposing Counsel: Kenneth B. McClain, Esq., Humphrey, Farrington & McClain, P.C., 221 West Lexington, Suite 400, P.O. Box 900 Independence, MO 64051, (816) 836-5050.

In re Asbestos School Litigation, Master File No. 83-268, United States District Court, Eastern District of Pennsylvania (final approval hearing September 1995). Negotiated and took the lead in obtaining judicial approval of class settlement brought on behalf of all primary and secondary, public and private schools in the country (class members included over 20,000 school districts) in which damages in excess of \$1 billion were sought, Judge: Hon. James T. Giles. Lead Co-Counsel (numerous co-defendants): J. Gordon Cooney, Jr., Esq., Morgan, Lewis & Bockius LLP, 1701 Market Street Philadelphia, PA 19103 (215) 963-5000. Lead Opposing Counsel (numerous class counsel): David and Harold Berger, Esqs., Berger & Montague, P.C., 1622 Locust Street Philadelphia, PA 19103, (215) 875-3000.

Dranchak v. Akzo America, Inc., Civil Action No. 92 C 1295, United States District Court, Northern District of Illinois (Eastern Div.) (April 1994). Acted as lead trial lawyer in combined jury and bench trial (12 trial days) defending against age discrimination, contract and ERISA claims by corporation's 52 year old former Director of Human Resources who sought in excess of \$4 million in damages. Judge: Hon. Paul V. Gadola. Opposing Counsel: Shayle Fox, Esq., Holland & Knight LLC 55 West Monroe Street, Suite 800 Chicago, IL 60603 (312)-263-3600. Co-counsel. Paul E. Starkman, Esq., Arnstein & Lehr, Suite 1200, 120 South Riverside Plaza, Chicago, IL 60606 (312) 876-7100. Resulted in judgment in

favor of client affirmed on appeal. Argued the appeal in the Seventh Circuit on March 29, 1996, 88 F. 3d 457 (7th Cir. 1996).

Merrick Industries, Inc., et al. v. General Signal Corporation, et al., Case Number 95-50225, United States District Court, Northern District of Florida (Panama City Div.) (evidentiary hearing in September 1995; amended to add federal and state antitrust claims). Lead counsel for defendant General Signal Corporation in its successful opposition to preliminary injunction by purchaser of business which manufactured coal feeders for power generation plants who claimed seller had violated non-compete provision. Judge: Hon. Roger Vinson. Opposing Counsel: James W. Hawkins, Esq., (presently) Kimberly-Clark Corporation, Roswell, GA and Clifford W. Sanborn, Esq., Barron, Redding, Hughes, Fite, Fensom, Sanborn & Kiehn, P.A. 220 McKenzie Avenue, P.O. Box 2467 Panama City, FL 32402, (850) 785-7454. Co counsel: J. D. Smith, Esq., McDonald, Fleming, Moorhead, Ferguson, Green & Smith, LLP, Madison Park, Suite 13, 4300 Bayou Boulevard, Pensacola, FL 32503 (850) 477-0660.

Akzo v. E.I. du Pont de Nemours & Company, United States District Court, Eastern District of Virginia. Co-trial counsel for Akzo in patent/fraud non-jury trial in the area of aramid fiber technology, See 810 F.2d 1148 (Fed. Cir. 1987). Judge: Hon. Richard L. Williams. Opposing Counsel: Joseph M. Fitzpatrick, Esq., Fitzpatrick, Cella, Harper & Scinto, 30 Rockefeller Plaza, New York, NY 10112, 212-218-2100. Co-Counsel: C. Frederick Leydig, Esq., Leydig, Voit & Mayer, Ltd. Two Prudential Plaza, 180 North Stetson Avenue, Suite 4900 Chicago, IL 60601, 312-616-5600. Decision reported at 663 F. Supp. 603 (E.D. Va. 1987), aff'd, 810 F.2d 1148 (Fed. Cir.1987). Also co-trial counsel in related proceedings before the United

**States International Trade Commission, Akzo N.V.
v. U.S. ITC, 808 F.2d 1471 (Fed. Cir. 1986).**

**TLX Acquisition Corp. v. The Telex Corporation, Case
No. CIV-87-2056-R, United States District Court,
Western District of Oklahoma (1987). Acted as
special counsel to board of directors of Telex
Corporation on hostile tender offer and
participated in litigation in Northern and Western
Districts of Oklahoma, as well as Delaware and
Oklahoma state courts, including arguing the
constitutionality of the Oklahoma Takeover
Disclosure Act. Judge: Hon. David L. Russell.
Opposing Counsel: (now) Hon. John S. Martin,
Jr., United States District Court, Southern District
of New York, (212) 637-0228. Co-Counsel: Joel L.
Wohlgenuth, Norman Wohlgenuth Chandler &
Dowdell, 2900 Mid Continent Tower Tulsa, OK
74103, (918) 583-7571.**

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

No.

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

None.

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

I will comply with all existing codes governing judicial

conduct. For an indefinite period, I will not sit on cases in which my former firm appears as counsel. I will not sit on any case to which a former client is a party and is substantially related to the work I have done for that client.

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?

Yes.

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

Yes.

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

I was interviewed by a federal judicial screening committee appointed by Governor George Pataki of New York. I was interviewed by members of the Office of White House Counsel, Office of Legal Policy of the Department of Justice and the FBI.

- (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.

Senator SESSIONS. Judge Feuerstein?

**STATEMENT OF SANDRA J. FEUERSTEIN, NOMINEE TO BE
DISTRICT JUDGE FOR THE EASTERN DISTRICT OF NEW YORK**

Judge FEUERSTEIN. Good morning, Mr. Chairman. Good morning, Senator Schumer.

I have no formal opening statement, but I would like to welcome family and friends here today. First of all my mother, Judge Annette Elstein, who is an Immigration Judge; my husband, Albert, who was born in Brooklyn, Senator Schumer. That's good, right?

[Laughter.]

Judge FEUERSTEIN. My terrific sons, Adam Feuerstein, who is here with his wife, Karen and my granddaughter, Arielle; my wonderful son, Seth, who's here with his wife Sharon and my grandsons. I think they're watching on closed circuit TV which is why it's quiet here. My grandsons Jacob and Joshua. My dear friends, Joan Katz, Phil and Joyce Glickman, Nan Weiner, Dale Twillis and Arlene Zalayet, have also accompanied me here today.

Senator SESSIONS. Outstanding. We are glad that you are all here.

Senator SCHUMER. If they are in the room, could we have them stand? I just like to see them. It is nice.

Judge FEUERSTEIN. Well, I would like you to see Arielle's dress because it's quite spectacular, but perhaps afterwards.

Senator SCHUMER. Welcome.

Senator SESSIONS. Thank you.

Judge FEUERSTEIN. Thank you.

[The biographical information of Judge Feuerstein follows:]

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

1. **Name:** Full name (include any former names used).
Sandra Jeanne Elstein Feuerstein
2. **Position:** State the position for which you have been nominated.
U.S. District Judge, Eastern District of New York
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.

100 Supreme Court Drive
Mineola, New York 11501
(516) 571-3337
4. **Birthplace:** State date and place of birth.
01/21/46, New York, 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.

Married
Albert I. Feuerstein, attorney, self-employed; part-time staff of Senator Kemp Hannon,
1600 Stewart Avenue, Westbury, N.Y.
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.

Benjamin N. Cardozo School of Law J.D., cum laude, 1976 - 1979
Hunter College, 9/66 - 12/70, 30 Graduate Credits, No Degree
University of Vermont, 1962-1966, B.S.
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.

Director, Benjamin N. Cardozo School of Law;
 Director Emeritus, Former Director South Nassau Communities Hospital;
 Director, Adelphi University Breast Cancer Hotline & Support Center Advisory Board;
 Founding and Honorary Director, 1 in 9 Breast Cancer Coalition;
 Former Board Member, L.I. Arts Center at Freeport;
 Director, Long Island Development Corporation; Merrick Senior Center Counsel
 Justice of the New York State Appellate Division, Second Department 1999-Present,
 45 Monroe Place, Brooklyn, New York 11201,
 New York State Supreme Court Justice 1994-1999, 100 Supreme Court Drive,
 Mineola, New York 11501,
 Nassau County District Court Judge 1987-1994, 99 Main Street, Hempstead, New
 York 11550,
 Law Clerk to Justice Leo H. McGinny, Administrative Judge, NYS Supreme Court,
 1985-1987, 100 Supreme Court Drive, Mineola, New York 11501.
 Supreme Court Law Department 1980-1985, 100 Supreme Court drive, Mineola,
 New York 11501;
 Union Free School District #31 - Island Park, New York, Teacher, 1966-1971

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.

Judge of the Year, Long Beach Lawyer's Association, 1996;
 Woman of the Year, Merrick Chamber of Commerce, 1993;
 Judge of the Year, Court Officers Benevolent Association of Nassau County, 1992;
 Humanitarian Award, Education Assistance Corporation, 1992;
 Pathfinder Award, Town of Hempstead, 1992;
 Pro Bono Recognition Award, Nassau County Bar Association, 1990;
 Achiever's Award, American Jewish Congress, Long Island Region, 1990;
 Achiever's Award, L.I. Center for Business and Professional Women, 1990;
 Outstanding Committee Chairperson of the Year Award, Nassau County Bar Association,
 1989;
 Mesivta Torah Award, 1986

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.

Bar Association Memberships:

New York State Bar Association; Lecturer: Ethics, Appellate Practice, Federal and State Civil Motion Practice;

Nassau County Bar Association; Director, 1988-1991; Director Nassau County Bar Association "We Care", 1994-Present;

Former Committees: Judicial Section Chair, 1996-1998; Vice Chair, 1993-1996; Public Education, Criminal Law and Procedure, Publications, Courts, Medical-Legal Membership, Tax Certiorari, Condemnation, Matrimonial, Mock Trial Tournament Judge, 1998-2000; Academy of Law Moot Court Competition Judge, 1984, 1987, 1996; "Lawyer in Classroom" Project, 1982-1983;

Nassau County Women's Bar Association: President, 1988-1989;

Nassau County Columbian Lawyers;

Women's Bar Association of State of New York: Delegate, Nassau County, 1990;

Judiciary Committee, 1985-1986; Special Matrimonial Committee, 1985-1986;

Discovery Oversight Committee for the Eastern District of New York 1983-1986;

Committee on Civil Litigation for the Eastern District of New York 1989-1990;

Task Force on Reducing Litigation Cost and Delay for the 10th Judicial District Co-Chair 1996-1998;

Advisory Committee on Judicial Ethics for New York State, 1996-Present;

Task Force on Family Violence for New York State, 1996-Present;

New York State Gender Fairness Committee, 1999-Present

Gender Bias Committee for the 10th Judicial District, 1994-Present; Chair, 1995-1996;

New York State Women's Judges Association, President-Elect; Vice President, 1998-2001;

Benjamin N. Cardozo School of Law, Board of Directors;

Hofstra University Law School, 1998-Present, Adjunct Professor;

Nassau County Domestic Violence Seminar Chair, 2002, 2001, 1995; Tenth Judicial

District Domestic Violence Seminar Chair, 1997, 1998; Nassau County Judicial

Advisory Council, 1993-2000;

Franklin D. Roosevelt Inns of Court Master, 1989;

Nassau County Landlord-Tenant Pro Bono Project, Founder 1987;

Nassau County Executive's Blue Ribbon Panel on Domestic Violence, 1989;

Town and Village Justice Continuing Judicial Education Lecturer, 1987;

Trial Defense Bar of Nassau County Lecturer, 1987

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:

New York State, January 1980;
 U.S. Tax Court, March 1981;
 U.S. District Court, Eastern and Southern Districts of New York, May 1983;
 U.S. Supreme Court, May 1988;
 U.S. Court of Military Appeals, May 1988

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

Kiwanis, Merrick Chapter;
 American Cancer Society and Cancer Care: Life Member and Former Board Member
 Long Beach Chapters;
 Long Beach Memorial Hospital Auxiliary Life Member;
 Hadassah Life Member;
 National Council of Jewish Women, Life Member;
 Congregation Ohav Shalom, Merrick, N.Y., UJA Chairperson, 1986;
 Cardozo School of Law of Yeshiva University, Founding Director of the Alumni
 Association; Dean's Counsel;
 Long Island Center for Business and Professional Women

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.

Co-Author, Handling a Criminal Case in New York: Practice Guide, West Group, 1994-
 Present (updated annually), Detailed and Extensive Reference Text of Criminal
 Procedure in New York State;
 Author of numerous published articles, Nassau Lawyer, 1984-1989:
 "PERSONAL INJURY THRESHOLD ISSUE REQUIRES VERY
 CAREFUL CONSIDERATION";
 "TENANT CAN BE PROTECTED IN DEFAULT SUITS";
 "COURT ENJOINS USE OF CUSTOMER'S LIST AND FILES";
 "ASARCH, ZALAYET, STARK, BRINT RECEIVE AWARDS
 FROM ASSOCIATION"

"COMMITTEE INTRODUCES NEW FEE DISPUTE PROCEDURES"
 "EDITORIAL - April 1989"
 "PIERCE IS TO BE HONORED AT ANNUAL DINNER-DANCE"
 "JUDGE UPHOLDS DENIAL OF A ZONING VARIANCE"
 "AFFATATO PROMISES CONTINUED GROWTH FOR NCBA"
 "PROPERTY ACQUIRED AFTER THE BREAKDOWN OF MARRIAGE
 NOT SUBJECT TO DISTRIBUTION"
 "OUTCOME OF 'ONE PERCENT TRIAL' WILL BE DEBATED FOR A
 LONG TIME"
 "NEW IRS AMENDMENT AFFECTS PROPERTY TRANSFER"
 "PLAINTIFF IS ENTITLED TO RESCIND ITS BID ON CONTRACT"
 "BUSINESS RECORD RULED INADMISSIBLE BY COURT"
 "LICENSE IS RULED PART OF VALUE OF A BUSINESS"
 "ROSLYN HIGH TEAM EMERGES TRIUMPHANT IN THE MOCK
 TRIALS"
 "JUDGE DIAMOND INITIATING CHANGES IN FAMILY COURT"
 "AN INTERVENTION PROGRAM IN KINDERGARTEN CANNOT BE
 CONSIDERED SPECIAL TENURE AREA"
 "COURT RULES ON PROPER DATE OF PROPERTY VALUATION"
 "DEFENDANT'S AGE NOT PROPER AS BASIS FOR TRIAL
 PREFERENCE"
 "DUNNE OUTLINES GOALS OF JUDICIARY COMMITTEE"
 "COURTS RULE ON IRREPARABLE INJURY IN PRELIMINARY
 INJUNCTIONS"
 "RAGGI WELCOMES NEW CHALLENGES AS JUDGE IN FEDERAL
 DISTRICT COURT"

Nassau Lawyer: Editor, 1987-1989; Associate Editor, 1984-1987

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.

Have never testified before Congress.

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

Excellent - Date of last physical exam: June 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;

People v Diggs, 140 Misc 2d 794, 531 NYS2d 723, aff'd 144 AD2d 382, 534 NYS2d 870
At a preliminary hearing to establish whether there is a reasonable basis to believe defendant committed a felony and sufficient evidence to hold defendant for the grand jury, defense counsel moved for disclosure of the complainant's prior statements to law enforcement for cross-examination. I held that CPL 240.44 requires the prosecution to provide Rosario material (prior statements of testifying witnesses) at a felony hearing, construing it to be a pretrial hearing.

People v Merriweather, 139 Misc 2d 1039, 529 NYS2d 426
The defendant held himself out as an architect, although unlicensed. I held that because the offense was "malum prohibitum," the unauthorized practice of architecture is a "strict liability" offense with no scienter requirement.

Lader v Finnerty, 172 Misc 2d 299, 658 NYS2d 191
Plaintiff, a disbarred attorney who was allegedly paid thousands of dollars for soliciting clients for a law firm sought a writ of prohibition to prevent the Grievance Committee from investigating his post-disbarment activities. I held that disbarred attorneys are subject to continuing jurisdiction of Grievance Committees to investigate and institute contempt proceedings for violations of orders of disbarment.

Tillman v Distribution Systems of America, n.o.r. (see attached) aff'd 224 AD2d 79, 648 NYS2d 630
Plaintiff homeowners repeatedly requested that news/advertising circulars deposited on front lawn not be delivered to their house. I held that plaintiffs are entitled to permanently enjoin deliveries of newspapers/advertisements on their property and there is no violation of defendant newspaper publishers constitutional rights of free speech by prohibiting unwanted delivery on private property.

Silver v Levittown, 180 Misc 2d 1015, 692 NYS2d 886
Although casual contact will not sustain a cause of action for negligent transmission, a wrestling competition is not casual contact. I held that the complaint stated a cause of action for negligent transmission of herpes simplex if defendant, aware of his condition wrestled with plaintiff and failed to disclose the condition.

Audiovox v Benyamini, 265 AD2d 135, 707 NYS2d 137
Pursuant to Court Rules, twenty (20) days having passed since a note of issue has been filed indicating the completion of discovery, defendant must demonstrate unusual or unanticipated circumstances and substantial prejudice in order to secure additional discovery.

Lopez v Imperial Delivery Service, 282 AD2d 190, 725 NYS2d 57
Section 3404 of the Civil Practice Law and Rules which provides a procedure for

“marking off” trial calendar cases should not be applied to cases which have not been placed on the trial calendar by filing a note of issue. (See also Bassetti v Nour, 287 AD2d 126, Standard for reinstatement of a case to the trial calendar).

People v Forbes, 283 AD2d 92, 728 NYS2d 64

Police Officers, pursuant to a lawful traffic stop, may constitutionally require the driver and all passengers to remain inside the vehicle until the traffic stop is concluded in order to minimize potential harm to officers and car occupants.

Zecca v Riccardelli, 293 AD2d 31, 742 NYS2d 76 (May 8, 2002)

In New York, personal injury negligence cases are generally bifurcated for trial requiring a determination of liability prior to a trial on damages. Although “serious injury” is an element of a personal injury automobile cause of action, I held that it must be separately established by a plaintiff and that the granting of summary judgment on the issue of liability does not necessarily establish “serious injury.”

People v Lamont, n.o.r. (see attached)

Defendant’s speedy trial rights were not violated by the People’s failure to demonstrate due diligence to secure the presence of a defendant who has used twenty seven (27) aliases and secured three (3) State identification numbers.

- (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

Rita Boscolo, et ano v County of Nassau, et al, n.o.r. (see attached) rev’d 229 AD2d 457 (1996)

I found that the plaintiff, who had tripped and fallen on a Village street, had raised a triable issue of fact as to whether the Village had created the alleged defect which caused plaintiff to fall. The Appellate Division found no issue of fact regarding the creation of the defect by the Village and, therefore, plaintiffs’ failure to serve a Notice of Claim mandated the granting of summary judgment to the defendant Village.

Joseph Cacaccio v Melanie J. Martin, et al, n.o.r. (see attached) rev’d 235 AD2d 384 (1997)

I denied defendant’s motion for summary judgment, finding plaintiff had raised a triable issue of fact as to whether he had sustained a “serious injury”, a necessary predicate to suit under New York State Insurance Law. The Appellate Division reversed, finding that the affidavit of plaintiff’s chiropractor was insufficient to demonstrate a causal nexus between the accident and plaintiff’s injury.

Ralph Borelli v 1051 Realty Corp. et ano, n.o.r. (see attached) rev’d 242 AD2d 517 (1997)

The Appellate Division reversed my denial of summary judgment and dismissed the complaint, holding that the plaintiff failed to raise issues of fact whether the corporation he

sued had hired employees of the bar where plaintiff was allegedly assaulted or whether his assailant was an employee of the bar.

Stanley O. Casey v Chemical Bank, et al, n.o.r. (see attached) 245 AD2d 258 (1997)
I held the defendant Bank liable for costs and sanctions for “freezing” plaintiff’s bank accounts, because my prior order had only restrained the plaintiff, a defendant in a matrimonial action from utilizing the funds improvidently. The Appellate Division held that the Bank’s conduct did not support the imposition of sanctions.

Damian B. Bous, et ano v Kathleen A. Fahey, et ano, n.o.r. (see attached) 250 AD2d 638 (1998)
The Appellate Division found that plaintiff’s conduct was the sole proximate cause of the accident and dismissed the complaint.

Meadow Farms Realty Corp. Ltd. v Peter A. Pekich, Jr., et al, n.o.r. (see attached) 251 AD2d 634 (1998)
I held the complaint was untimely. The Appellate Division held that, because the County had denied plaintiff due process and, since his challenge was to the constitutionality of the notice provision, the Statute of Limitations did not bar the action.

Hentschel v Robert Campbell Carpet Services, n.o.r. (see attached) 256 AD2d 500 (1998)
I granted summary judgment to the defendant whose vehicle was struck by plaintiff’s vehicle when plaintiff crossed into defendant’s oncoming lane of traffic. The Appellate Division held that the motion was premature and reversed with leave to renew following disclosure.

Tig Insurance Co. v Peter Pellegrini, n.o.r. (see attached) 258 AD2d 658 (1999)
The Appellate Division ordered the parties to arbitration, reversing a stay I had granted, because the basis for the stay, that respondent Pellegrini failed to obtain consent from his insurer prior to settlement of the case, had been raised for the first time in the insurer’s reply papers.

Hausman Realty Co., Inc. v Irene Klaver, et ano, n.o.r. (see attached) 262 AD2d 613 (1999)
I denied a motion to dismiss the complaint for failure to state a cause of action. The Appellate Division dismissed holding that the handwritten “binder” of plaintiff’s decedent was unenforceable.

Nationwide Insurance Co. v Erika Sellman, n.o.r. (see attached) 266 AD2d 551 (1999)
The Appellate Division held that arbitration should be stayed pending a hearing to determine whether the offending vehicle was insured.

Joseph Silver v Levittown UFSD, et ano, n.o.r. (see attached) 270 AD2d 331 (2000)
I denied plaintiff’s contention that he was entitled to an infancy toll, relying on the subsequently overruled opinion of the Appellate Division.

Associated Aviation Underwriters v Island Helicopter, n.o.r. (see attached) 229 AD2d 409 (1996)

I denied renewal on a motion and signed a judgment for a retired Justice. The Appellate Division reversed the finding of the retired Justice that plaintiff had failed to rebut the presumption that it intended to abandon the case.

Maria Ege v Town of Oyster Bay, et al., n.o.r. (see attached) 241 AD2d 507 (1997)

The Appellate Division agreed with my decision that there was no actual notice of the defective condition, but found an issue of fact whether the County had constructive notice of the rotted tree limb which fell on plaintiff's vehicle.

John C. DiCocco v Alton L. Lawson, et al., n.o.r. (see attached) 254 AD2d 244 (1998)

I conducted an inquest based upon another judge's denial of defendant's motion to vacate its default. The Appellate Division held that the decision of the prior judge which permitted entry of the default judgment was incorrect and, therefore, also vacated the judgment following inquest.

Marilyn Schragar v Jack Klein, n.o.r. (see attached) 267 AD2d 296 (1999)

The Appellate Division held that the plaintiff had failed to demonstrate entitlement to a preliminary injunction.

Cary Schwartz, et ano v Mark Nathanson, et al., n.o.r. (see attached) 261 AD2d 527 (1999)

The Appellate Division held that plaintiffs' motion to vacate their default should have been granted.

Paulette Bilella v Patricia Singh, n.o.r. (see attached); rev'd n.o.r. (1991) (see attached)

The Appellate Term panel held that the small claims plaintiff was entitled to a second vacatur of her default.

People v Schmitt, n.o.r. (unavailable); rev'd n.o.r. (1992) (see attached)

The Appellate Term panel held that defendant's conviction of speeding, upon a bench trial, was based upon legally insufficient evidence.

Gabriele Hammerstein-Rosenhain v Robert L. Marcus, n.o.r. (unavailable); rev'd n.o.r. (see attached)

The Appellate Term panel ordered a new trial of this small claims matter.

People v Walcott, n.o.r. (see attached); rev'd n.o.r. (see attached)

The Appellate Term panel held that the initial arrest of defendant upon an outstanding warrant was a pretext to search defendant for drugs.

- (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.

People v Forbes, 283 AD2d 92

Police Officers, pursuant to a lawful traffic stop, constitutionally require the driver and all passengers to remain in the vehicle.

Tillman v Distribution Systems of America, n.o.r. (see attached) aff'd 224 AD2d 79, 648 NYS2d 630

Homeowner is entitled to enjoin newspaper/advertisement deliveries on their property.

People v Lamont, n.o.r. (see attached)

Defendant who has used twenty-seven (27) aliases and secured three (3) state identification numbers, cannot claim a violation of speedy trial rights, based upon People's failure to locate him.

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

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

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

In 1980 I was an unsuccessful candidate for the New York State Assembly.

- (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.

N/A

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

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

Supreme Court Law Department 1980-1985 (Clerk Pool)
Nassau County District Court Judge 1987 - 1994, 99 Main Street,
Hempstead, New York 11550
New York State Supreme Court Justice 1994 - 1999, 100 Supreme
Court Drive, Mineola, New York, 11501
Justice of the New York State Appellate Division, Second

Department 1999-Present. 45 Monroe Place, Brooklyn, New York 11201.

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

Law Clerk to Justice Leo H. McGinity Administrative Judge, New York State Supreme Court, 100 Supreme Court Drive, Mineola, New York 11501. 1985-1987

- (2) 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 affiliated, and the nature of your affiliation with each.

Supreme Court Law Department 1980-1985 (Clerk Pool)
Nassau County District Court Judge 1987 - 1994, 99 Main Street, Hempstead, New York 11550
New York State Supreme Court Justice 1994 - 1999, 100 Supreme Court Drive, Mineola, New York, 11501
Justice of the New York State Appellate Division, Second Department 1999-Present. 45 Monroe Place, Brooklyn, New York 11201.

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

Since admission to the bar in January of 1980, my career has been in the public sector.

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

N/A

- (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.

N/A

- (2) Indicate the percentage of these appearances in

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

N/A

(3) Indicate the percentage of these appearances in:

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

N/A

(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.

N/A

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

N/A

(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.

N/A

(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.

Although the rules of judicial conduct prohibit the rendering of legal services by judges, I have participated extensively in charitable and community activities. In addition, in 1987 I founded the Nassau County District Court Landlord-Tenant pro bono project, which provides attorneys for indigent tenants.

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;

N/A

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

N/A

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

N/A

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

N/A

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.

NONE

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

I am not aware of any potential conflict of interest. Should conflicts arise I will abide by the guidelines of Judicial Ethics.

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, but with permission of the Chief Judge of the Second Circuit, I may wish to continue teaching at Hofstra University and updating the text of "Handling a Criminal Case In New York" for West Publishing.

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

Please see attached Financial Disclosure Report.

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

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

YES

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

YES

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

I wrote to Governor Pataki's screening committee, requesting an application. I was interviewed by Governor Pataki's Committee on Federal Judicial Appointments on February 28, 2002 and by White House Counsel's Office on May 2, 2002. I filled out forms, was interviewed by the Federal Bureau of Investigation and nominated.

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

NO

FINANCIAL STATEMENT

NET WORTH

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

ASSETS			LIABILITIES		
Cash on hand and in banks (see Schedule A)	461065.40		Notes payable to banks-secured		0
U.S. Government securities-add schedule			Notes payable to banks-unsecured		0
Listed securities-add schedule (see Schedule B)	568224.12		Notes payable to relatives		0
Unlisted securities-add schedule (see Schedule C)	100.00		Notes payable to others		0
Accounts and notes receivable:	13500.00		Accounts and bills due Current		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 (see Schedule F)	353868.00	
Real estate owned-add schedule (see Schedule D)	236500.00		Chattel mortgages and other liens payable		0
Real estate mortgages receivable	0		Other debts-itemize:		0
Autos and other personal property	15000.00				
Cash value-life insurance	0				
Other assets itemize: (see Schedule E)	17000.00				
			Total liabilities	353868.00	
			Net Worth	3474021.52	
Total Assets	3827889.52		Total liabilities and net worth	3827889.52	
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 Letter of	10000.00				

Credit Approx.

Senator SESSIONS. Mr. Holwell?

STATEMENT OF RICHARD J. HOLWELL, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK

Mr. HOLWELL. Thank you, Senators. I too have no prepared remarks, but I would like to introduce my beautiful wife of 32 years, Nancy; my two wonderful daughters, Ana and Eve; my sister-in-law Barbara; and my good friend, Hon. Paul Friedman, a District Court Judge here in the District of Columbia.

Senator SESSIONS. Very good. If you would stand. We are delighted to have you with us.

[The biographical information of Mr. Holwell follows:]

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

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

Response:

Richard James Holwell

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

Response:

United States District Court Judge
Southern District of New York

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.

Response:

White & Case LLP
1155 Avenue of the Americas
New York, NY 10036
(212) 819-8816

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

Response:

July 2, 1946
New York, NY

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.

Response:

Married
Nancy Butera Holwell
Architect
Self-employed
630 9th Avenue
New York, NY 10036
(212) 307-0688
One dependent child

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

Response:

1. Cambridge University
Institute of Criminology
September 1970 to June 1971
Dip. Crim. (1971)
2. Columbia University
School of Law
September 1967 to June 1970
J.D. *cum laude*, (1970)
3. Villanova University
September 1963 to June 1967
B.A. (1967)

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.

Response:

1. White & Case LLP
1155 Avenue of the Americas
New York, NY 10036
Associate (1971 to 1979)
Partner (1979 to date)
2. United States Attorney's Office
Southern District of New York
1st Andrews Plaza
New York, NY 10038
Summer intern – Criminal Division
June 1969 to August 1969
3. Lizza Brothers Construction Co.
Mineola, NY (out of business)
Laborer
June 1967 to August 1967
June 1968 to August 1968

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.

Response:

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.

Response:

1. Villanova University: President's List, Dean's List, Chairman of Honor Code Committee, Sr. Class President, Who's Who in America Colleges and Universities (1967).
 2. Columbia Law School: graduated cum laude (1970).
 3. Cambridge Institute of Criminology: awarded Columbia – Cambridge Fellowship in Criminology (1971).
 4. Professional: Pro Bono Award, NAACP Legal Defense and Educational Fund, Inc., (1987).
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.

Response:

1. American Bar Association
member since mid – 1970's
 2. N.Y.S. Bar Association
member since mid – 1970's
 3. The Law Society (London)
member since 2001
 4. Departmental Disciplinary Committee
New York State Supreme Court
Appellate Division, First Department
Chairperson of Panel I
member since 1999
11. **Bar and Court Admissions:** List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the

reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Response:

1. - New York State Supreme Court, First Department
(admitted 2/72)
2. U.S. District Court for the Southern District of New York
(admitted 10/31/74)
3. U.S. Court of Appeals for the Seventh Circuit
(admitted 9/5/80)
4. U.S. Court of Appeals for the Second Circuit
(admitted 9/9/82)
5. U.S. Court of Appeals for the Sixth Circuit
(admitted 11/4/83)
6. Supreme Court of the United States
(admitted 3/31/86)
7. U.S. District Court for the Eastern District of New York
(admitted 4/15/96)
8. U.S. District Court for the Northern District of New York
(admitted 1/8/98)
9. U.S. District Court for the Western District of New York
(admitted 1/16/02)
10. Register of Foreign Lawyers (London)
(admitted 1/16/02)

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.

Response:

1. New York Yacht Club
1986 to date (bylaws attached)

2. New York Athletic Club
2001 to date (bylaws attached)
3. Downtown Athletic Club
1979 to 1986
4. Phi Delta Phi Legal Fraternity
1967 to 1970

To my knowledge, none of these organizations has discriminated during my membership 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.

Response:

None

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

Response:

I have never testified before any legislative body.

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

Response:

The state of my health is excellent. My last physical was June 4, 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 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.

Response:

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.
- (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.

Response:

- (a) I have never held public office.
- (b) I have never held a position in a political campaign.

18. Legal Career: Please answer each part separately.

- (a) Describe chronologically your law practice and legal experience after graduation from law school including:
 - (1) whether you served as clerk to a judge, and if so, the name for the judge, the court and dates of the period you were a clerk;
 - (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.

- (b) (1) Describe the general character of your law practice and indicate by date if and when its character has changed over the years.
- (2) Describe your typical former clients, and mention the areas, if any, in which you have specialized.
- (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.
- (2) Indicate the percentage of these appearances in:
 - (A) federal courts;
 - (B) state courts of record;
 - (C) other courts.
- (3) Indicate the percentage of these appearances in:
 - (A) civil proceedings;
 - (B) criminal proceedings.
- (4) State the number of cases in courts of record you tried to verdict or judgment rather than settled, including whether you were sole counsel, chief counsel, or associate counsel.
- (5) Indicate the percentage of these trials that were decided by a jury.
- (d) Describe your practice, if any, before the United States Supreme Court. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the U.S. Supreme Court in connection with your practice.
- (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.

Response:

(a) Chronology. (1) Following graduation from law school I attended Cambridge University and received a diploma in criminology in 1971. I did not serve as a judicial clerk. (2) I never practiced alone. (3) I joined the firm of White & Case as an associate in New York in September 1971. I became a partner of the firm in 1979 and have remained at the firm throughout my legal career.

(b) Character of Practice: (1) I have maintained a broad litigation practice with a number of sub-specialties that have evolved over the course of my career. During the 1970's I concentrated on antitrust law, representing clients in criminal price-fixing investigations and related civil class action litigation. During the 1980's I concentrated on securities law and

corporate law in connection with merger and acquisition matters. Typical representations would include SEC investigations and shareholder or hostile tender offer litigation in federal and state courts. During the 1990's my emphasis shifted towards banking industry matters including criminal and regulatory investigations, creditors' rights and lender liability litigation. During this period of time I also devoted substantial effort to the management of the firm becoming Executive Partner of the firm's global litigation practice and a member of the firm's Management Board.

(2) Typical clients include the State of New York, USX Corporation, Deutsche Bank, Newmont Mining Corporation, Credit Lyonnais S.A., Clark Equipment Company, MacMillan Blodel Paper Company, Holly Sugar Company, the Metropolitan Transportation Authority and MGM-United Artists, Inc. While I consider my areas of specialization to include securities, antitrust, insolvency, corporate fiduciary law and financial market matters, I have acted as lead counsel in a broad array of litigation matters including Indian law claims, construction disputes, insurance law issues, admiralty claims, civil rights cases, Rico complaints, and toxic tort / product liability matters.

(c) Court Appearances. (1) Over the course of my career my appearances in court have been frequent. As I have become the firm's senior litigation partner with responsibility for large litigation teams (four or five partners and fifteen associates would be typical) the frequency of my court appearances has diminished. This change has occurred over the past 3-5 years. (2) I estimate that 80% of my practice is in the federal courts and 20% in state courts including the Chancery Court of Delaware. (3) Practically all of these appearances are in civil proceedings. While a significant portion of my practice is criminal, these are white collar criminal matters that typically result in a negotiated resolution. (4) I have tried approximately fifteen cases to a final judgment or, in the case of matters such as hostile tender offers, to the issuance or denial of preliminary injunctions which effect a final resolution of the litigation. I have been chief counsel in twelve of these cases. (5) I have tried three of these cases before a jury, acting as chief counsel in one and associate counsel in two.

(d) Supreme Court Practice. I have identified two of my cases in which cert petitions have been filed. In both cases my client was the respondent. The cases are: (i) Radol v. Thomas, 556 F.Supp. 586 (S.D. Ohio, 1983); aff'd, 774 F.2d 1163 (6th Cir. 1985), cert denied, Armstrong v. Thomas, 475 U.S. 1086 (1986); (ii) Consolidated Gold Fields PLC, et al., v. Minorco S.A., et al., 871 F.2d 252 (2d Cir., 1989); 713 F.Supp. 1457 (S.D.N.Y. 1989) (on remand) cert denied, 492 U.S. 939 (1989). A brief in opposition was filed in Radol/Armstrong, a copy of which is attached. No opposition brief was filed in Consolidated Gold Fields.

(e) Pro Bono. I have been active in pro-bono matters throughout my career. As a young associate I was a volunteer at the Legal Aid Society handling individual cases such as landlord-tenant disputes and custody matters. As a senior associate and junior partner I was lead counsel in a 10 year class action litigation against the Long Island Railroad brought by a class of black employees under Title VII. Until recently, I served as a member of the firm's pro-bono committee with responsibility for supervising the firm's pro-bono activities. On average, I devote approximately 250 hours/year to pro bono matters.

19. **Litigation:** Describe the ten (10) most significant litigated matters which you personally handled, and for each provide the date of representation, the name of the court, the name of the judge or judges before whom the case was litigated and the individual names, 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.

Response:

In reverse chronological order:

1. The Oneida Indian Nation of New York, et al. v. The State of New York, et al., 74-CV-187, United States District Court, Northern District of New York (Kahn, Lawrence E.)

Reported Decisions: 194 F.Supp.2d 104 (N.D.N.Y. 2002); 201 F.R.D. 64 (N.D.N.Y., 2001), 860 F.2d 1145 (2d Cir., 1988); 649 F.Supp. 420 (N.D.N.Y. 1986)

Party Represented: Counsel for the NYS Thruway Authority and of counsel to the State of New York.

Co-Counsel:

G. Robert Witmer, Jr.
Nixon Peabody LLP
Clinton Square
P.O. Box 31051
Rochester, NY 14603
(716) 263-1609
Counsel for Defendants County of Madison and County of Oneida

David B. Roberts
Assistant Attorney General
State of New York
New York Department of Law

The Capital
Albany, New York 12224
(518) 473-3299
Counsel for New York State

John O'Mara
Davidson & O'Mara
243 Lake Street
Elmira, NY 14901
(607) 733-4635
Special Counsel for the Governor

Opposing Counsel:

William R. Taylor
Zuckerman, Spaeder, Goldstein, Taylor & Kessler LLP
1201 Connecticut Avenue
Washington, D.C. 20036
(202) 778-1800
Counsel for the Oneida Indian Nation of New York

Arlinda Locklear, Esq.
P.O. Box 243
Knoxville, MD 21758
(301) 473-5160
Counsel for the Oneida Tribe of Indians of Wisconsin

Carey R. Ramos
Paul Weiss Rifkin Wharton & Gavin
1285 Avenue of the Americas
New York, NY 10002
(212) 373-3240
Counsel for the Oneida of the Thames

Charles E. O'Connell, Jr.
Attorney, Department of Justice
Environment and Natural Resource Division
P.O. Box 44378
Washington, D.C. 20026

Nature of Case:

Plaintiff tribes assert claims covering 250,000 acres of land alleged to have been guaranteed to the Oneida by the United States in the 1794 Treaty of Canandaigua and allegedly wrongfully acquired by the State of New York in violation of the Indian Trade and Intercourse Act. At issue are 30 separate transactions beginning in 1795 pursuant to which the Oneida sold land to the State. Defendants have asserted numerous factual and legal defenses including (1) consent of the United States to the challenged transactions, (2) abandonment of the Oneidas, (3) ratification under the Treaty of Buffalo Creek and (4) laches.

Role:

I was retained in 2000 to assist the State in the development of a comprehensive strategy for the defense and, if possible, the settlement of this long-standing dispute as well as similar claims being asserted or threatened by other Indian tribes. I participate directly in this process and supervise younger lawyers also working on the matter. Although the matter was filed in 1974, related test cases have been up to the Supreme Court on several occasions and discovery has just begun. Intensive settlement negotiations are ongoing.

2. Robert T. Johnson v. George E. Pataki, et al., Civ. 1714-98, New York State Supreme Court, Bronx County, Civ. 1714-98 (Silver, Howard R.)

Reported Decisions: 91 N.Y.2d 214 (N.Y. Court of Appeals, 1997); 655 N.Y.S.2d 463 (First Department, 1997).

Party Represented: Gov. George Pataki

Co-Counsel:

Edward D. Saslaw
 Assistant Attorney General
 State of New York
 New York Department of Law
 120 Broadway
 New York, NY 10271
 (212) 416-8000
 Counsel to Co-Defendant
 Dennis C. Vacco, Attorney General
 of the State of New York

Opposing Counsel:

Anthony J. Girese
Counsel to the District Attorney
The Office of the Bronx County
District Attorney
198 East 161st Street
Bronx, New York 10451
(718) 590-2175
Counsel for Robert T. Johnson
District Attorney, Bronx County

Nature of Case:

The Bronx District Attorney initiated this proceeding to challenge the Governor's decision to remove the District Attorney from a homicide case on the grounds, inter alia, that the District Attorney had adopted a policy not to seek the death penalty in any case, which policy was contrary to the public policy underlying the State's new death penalty statute. Fact issues centered on whether the District Attorney had adopted such a policy and on the grounds articulated by the Governor for the exercise of his superseder authority. Legal issues included justiciability, separation of powers, the constitutional and statutory basis for the Governor's actions, alleged infringement of First Amendment rights and alleged infringement on the rights of the voters of Bronx County.

Role:

I acted as lead trial and appellate counsel for the Governor. The Governor's authority to supersede the District Attorney was upheld by the Supreme Court, Bronx County, the Appellate Division, First Department and, ultimately, by the Court of Appeals.

3. Molloy, et al. v. Metropolitan Transportation Authority, et al., 96 Civ. 7786, United States District Court, Eastern District of New York (Wexler, Leonard D.)

Reported Decisions: 94 F.2d 808 (2d Cir., 1996)

Party Represented: MTA and LIRR

Opposing Counsel:

Dolores Fredrich
Farrell, Fritz, Caemmer, Cleary, Bernosky & Armentano
EAB Plaza
West Tower, 14th Floor
Uniondale, NY 11562
(516) 227-0600
Counsel for Plaintiffs

Nature of the Case:

This was an action brought by Nassau and Suffolk Counties and three organizations representing the visually impaired seeking to enjoin the MTA from replacing ticket clerks at certain LIRR stations with automatic vending machines. The central legal and factual issue was whether the MTA's program constituted an "alteration" to the stations that violated the Americans with Disabilities Act.

Role:

I acted as lead trial and appellate counsel. The District Court upheld plaintiffs claims and enjoined the station closings. On an expedited appeal, the Court of Appeals for the Second Circuit lifted the injunction finding that the statute covered only physical alterations to a facility and that there was no irreparable harm as visually impaired passengers could purchase tickets without surcharge onboard trains.

4. Credit Lyonnais Bank Nederland, et al v. Tracinda Corporation, et al., 94 Civ. 2957, United States District Court, Central District of California (Real, Manuel L.)

Reported Decisions: None; related decisions, 43 Cal. Rptr. 327 (Cal. App. 2 Dist., 1995)

Party Represented: Credit Lyonnais S.A. and Credit Lyonnais Bank Nederland

Co-Counsel:

John J. Quinn
Arnold & Porter
777 Figueroa Street
Los Angeles, CA 90017
(213) 243-4080
Co-Counsel for Plaintiffs

Opposing Counsel:

Patricia L. Glaser
James Schrier
Christensen, White, Miller, Fink, Jacobs & Shapiro
2121 Avenue of the Stars
Los Angeles, CA 90067
(310) 553-3000
Counsel for Defendants

Nature of the Case:

This was a fraudulent conveyance action brought against the former owners of MGM-United Artists, Kirk Kerkorian and Tracinda Corp., arising out of the \$1.3 billion sale of the movie studio to Pathe Communications Corporation. Plaintiffs had financed most of the acquisition and alleged that both the seller and the buyer had engineered inflated income projections and asset valuations to fraudulently secure financing.

Role: I acted as plaintiff's lead counsel. The matter was resolved by settlement shortly before trial.

5. Credit Lyonnais Bank Nederland, et al. v. Pathe Communications Corp., Civ. No 12150, Court of Chancery of the State of Delaware, New Castle County, (Allen, William T.)

Reported Decisions: 1991 WL 277613 (Del. Ch. 1991)

Party Represented: Credit Lyonnais Bank Nederland

Co-Counsel:

Samuel A. Nolen
Richards Layton & Finger
One Rooney Square
Wilmington, DE 19899
(302) 651-7752
Co-Counsel for CLBN

Michael D. Goldman
Potter Anderson & Caroon
350 Delaware Trust Building
Wilmington, DE 19899
(302) 658-6771
Counsel for Plaintiff MGM-Pathe

Howard Weitzman
Katten Muchin Zanier & Weitzman
2029 Century Park East
Suite 200
Los Angeles, CA 90067
(310) 788-4495
Counsel for Plaintiff MGM-Pathé

Opposing Counsel:

Richard Sutton
Lawrence Hamermesh
Kenneth Nachbar
Morris, Nichols, Arsht & Tunnel
1201 North Market Street
Wilmington, DE 19899
(302) 658-9200
Counsel for Defendants

Nature of the Case:

This was a significant creditors rights case in which the plaintiff banks sought to remove the existing directors of MGM/UA and assume control of the studio. Factual and legal issues focused on the fiduciary duties of the directors and the lenders and whether various corporate actions were in breach of the underlying financing documents.

Role:

I acted as lead trial and appellate counsel for plaintiff CLBN. Following a four-week trial, the court affirmed the power of the banks to seize control of the Board of Directors of the debtors based on breaches of the financing arrangements by the defendants. The Court also held for the first time that when a company is not insolvent but is operating "in the vicinity of insolvency," the fiduciary duties of the directors begin to shift from shareholders to other corporate constituencies, including creditors and employees.

6. Consolidated Gold Fields PLC, et al. v. Minorco S.A., et al., 88 Civ. 7191, United States district Court, Southern District of New York (Mukasey, Michael B.)

Reported Decisions: 871 F.2d 252 (2ds Cir., 1989); 713 F.Supp. 1457 (S.D.N.Y. 1989) (on remand); cert. denied, 492 U.S. 939 (1989).

Party Represented: Plaintiff Newmont Mining Corporation

Co-Counsel:

Lewis A. Kaplan
Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas
New York, NY 10002
(Mr. Kaplan is presently a District Court Judge, SDNY)
(212) 373-3000
Counsel for Consolidated Gold Fields

Opposing Counsel:

Jeremy Epstein
Kenneth Kramer
Shearman & Sterling
599 Lexington Avenue
New York, NY 10022
(212) 848-4000
Counsel for Minorco S.A.

Nature of Case:

Plaintiffs Consolidated Gold Fields and Newmont Mining sought to enjoin defendants' tender offer on the grounds that the proposed acquisition would violate Section 7 of the Clayton Act as well as Sections 10(b) and 14(e) of the Securities Exchange Act of 1934.

Role:

I acted as lead trial and appellate counsel to plaintiff Newmont Mining Corporation. The District Court entered a preliminary injunction finding (1) that plaintiffs as targets of a tender offer demonstrated "antitrust injury" sufficient to confer standing to sue under the antitrust laws; (2) that the proposed acquisition was likely to lessen competition in violation of the antitrust laws; and (3) that the court lacked subject matter jurisdiction over the securities law claims. On an expedited appeal, the Court of Appeals affirmed the injunction under the antitrust laws and also held that the District Court had jurisdiction to apply U.S. securities laws to a tender offer involving two foreign corporations and occurring on foreign soil where there were sufficient effects within the United States.

7. Columbia Marine Services, Inc. v. Reffet Limited, et al., Civ. _____, United States District Court, Southern District of New York (Sprizzo, John E.)

Reported Decisions: 861 F.2d 18 (2d Cir. 1988).

Party Represented: Defendant U.K. insurance companies.

Co-Counsel:

Jay Safer
William Primps
LeBoeuf, Lamb, Leiby & MacRae
520 Madison Avenue
New York, New York 10022
(212) 715-8000
Counsel for Defendant Reffet Limited

Opposing Counsel:

Lawrence Milberg
Milberg Weiss, Bershad, Specthrie & Lerach
One Pennsylvania Plaza
New York, New York 10001
(212) 868-1229
Plaintiffs' Counsel

Nature of Case:

This was a class action brought on behalf of U.S. insureds against 183 U.K. insurance companies seeking to recover a refund of federal excise taxes that had been paid by the IRS to the insurance companies under the terms of a bilateral tax treaty between the U.S. and the U.K. Plaintiffs claimed that the excise tax, though paid by the U.K. insurers, had been "passed on" to the U.S. insureds in the form of higher premiums. Plaintiffs sought recovery based on (1) an implied right of action under the Treaty, (2) a common law conversion claim and (3) under the RICO statute. Factual and legal issues included the terms and scope of the treaty and the organized effort by the London insurance market to obtain the disputed refunds.

Role:

I acted as lead trial and appellate counsel for the 183 companies who comprised the London insurance market. The District Court ultimately dismissed the sixth amended complaint finding that there was no federal question jurisdiction as the treaty did not imply a private right of action and, assuming, arguendo, that jurisdiction existed, the refund provisions of the treaty were intended to benefit the U.K. insurers, not the U.S. insureds. The District Courts order was affirmed by the Second Circuit.

8. Frances Joy Capers, et al. v. The Long Island Rail Road, et al., 72 Civ. 3168, United States District Court for the Southern District of New York, (Gagliardi, Lee P.)

Reported Decisions: 1983 WL 506 (S.D.N.Y. 1983); 1984 WL 973 (S.D.N.Y. 1984).

Co-Counsel:

Barry L. Goldstein
NAACP Legal Defense and Educational Fund
(Presently, Saperstein, Goldstein, Demchak & Baller)
300 Lakeside Drive
Suite 1000
Oakland, CA 94612
(510) 763-9800

Opposing Counsel:

Edward L. Ganz
Proskauer, Rose, Goetz & Mendelsohn
1585 Broadway
New York, NY 10036
(212) 969-2900

Nature of Case:

This was an action brought on behalf of a class of black workers against the LIRR and 23 unions alleging discrimination in hiring and promotion in violation of Title VII. Factual and legal issues centered around the origin and effect of class and craft seniority systems that were alleged to have a discriminatory effect on minority employees. The case had been filed on plaintiffs' behalf by the NAACP Legal Defense and Educational Fund, which entity subsequently asked White & Case to take a leading role in its prosecution.

Role:

I acted as lead trial and appellate counsel to the plaintiff class. After exhaustive discovery and several preliminary injunction hearings (one of which was the subject of an unsuccessful appeal to the Second Circuit), the matter was resolved on a negotiated basis through the entry of a consent decree providing for injunctive relief and back pay awards.

9. Irving Radol, et al. v. W. Bruce Thomas, et al., No. C-1-82-13, United States District Court for the Southern District of Ohio, (Rubin, Carl B.)

Reported Decisions: 556 F.Supp. 586 (S.D. Ohio, 1983); affirmed, 774 F.2d 1163 (6th Cir., 1985), cert. denied, Armstrong v. Thomas, 475 U.S. 1086 (1986).

Party Represented: USX Corporation

Co-Counsel:

John W. Beatty
Dinsmore & Shohl
2100 Fountain Square Plaza
Cincinnati, OH 45202
(513) 621-6747
Counsel to USX Corporation

John Strauch
John Newman
Robert Weller
Jones, Day, Reavis & Pogue
1700 Huntington Building
Cleveland, OH 44115
(216) 696-3939
Counsel to Defendant Marathon Oil Company

Opposing Counsel:

Melvyn Weiss
Milberg, Weiss, Bershad, Spechtrie & Lerach
One Penn Plaza
New York, NY 10001
(212) 594-5300
Plaintiffs Counsel

Nature of Case:

This case arose out of the acquisition of Marathon Oil Company by USX (then U.S. Steel) pursuant to a \$6 billion tender offer in late 1981 and early 1982. On behalf of a class of Marathon shareholders, plaintiffs alleged that USX had committed securities fraud by not disclosing in its tender offer materials certain internal valuations of Marathon based on cash flow projections of Marathon's oil and gas reserves. Plaintiffs also alleged that USX's "two-tier" tender offer (i.e. a high cash price for the first-step tender offer and a lower priced debenture in the second-step merger) was manipulative under the securities laws. Factual and legal issues included the materiality of "soft information" including forecasts, projections and asset appraisals based on discounted cash-flow analysis and the impact of two-tier tender offers on shareholders' decisions to accept or reject such an offer.

Role:

I acted as lead trial and appellate counsel for USX, its officers and directors. Upon completion of expedited discovery and a full evidentiary hearing, plaintiffs' motion to preliminarily enjoin the merger was denied. A subsequent four-week plenary trial resulted in a unanimous verdict in favor of all defendants. On appeal, the Sixth Circuit affirmed the verdict finding that "soft information" generally need not be disclosed to shareholders and that USX's two-tier tender offer was not manipulative.

10. Pullman Incorporated v. J. Ray McDermott & Co., Inc., United States District Court for the Northern District of Ohio (McGarr, Frank J.)

Reported Decisions: 631 F.2d 736 (1980)

Party Represented: J. Ray McDermott & Co.

Co-Counsel:

Reuben Hedlund
John McCambridge
Robert Dell
Hedlund, Hunter & Lynch
Sears Tower Suite 7820
Chicago, Illinois 60606
(312) 876-7700

Opposing Counsel:

Donald Kempf
Kirkland & Ellis
200 East Randolph Drive
Chicago, IL 60601
(Presently General Counsel of Morgan Stanley)
(212) 761-4000

Nature of Case:

This case arose out of a hostile tender offer by McDermott for control of Pullman. Pullman sought to enjoin the acquisition on the grounds that it would substantially lessen competition in the design and construction of industrial flue gas desulfurization systems ("scrubbers"). Factual and legal issues focused on interchangeability of end use of different types of scrubbers, cross-elasticity of demand, industry recognition of market, excess capacity and barriers to entry.

Role:

I acted as lead trial and appellate counsel for McDermott. Following expedited discovery and a full evidentiary hearing, the District Court denied plaintiff's motion for a preliminary injunction finding that plaintiff had not shown a likelihood of success on the merits of its antitrust claim or irreparable injury. Plaintiff sought an injunction pending appeal which was denied by both the District Court and the Seventh Circuit. On an expedited appeal, the Court of Appeals thereafter affirmed the District Court's decision in all respects.

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.

Response:

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.

Response:

I have not been involved personally in any civil or administrative proceedings. As noted, I am a member of the law firm of White & Case LLP which is comprised of approximately 1,700 lawyers in 39 offices around the world. The firm has been in business since 1901. From time to time it has been engaged either as plaintiff or defendant in litigation in the normal course of business (e.g. malpractice claims and fee disputes). I have had no direct participation in any of the foregoing matters.

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.

Response:

I will comply with the guidelines of the Code of Judicial Conduct. The only potential conflict of interest I can foresee would relate to cases in which White & Case is counsel to one of the parties. I will retain a financial interest in the firm for six years (i.e. until the pay-out of my capital account is complete). During this period I believe it would be appropriate to excuse myself from any matter in which White & Case is acting as counsel for a party.

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.

Response:

I do not plan to pursue outside employment while on the court.

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

Please see attached Financial Disclosure Report, Form A0-10.

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

Please see attached net worth statement with schedules.

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

- (a) If so, did it recommend your nomination?
- (b) Describe your experience in the judicial selection process, including the circumstances leading to your nomination and the interviews in which you participated.
- (c) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such case, issue, or question? If so, please explain fully.

Response:

(a) Governor Pataki's judicial selection committee recommended my nomination to the White House. (b) I had previously expressed my interest in being considered for a federal judgeship to the Governor and his counsel. Thereafter, I contacted the committee and requested a questionnaire. After completing the questionnaire, an interview was conducted with the full committee on March 1, 2001. On March 4, I was advised that the committee had recommended my nomination. On April 23 I was interviewed by the Office of the Counsel to the President. I was subsequently advised that an FBI background check would be performed. During the month of June I met or spoke with a Special Agent of the FBI on several occasions. (c) No one involved in the process of selecting me as a judicial nominee discussed with me any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how I would rule on such case, issue, or question.

Response to Question 25:

Net Worth Statement

Richard J. and Nancy B. Holwell

ASSETS

1.	Cash on Hand	\$ 288,000
2.	U.S. Government securities	-0-
3.	Listed sec. (Sch. 3)	2,709,500
4.	Unlisted sec.	-0-
5.	Accounts and notes rec.	-0-
6.	Real estate owned (Sch. 6)	3,000,000
7.	Real estate mortgage rec.	-0-
8.	Autos and other personal property	150,000
9.	Cash value life insurance	-0-
10.	Other (Sch. 10)	
	(a) White & Case Retirement Income Plan	500,000
	(b) White & Case Capital Account	1,741,000
	TOTAL ASSETS	\$8,388,500

CONTINGENT LIABILITIES

11.	As endorser	-0-
12.	On leases on contracts	-0-
13.	Legal claims	-0-
14.	Provision for Federal Income	-0-
15.	Other special debt	-0-

LIABILITIES

16.	Notes payable to banks-secured	-0-
17.	Notes payable to banks-unsecured	-0-
18.	Notes payable to relatives	-0-
19.	Notes payable to others	-0-
20.	Accounts and bills due	10,000
21.	Unpaid income tax	-0-
22.	Other unpaid income and interest	-0-
23.	Real estate mortgages payable (Sch. 23)	248,000
24.	Chattel mortgages and other liens payable	-0-
25.	Other debts	-0-
	Total Liabilities	\$ 258,000
	Net Worth	\$8,130,500
	Total Liabilities and Net Worth	\$8,388,500

GENERAL INFORMATION

Are any assets pledged?	No
Defendant in any legal actions?	No
Have you ever taken bankruptcy?	No

Schedule 3

Listed securities

Bell South	\$- 1,000
Lucent	500
Fidelity Magellan Fund	241,000
Merrill Lynch Pacific Fund LLA	25,000
TCW Galileo Select Equity Fund	174,000
Turner Mid-Cap Growth Equity Fund	96,000
Axiom Int'l Investors LLC	347,000
White & Case LEO Benefit Pension	115,000
Fidelity SP 500	182,000
Fidelity Contrafund	117,000
Fidelity Lo Pr Stk	223,000
Fidelity Blue Ch. Growth	172,000
Fidelity VIP Contrafund	48,000
Fidelity VIP Growth Opps.	74,000
PIMCO Total Return	101,000
Fidelity Div. Growth	69,000
Strong Gov't Securities	271,000
Royce Low-Priced Stock	148,000
Davis NY Venture	<u>305,000</u>
TOTAL	\$2,709,500

Schedule 6

Real Estate Owned:

1.	Primary Residence	\$1,500,000.00*
2.	Vacation Home	<u>1,500,000.00</u>
	TOTAL	\$3,000,000.00

* The Holwells co-own a brownstone building in New York City. The co-owners are Robert and Florence Van Duyn. The legal owner of the building is Van Duyn Associates in which the Holwells and the Van Duyns are equal partners. One unit in the building is not occupied by either partner and is a rental unit. Income from the rental unit is shared on an equal basis pursuant to the partnership agreement. The market value of the entire building is estimated to be \$3,000,000.

Schedule 10

Other Assets:

(a) The White & Case Retirement Income Plan (RIP) presently entitles me to a monthly benefit payable at age 65 of approximately \$5,000 per month. I have estimated the present value of this benefit at \$500,000.

(b) My White & Case Capital Account is payable, subject to certain conditions, in six annual installments beginning on the date I cease to be a partner of the Firm.

Schedule 23

Real Estate Mortgages Payable

1.	Mortgage on Primary Residence	
	Chase Manhattan Mortgage Corporation	\$248,000.00

Senator SESSIONS. Judge McKnight?

STATEMENT OF H. BRENT MCKNIGHT, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Judge MCKNIGHT. Thank you very much. I have no formal opening statement. I am honored to be here. I would like to thank Senators Edwards and Dole for their support, and Congressman Myrick for coming and speaking today.

In addition, my wife, Beth, I would like to introduce, and my sons, Brent, Matthew and Stephen. This is their first introduction really to Washington, and they are learning a lot. I'm so proud and happy to have them here.

In addition, my father-in-law and mother-in-law, Charles and Sherry Herion are here, as well as some friends. Howie and Debbie Donahoe and their sons Chris and C.J.; John and Carol Sittema; and Larry and Barbara Gregory. I hope I've got them all, and if we could—

Senator SESSIONS. Yes, if you would stand, we would appreciate it. It is good to see the boys there. I got to meet them earlier. Very good, thank you.

[The biographical information of Judge McKnight follows:]

**Questionnaire for Nominees Before the Committee on the Judiciary,
United States Senate**

I. BIOGRAPHICAL INFO

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

Harold Brent McKnight (no other names)

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

Residence: Charlotte, North Carolina

Work: The Charles R. Jonas Federal Building
401 West Trade Street, Room 195
Charlotte, North Carolina 28202

3. Date and place of birth.

February 20, 1952, in Mooresville, North Carolina

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 Beth Aleece Herion McKnight (maiden name "Herion")
Homemaker

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

The National Judicial College
Reno, Nevada
March, 1989
Certificate of Completion
(two week program for new state court judges)

University of North Carolina School of Law
8/77 - 5/80
JD, 5/80

University of North Carolina, Department of Philosophy
8/78 – 9/82
Coursework and written examinations for PhD in Philosophy completed
No degree received

Wycliffe Hall, Oxford University
10/76 - 8/77
Diploma in Theology, 7/77

Magdalen College, Oxford University
10/74 – 8/76
M.A., 8/76

University of North Carolina at Chapel Hill
8/70 – 5/74
B.A., 5/74

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.

Administrative Office of the United States Courts
Washington, DC 20544
United States Magistrate Judge, Western District of North Carolina
5/93 to present

Wingate University
315 East Wilson
Wingate, North Carolina 28174
Adjunct Assistant Professor of Law
1994 to present

University of North Carolina at Charlotte
9201 University City Blvd.
Charlotte, North Carolina 28223
Visiting Lecturer in Constitutional Law and Federal Jurisdiction
Professional Affiliate Member of the Graduate Faculty
1992 to present

Bioethics Resource Group

1112 Harding Place
 Charlotte, North Carolina 28204
 Member, Board of Directors
 1991-1994

State of North Carolina, Administrative Office of the Courts

2 East Morgan Street
 Raleigh, North Carolina 27602
 District Court Judge, 26th North Carolina Judicial District
 1/89 – 5/93

Mecklenburg Ministries

1510 East 7th Street
 Charlotte, North Carolina 28204
 Member, Board of Directors
 1987-1990

State of North Carolina, Administrative Office of the Courts

100 East Six Forks Road, Anderson Plaza
 Raleigh, North Carolina 27609
 Assistant District Attorney
 10/82 – 12/88

Sanford, Adams, McCullough and Beard

(currently d/b/a Parker, Poe, Adams and Bernstein)
 150 Fayetteville Street Mall
 Raleigh, North Carolina 27602
 Summer Intern
 6/79 – 8/79 and 6/78 – 7/78

Helms, Mullis and Johnston

(currently d/b/a Helms, Mullis and Wicker)
 201 North Tryon Street
 Charlotte, North Carolina 28202
 Summer Intern
 7/78 – 8/78

Office of the Governor

Capitol Building
 Sacramento, California 95814
 Temporary Summer Intern
 July, 1975

North Carolina National Bank

(currently d/b/a Bank of America)
 101 South Tryon Street
 Charlotte, North Carolina 28202
 Summer Research Assistant, International Division
 5/74 – 8/74

7. **Military Service:** Have you had any military service? If so, give particulars, including 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.

The American Law Institute

Order of the Long Leaf Pine

Award from the Governor of North Carolina for distinguished service to the State of North Carolina for work as a North Carolina State District Court Judge.

Oxford University, England

- Rhodes Scholar
- Oglethorpe Exhibition – a grant awarded by the Magdalen College tutorial board on the basis of scholarship.
- Edward Pilsworth Award – a grant given to one student each year for the study of Theology.

University of North Carolina at Chapel Hill

- Morehead Scholar (full, four-year academic scholarship)
- Crawford L. Taylor Fellowship, Philosophy Department
- Phi Beta Kappa
- Phi Eta Sigma, freshman honorary academic fraternity
- Delta Sigma Rho – Tau Kappa Alpha – national honorary debate fraternity

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.

The Judicial Conference of the United States

- Advisory Committee on Civil Rules (to the Committee on Rules of Practice and Procedure).
 - Appointed by Chief Justice Rhenquist, October, 2001.
 - Chair, Subcommittee on Civil Forfeiture and Sealed Settlement Agreements, 2002 to present.

The American Law Institute

Fourth Circuit Judicial Conference - invitee

American Bar Association

- Judicial Division
- Litigation Section:
 - Pretrial Practice and Discovery Committee, 4/98-1/02.

North Carolina State Bar

- Advisory Member of the Ethics Committee of the North Carolina State Bar Council, 1/01 to present.
- ABA Ethics 2000 Committee, 9/01 – 1/03.

North Carolina Bar Association

- Professionalism Committee, 1997 to present.
 - Chair, 2002-2003
- *Pro Se* Task Force, 2002 to present.
- Administration of Justice Task Force, 12/96-3/97.
- Futures Commission Advisory Task Force, 1995-1996 est.

Mecklenburg County Bar

- Honorary/Judicial Board Member to the Board of Directors, Fiscal Year 1991/92 to present.
- Continuing Legal Education Committee, 1995 to present.
- Mecklenburg County Bar Leadership Institute, 2000.
- Nominating Committee, 1994.
- Public Information and Education Committee, 1991-1995.
- Alternate Dispute Resolution Committee, 1993-1994.
- Bar History Committee, 1991-1993.
- North Carolina District Court Representative to Board of Directors, 1991-1993.
- North Carolina District Court Representative to Civil Litigation Committee, 1991-1993.

Federal Magistrate Judges' Association

North Carolina District Court Judges' Association

- Education Committee, 1991-1993.

As a North Carolina State District Court Judge

- Domestic Committee Chairman, 1991-1993.
- Alternative Dispute Resolution Subcommittee Chairman, 1992.
- Criminal Courts Coordinating Council

American Judges Association

Association of Trial Lawyers of America

North Carolina Academy of Trial Lawyers

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 Inns of Court

Chief Justice William H. Bobbitt Chapter

Phi Beta Kappa

Association of American Rhodes Scholars

Christ Lutheran Church

General Alumni Association, The University of North Carolina at Chapel Hill

Phi Delta Phi international legal fraternity

Federalist Society for Law and Public Policy Studies

The Horace Williams Philosophy Group

American Kempo-Karate Association

To the best of my knowledge, no organizations to which I belong lobby public bodies.

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.

North Carolina State Bar:	August 2, 1981 to present
North Carolina State Courts:	August 2, 1981 to present
United States District Court:	
Western District of North Carolina:	August 2, 1981 to present
Middle District of North Carolina:	August 8, 1981 to present
United States Court of Appeals for the Armed Forces:	February 25, 2003 to 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 involving constitutional law or legal policy. If there are press reports about the speech, and they are readily available to you, please supply them.

Publications – please see attached copies

“Kerry K. Pierce, 1952-2000,” The American Oxonian, Winter, 2001.

“Assessing the Impact of Conflict of Interest on the Decisions of ERISA Fiduciaries,” Regent University Law Review, Vol. 13, No. 1 (Fall 2000).

“Pleading Fraud Under the Private Securities Litigation Reform Act: A Heightened Pleading Standard?” The Practical Litigator, Vol. II, No. 3 (May 2000).

“The Emerging Contours of Justice Thomas’ Textualism,” Regent University Law Review, Vol. 12, No. 2 (Spring 2000).

“Honesty in Discovery,” The North Carolina State Bar Journal, Summer, 1999.

Rules of Practice and Procedure of the United States District Court for the Western District of North Carolina, revision effective January 1, 1999. Drafted the Alternative Dispute Resolution Rules (16.2 and 16.3) in conjunction with the Mecklenburg County Bar Alternative Dispute Resolution Committee.

Criminal Courts and the Criminal Process – Brochure, 1995

“How Shall We Then Reason? The Historical Setting of Equity,” 45 Mercer Law Review 919-998 (October 1994).

“What is Justice?,” The Charlotte Observer, Viewpoint section of the Editorial Page, December, 1992.

“Response of the Courts,” The Charlotte-Mecklenburg Domestic Violence Update Report, February, 1992. Published by the Charlotte-Mecklenburg Domestic Violence Citizens Committee.

“Response of the Probation Office” and “Response of the District Attorney’s Office,” Domestic Violence, A Report of the Charlotte-Mecklenburg Domestic Violence Task Force, April 21, 1986.

Speeches, Lectures, and Continuing Legal Educations – please see attached copies

- Section 1983 Litigation, North Carolina Bar Foundation Continuing Legal Education, 3/27/03. Panelist.
- Civil Litigation View from the Bench (Western District of North Carolina), Mecklenburg County Bar Continuing Legal Education, 2/21/03. Speaker: "Federal View from the Bench."
- Hunton and Williams, Litigation Department, 1/29/03. Speaker: "Persuasive Brief Writing."
- Horace Williams Philosophy Group, 11/02. Speaker: "Reflections on Mercy – Biblical, Poetic and Philosophical."
- "Remarks at the swearing-in of new lawyers," 9/17/02. Charlotte, North Carolina.
- Duke University School of Law, Professor Robinson Everett's Criminal Law class and Advanced Criminal Law Seminar, 3/02, 9/01 and 2/03.
- Electronic Discovery. Videotaped joint effort of the Federal Judicial Center, Federal Bar Association and the Mecklenburg County Bar, 8/01.
- Federal Discovery Rules: View from the Federal Bench, Mecklenburg County Bar Continuing Legal Education, 2/27/01. Program Chairman, and panelist in two-person panel discussion.
- Electronic Discovery: The Challenge and Opportunities of Electronic Evidence, Mecklenburg County Bar Continuing Legal Education, 2/2/01. Moderator, Panelist.
- Duke University School of Law Christian Legal Society, 1/01. Speaker: "The Art of the Jurist: Balancing Justice and Mercy in a Court of Law."
- The New Federal Rules of Civil Procedure As Applied in the Western District of North Carolina, Mecklenburg County Bar Continuing Legal Education, 12/00.
- Dealing in a Professional Way with Unprofessional Adversaries, North Carolina Bar Foundation Continuing Legal Education, 2/4/00. Program Planner and Panelist. "When is Spoliation Sanctionable, and When is it Not?"
- Bridging the Gap 2000 – Litigation, Mecklenburg County Bar Continuing Legal Education Young Lawyers Division, 9/00. Speaker: "Approach to Discovery Motions and Protective Orders."
- A Guide to Practicing Law for New Lawyers, Mecklenburg County Bar Continuing Legal Education Young Lawyers Division, 11/11/99. Speaker: "Proposed Changes to the Federal Rules of Civil Procedure Affecting Civil Discovery."
- Electronic Discovery: Discovering and Managing Electronic Evidence, Mecklenburg County Bar Continuing Legal Education, 5/21/99. Speaker: "A View from the Bench."
- "On Detention Hearings," speech to Western District criminal defense attorneys, 4/99.
- Recent Amendments to the Western District Rules, Mecklenburg County Bar Continuing Legal Education, 4/30/99. Program Planner and Speaker: "Review of the New Rules."
- Employment Law Roundtable: A Day with the Experts, North Carolina Academy of Trial Lawyers Employment Law Section, 4/99. Federal Judges Panel: "Title VII Litigation: A View from the Federal Bench."
- Insurance Law, Wake Forest University School of Law Continuing Legal Education, 3/12/99. Speaker: "Professionalism Issues Involving Destruction of Evidence and Rule 30(b)(6) Obligations."
- The Second Annual Meeting on Business Torts: Recent Developments in the Southeast Region, The American Bar Association, Section of Litigation, Business Torts Committee, Southeast Region, 10/16/98. Speaker: "Motions to Compel, Protective Orders, and Other Strange Creatures of the Federal Wild."

- Robinson, Bradshaw & Hinson, P.A., Litigation Department, 1/15/98. Speech: "What Persuades: Lessons from Aristotle's Rhetoric."
- Civil Discovery in Federal Court: Problems and Possibilities, Mecklenburg County Bar Continuing Legal Education, 4/24/98. Panels: "Existing Court Procedures and Differences;" "Recurrent Discovery Problems."
- National Practice Institute, 2/98. Speech: "Objections at Trial, 1998, and How to Deal With the Difficult Lawyer."
- Federal View from the Bench, North Carolina Bar Foundation Continuing Legal Education, 9/97. Panelist: "Pretrial Controversies and the Role of the Magistrate Judge."
- American Judicature Society Sidebar Programs for New Lawyers, 7/10/96, 7/24/97, 7/24/98. "Practice in the Federal Courts."
- Federal Mediation Seminar, Buncombe County Bar and Mecklenburg County Bar Continuing Legal Education, 5/17/96. Panelist and Speaker: "What the Rules Say and How They Work."
- North Carolina Tort Law, Wake Forest University School of Law Continuing Legal Education, 2/23/96. Speaker: "Where to Try Your Case? Diversity Jurisdiction."
- Federal Alternate Dispute Resolution in the Western District of North Carolina, Mecklenburg County Bar Continuing Legal Education, 5/25/95. Speaker: "What the Rules Say and How they Work."
- Practical Legal Ethics, Wake Forest University School of Law Continuing Legal Education, 1/13/95. Speaker on Professionalism and Ethics - View from the Bench: "How Shall We Then Live? The Necessity for Civility."
- West Point Military Academy, 9/95.
 Guest Speaker to the Law Faculty: "Trends in the Federal Courts."
 Guest Lecturer, Col. Kerry Pierce's classes on Political Philosophy: "On the debate between Socrates and Thrasymachus concerning the reality of justice and the nature of law, as chronicled in Plato's Republic."
- Federal View from the Bench: Civil and Criminal Practice in the Western District of North Carolina, Mecklenburg County Bar Continuing Legal Education, 5/20/94. Panel Discussion.
- Federal Rules Seminar, Mecklenburg County Bar Continuing Legal Education, 3/25/94. Speaker: Federal Rules of Civil Procedure, as amended December, 1993.
- Money Laundering and Asset Forfeiture, Mecklenburg County Bar Continuing Legal Education, 2/18/94. Speaker.
- Basics of State and Federal Criminal Law Breakfast Series, Mecklenburg County Bar Continuing Legal Education, 1/26/94. Panel: Professionalism: The Relationship between Prosecutors, Defense Counsel and Judges.
- Lenoir Rhyne College, Fall, 1994. Convocation Speaker: "The Historical Setting of Equity."
- Equitable Powers of the Federal Courts: A Discussion on the Proper Role of the Federal Courts in Supervising Structural Injunctions, Carl W. Vinson Memorial Lecture Series/Mercer Law Review symposium, 1994. Panelist and Speaker: "How Shall We Then Reason? The Historical Setting of Equity."
- William H. Bobbitt Chapter, American Inns of Court, 10/1/93. "Zealous Representation and the New Rule 26."
- Basics of State and Federal Criminal Law Breakfast Series, Mecklenburg County Bar Continuing Legal Education, 2/4/93. Speaker: "Current Ethical Controversies: Perils of Cash Payments: Waiver of Appellate and Postconviction Rights."
- Chicago Theological Seminary, Fall, 1991. Speech: "Justice as an Ideal for Our Times."
- University of North Carolina at Charlotte Pre-Law Society, 1990. Speaker: "Equity Powers of Federal Courts."

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

Excellent Health
Last examination: February 11, 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.

May, 1993 to present: United States Magistrate Judge for the Western District of North Carolina. Appointed by the District Court Judges in the District in 1993 and reappointed in 2001.

January, 1989 – April, 1993: North Carolina District Court Judge for the 26th North Carolina Judicial District (Mecklenburg County). Elected in November, 1988.
Re-elected without opposition in November, 1992.

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

(1) citations for the ten most significant opinions you have written;¹

1. Virmani v. Novant Health Inc., 3:99CV15 (W.D.N.C. 2000).

This is an employment discrimination case in which the defendant hospital had moved for a protective order barring the discovery of peer review materials and medical records pursuant to North Carolina law and the Federal Rules of Evidence. After analyzing the interplay between the Federal Rules, the purposes of Title VII, and the peer review privilege, I determined that the privilege was not applicable. This decision was upheld by the Fourth Circuit Court of Appeals in Virmani v. Novant Health Incorporated, 259 F.3d 284 (4th Cir. August 1, 2001). See attached Order.

2. Rexam Industries Corp. v. Avery Dennison Corporation, 3:94CV271; Rexam Industries Corp. v. Eastman Kodak Company and Avery Dennison Corporation, 3:95CV62 (W.D.N.C. 2001).

This was a patent case in which the patent holder was challenging the decision of the Patent and Trademark Office Board of Patent Appeal in favor of the patent applicant in an interference proceeding based on its constructive reduction to practice date. During the pendency of the case, another interference proceeding was brought involving the same invention but a different adversary, and the Board entered judgment in favor of the adversary. The patent holder in this case moved for summary judgment on the grounds that the patent applicant could not contest priority given that final judgment had been entered against it in another proceeding. The motion was denied, and the issue was certified for appeal to the Federal Circuit. The Federal Circuit affirmed the decision. See Rexam Industries Corp. v. Eastman Kodak and Avery Dennison, 182 F.3d 1366, 51 U.S.P.Q. 2d 1457 (Fed. Cir. July 16, 1999). A bench trial was subsequently held to determine whether or not the plaintiff/patent holder could establish conception of an

¹ Note that in addition to the above cases, the following cases of mine were affirmed by the Fourth Circuit on appeal: Jones v. Duke Energy Corporation, 43 Fed. Appx. 599, 2002 WL 1821979 (4th Cir. (N.C.) August 9, 2002)(unpublished); Caldwell v. Duke Energy, 41 Fed.Appx., 2002 WL 1685381 (4th Cir. (N.C.), July 25, 2002)(unpublished); Chatman v. Time Warner, Inc. 31 Fed. Appx. 255, 2002 WL 463576 (4th Cir. (N.C.), June 20, 2002)(unpublished); Brown v. Henderson, 6 Fed. Appx. 155, 2001 WL 285147 (4th Cir. (N.C.), Mar. 23, 2001)(unpublished); Winkler v. Apfel, 149 F.3d 1172, 1998 WL 276262 (4th Cir. (N.C.), May 29, 1998)(unpublished); London v. Hamilton, 145 F.3d 1325, 1998 WL 196611 (4th Cir. (N.C.), Apr. 22, 1998)(unpublished); Ballard v. Hickory Police Dept., 112 F.3d 508, 1997 WL 226355 (4th Cir. (N.C.), May 7, 1997)(unpublished); Meecker v. USAir, Inc., 92 F.3d 1180, 1996 WL 442788 (4th Cir. (N.C.), August 7, 1996)(unpublished); McCarn v. Beach, 91 F.3d 131, 1996 WL 393168 (4th Cir. (N.C.), July 15, 1996) (unpublished); Webb v. Charlotte City Police Dept., 83 F.3d 417, 1996 WL 191972 (4th Cir. (N.C.), April 22, 1996)(unpublished); Barnett v. Burlington Industries, Inc., 73 F.3d 356, 1996 WL 4342 (4th Cir. (N.C.) January 5, 1996)(unpublished). See attached opinions.

invention and a reduction to practice and, if so, whether or not the plaintiff had concealed or suppressed the invention. Based on the evidence presented, I concluded that the plaintiff had not met its burden of proof on these issues and that even if it could meet its burden, there would be a strong presumption that it concealed the invention. The order was affirmed by the Federal Circuit Court of Appeals in an unpublished opinion. Rexam Industries Corp. v. Eastman Kodak Company, 30 Fed. Appx.983, 2002 WL 409898 (Fed. Cir. (May 10, 2002))(unpublished). See attached Orders and Opinion.

3. Radiator Specialty Company v. IQ Products Company, 3:97CV69 (W.D.N.C. 2002).

This is a patent infringement case in which the parties moved for summary judgment on numerous issues including literal infringement. Resolution of this issue required construction of the claims at issue and a hearing pursuant to Markman v. Westview Instruments, Inc., 517 U.S. 370, 373 (1996). Based on my construction of the claims at issue, I concluded that the accused infringer was entitled to summary judgment on the infringement issue. See attached Order.

4. United States v. Said Harb, et al., 3:00CR147 (W.D.N.C. 2002).

This case involved allegations that the defendants were involved in a criminal conspiracy to provide material support and resources to a terrorist organization. At issue before the court was the admissibility of audiotapes and summaries of electronic surveillance conducted by the Canadian Security Intelligence Service. It was agreed by all parties that the records at issue were hearsay as defined by the rules of evidence. After conducting an evidentiary hearing and considering all the possible exceptions to the hearsay rule, I held that the summaries were admissible under the past recollection recorded exception. See attached Memorandum and Recommendation.

5. Cabot Corporation v. Solution Technology, Inc.; 122 F.Supp. 2d 599(2000).

This was a patent infringement case involving a patent for a nonagglomerating alumina slurry used to connect transistors in silicon chips. The issue before the court was whether or not the case was "exceptional" based on willful infringement and litigation misconduct and, therefore, justified an award of attorneys' fees. Based on the evidence presented, I concluded that the exceptional standard had not been met.

6. In re: Alydaar Software Securities Litigation, 3:99CV196 (W.D.N.C. 2000).
In re: Alydaar Software Securities Litigation, 3:99CV196 (W.D.N.C. 2001).

This was a class action securities fraud case in which the defendant filed a motion to dismiss the complaint on the grounds that the Plaintiffs had not sufficiently pled the allegations of fraud as required by Rule 9(b) of the Rules of Civil Procedure as well as the Civil Justice Reform Act. After dismissing the initial complaint without prejudice, the Plaintiffs were allowed leave to amend their complaint in order to cure the deficiencies in their pleading. The Plaintiffs were subsequently allowed to file a second amended complaint which was still insufficient despite being given clear guidance as to the nature of the allegations that would be sufficient. The defendants filed a second motion to dismiss which was granted, and the second amended complaint was dismissed with prejudice. Both Orders are attached.

7. Priscilla Johnson v. City of Charlotte, 229 F. Supp. 2d 488(2002).

This was an employment discrimination case in which the Plaintiff alleged that she was discriminated against based on her race and gender when the Fire Department failed to promote her to the position of Fire Captain even though her name was at the top of the eligibility list. The defendant moved for summary judgment on the grounds that Plaintiff could not establish a *prima facie* case of discrimination. The motion was denied.

8. George F. Leeper v. Duke Energy Corporation, 3:98CV17 (W.D.N.C. 2002).

This was an employment discrimination case in which the Plaintiff claimed that he had been racially harassed based on a single incident. The Defendant moved for summary judgment and the motion was granted on the grounds that it could not be held vicariously liable for the incident since it had taken prompt and adequate measures to stop the harassment. The decision was upheld by the Fourth Circuit Court of Appeals in an unpublished opinion. Leeper v. Duke Energy, 54 Fed. Appx. 180, 2003 WL 103101 (4th Cir. (N.C.) January 13, 2003)(unpublished). See attached Order and Opinion.

9. Royal Insurance Company v. Kentucky Fried Chicken Corp. and National Cash Register Co., 3:00CV295 (W.D.N.C. 2001).

This action arose out of the alleged breach of an equipment maintenance insurance policy issued by the Plaintiff to the Defendants. The Defendants made a motion to dismiss based on lack of personal jurisdiction or, in the alternative, to stay the case based on the fact that a parallel action had been commenced in state court in Kentucky. While it was determined that the court had personal jurisdiction over the Defendants, I found under the factors set forth in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), that abstention in this case was appropriate. See attached Order.

10. United States of America v. Town of Maiden and Doris C. Bumgarner, 5:00CV45 (W.D.N.C. 2001).

This was an action brought pursuant to the Fair Housing Act, 42 U.S.C. § 3610, against the Town of Maiden and its Town Manager for interfering with a private organization's attempt to establish a group home for emotionally disturbed children. The Defendants moved for summary judgment on the ground that there was no evidence of any unlawful conduct. After reviewing the record, I determined that there was ample evidence from which a jury could conclude that violations had occurred and denied the motion for summary judgment. See attached Order. Note: The order denying summary judgment ultimately resulted in a settlement agreement that included efforts by the Town to ensure that such conduct did not happen again in the future. See attached Settlement Agreement, 5:00CV45 (W.D.N.C. 2002).

(2) a short summary 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;

1. As a North Carolina State District Court Judge:

No reversals of which I am aware.

2. As a United States Magistrate Judge:

A. Orders reversed or criticized by the Fourth Circuit:

Yates v. Motivation Industrial Equipment Ltd., 3:99CV337 (W.D.N.C. 2001).

This was a wrongful death case in which the Defendant moved to dismiss based on lack of personal jurisdiction. The motion to dismiss was denied, and the Defendant appealed to the Fourth Circuit Court of Appeals. The Court of Appeals reversed; however, the Chief Judge wrote a dissenting opinion in which he argued that the exercise of jurisdiction was both reasonable and justified. Yates v. Motivation Indus. Equipment, Ltd., 38 Fed. Appx. 174, 2002 WL 1343251 (4th Cir. (N.C.) June 20, 2002)(unpublished). See attached Order and Opinion.

***B. Memoranda and Recommendations accepted by the United States District Court.
United States District Court's Order then reversed by the Fourth Circuit Court of Appeals:***

United States of America v. James Cecil Hastings, 5:95CR37 (W.D.N.C. 1996).

This was a criminal case assigned to the Honorable Richard L. Voorhees and referred to me for the handling of pretrial matters. The Defendant in this case, who was a very prominent businessman and Republican Party leader in Boone, N.C., had been indicted for failing to file tax returns with the federal government for the years 1988-91. In response, the Defendant admitted that he had not paid his taxes but contended that his failure to pay was an innocent mistake due in part to the fact that he had overpaid his taxes in 1987 and thus was entitled to a large tax credit for that year. Since such a small percentage of those individuals who fail to pay their taxes are prosecuted criminally, the Defendant also asserted that he had been selectively targeted for prosecution and moved to dismiss the indictment on that basis. When, however, the Defendant propounded discovery on the Government relevant to this defense, the Government refused to comply. The Government subsequently provided some but not all of the requested material; however, the Government failed to turn over a portion of the IRS's Law Enforcement Manual on the grounds that it was privileged. It was recommended that if the government continued to refuse to produce the information, the indictment be dismissed since the Defendant would not have the information he needed with respect to his defense. The District Court accepted this recommendation and dismissed the indictment. The government appealed, and the Fourth Circuit reversed the dismissal. In short, the Court of Appeals held that the Defendant had not presented sufficient evidence that his prosecution was the result of discriminatory intent. In particular, the Court of Appeals held that even if the IRS investigators had possessed some political animus or bad motive, it could not be imputed to the prosecutors. The Court of Appeals also held that even if the Defendant could show that he was prosecuted because he is a prominent businessman, this motive would not be improper. United States v. Hastings, 126 F.3d 310 (4th Cir. September 17, 1997). See attached Memorandum and Recommendation and Orders.

United States of America v. Lauren Eric Wilhelm, 5:94CR9 (W.D.N.C. 1996).

This was another criminal matter referred to me by the District Court. At issue was a search warrant for the home of the Defendant, an alleged drug dealer. The Defendant moved to suppress the search warrant on the grounds that the information contained therein was insufficient in that the agent had relied upon a confidential informant whom she had never met. After a hearing, at which time the agent testified but the Defendant did not, I recommended that the motion be denied since the agent had been able to corroborate the information contained in the affidavit. The District Court agreed, and the Defendant entered a plea conditioned on his right to appeal. On appeal, the Fourth Circuit held that the warrant had not been supported by probable cause and declined to find that the good faith exception was applicable. United States v. Wilhelm, 80 F.3d 116 (4th Cir. April 3, 1996). See attached Memorandum and Recommendation and Order.

C. Memoranda and Recommendations not fully accepted by the District Court:

Since there are no official records kept with respect to whether or not a Memorandum and Recommendation is adopted by the District Court, this list includes all of the orders that my office was aware of that were not fully adopted. In addition, the clerk's office conducted a review of the court's records to determine whether the list was complete. The Clerk's Office survey found 437 Memoranda and Recommendations over the roughly 10 year period. Of these, eighteen were rejections or partial rejections. These are included below. It should be noted that the list includes all Memoranda and Recommendations that were not adopted to any extent including those Memoranda and Recommendations that were partially or even substantially adopted and those cases in which the District Court simply decided the issue on other grounds.

1. United States of America v. Steven Weeks, et al., 5:94CR39 (W.D.N.C. 1995).

This was a case assigned to the Honorable Richard L. Voorhees in which pretrial matters had been referred to me. The Defendants in the case were glove manufacturers who had contracted with state prison facilities in Mississippi and Ohio for inmates to produce cotton work gloves. The Defendants were subsequently charged with violating a criminal statute that allegedly made it illegal to transport goods manufactured or produced by prisoners across state lines. At issue was the construction of the statute and whether or not it was ambiguous. Also at issue was whether or not the search warrant issued in the case was defective. I found that the conduct at issue fell within an exception in the statute and recommended that the indictment be dismissed on the grounds that the statute was inapplicable. I also found that the search warrant was invalid. The District Court, while agreeing with the findings with respect to the search warrant, disagreed with the interpretation of the statute set forth in the Memorandum and Recommendation. Accordingly, it denied the motion to dismiss the indictment. See attached Memorandum and Recommendation and Memorandum and Order.

2. United States of America v. Said Harb, 3:00CR147 (W.D.N.C. 2002).

See summary above. The District Court agreed with the Memorandum and Recommendation that the evidence at issue was admissible pursuant to the past recollection recorded exception to the hearsay rule; however, for reasons not set forth in its order, the District Court also found that the evidence was admissible under the public records exception to the hearsay rule. See attached Memorandum and Recommendation and Order.

3. Robert A. Chapman v. Thorndyke International, Inc., Donald Lavery, et al., v. Thorndyke International, Inc., et al., George Street, Jr., et al., v. Thorndyke International, Inc., et al., 5:97CV133, 5:98CV75, 3:97CV494 (W.D.N.C. 1999).

These were civil enforcement actions under ERISA involving claims for reimbursement or payment of medical expenses associated with certain welfare benefit plans. The matters were consolidated to consider identical motions to dismiss brought by Defendant Thorndyke on the grounds that an order had been issued by a District Court in California staying any proceedings against it. I recommended that the motion be denied and that the instant actions be stayed until the matters were resolved in California. For reasons not set forth in its order, the District Court disagreed that the matter should be stayed, and granted the motions to dismiss. See attached Memorandum and Recommendation and Order.

4. Michael Joseph Fratus, Sharon Fratus, Parents and Guardians of Rayna Fratus v. T.J. Maxx, et al., 3:98CV529 (W.D.N.C. 1999).

At issue was a motion to remand the case to state court on the grounds that all of the defendants had not joined in the notice of removal. I recommended that the motion be granted since in fact, one of the defendants had not filed his consent to removal until well after the deadline for doing so. The District Court agreed that the Plaintiffs had grounds for remanding the case; however, the Court found that the Plaintiffs' motion to remand was untimely since they had failed to file the motion within 30 days from the date that the other defendants had filed their notice of removal. See attached Memorandum and Recommendation and Memorandum and Order.

5. Million Kings Industrial Limited, d/b/a Hung Sing Brass and Metal Wares Factory v. Collezione Europa USA, Inc., 3:00CV255 (W.D.N.C. 2002).

This action involved a contractual dispute between a furniture supplier based in Hong Kong, China, and a furniture distributor/importer arising out of the production of certain furniture lines. The Plaintiff had originally filed the case in state court alleging claims for action on an account and breach of contract. The Defendant, who removed the case to federal court, counterclaimed for breach of contract, defective goods, and conversion. The Defendant moved for summary judgment. I recommended that summary judgment be granted in favor of Plaintiff with respect to its account claim and Defendant's conversion counterclaim, and in favor of Defendant on the breach of contract and lost profits claim. The District Court held that because there were issues of fact with respect to some of these claims and the claims were interrelated, summary judgment should be denied. See attached Memorandum and Recommendation and Order.

6. Genwove U.S. Ltd. v. William H. Muth, 3:01CV153 (W.D.N.C. 2001).

This action was the second of three cases involving the same parties. It involved a motion to change venue. The first suit was filed by the Defendant in the Southern District of West Virginia alleging age discrimination in connection with his employment by the Plaintiff. The instant case involved a claim filed by the Plaintiff/employer in North Carolina alleging that the Defendant had violated his employment agreement while employed by the Plaintiff. The facts that gave rise to the second case were allegedly gleaned from documents produced in the first case filed in West Virginia. Such documents had been produced pursuant to a protective order and were only supposed to be seen by the attorneys' eyes. The third suit was filed by the Defendant in the Southern District of West Virginia alleging that the information had been disclosed in violation of the court's protective order entered in the first case. The Defendant filed a motion to transfer venue of the second case to West Virginia given that the two other related cases were pending there. After reviewing all of the relevant factors in connection with changing venue, I recommended that a change of venue be granted. The District Court disagreed that the case needed to be transferred, primarily because it concluded that the cases involved unrelated issues of law and fact. See attached Memorandum and Recommendation and Order.

7. Rodney Eugene Wilhelm v. Aetna Life Insurance Co., 3:01CV458 (W.D.N.C. 2002).

This is an ERISA case in which the Defendant made a motion to dismiss for failure to state a claim. I recommended that the motion to dismiss be granted. In its objections to the District Court, the Plaintiff continued to assert that the complaint was sufficient, but alternatively requested leave to amend. The District Court agreed with the Memorandum and Recommendation that the complaint was insufficient but granted the motion to amend. Accordingly, the District Court denied the motion to dismiss. See attached Memorandum and Recommendation and Memorandum and Order.

8. Sharon C. Walker v. Donna E. Shalala, 5:93CV115 (W.D.N.C. 1994).

This was a social security case in which the claimant was contesting the date upon which the ALJ had determined that her disability ended. In support for her claim that the ALJ erred, the claimant alleged that the ALJ had not placed enough emphasis on the opinion of her treating physician. Apparently, I agreed with and affirmed the decision of the ALJ (the Memorandum and Recommendation could not be located). After the Memorandum and Recommendation was entered, the Plaintiff stipulated that her disability had ended by a certain date and, therefore, there was only a five month period of time still at issue. The District Court apparently agreed with the Memorandum and Recommendation with respect to the medical testimony; however, the District Court found that the ALJ's decision had not included an evaluation of Plaintiff's subjective complaints and the case was remanded for that purpose. See attached Memorandum and Recommendation and Memorandum and Order of Remand.

9. Pioneer/Eclipse Corporation v. Kohler Co., Inc., 5:97CV59 (W.D.N.C. 1999).

This was a breach of contract case arising out of the sale of engines to be used in buffer machines manufactured by the Defendant for the Plaintiff. While the Plaintiff was satisfied with a prototype engine supplied by the Defendant, it was dissatisfied with the engines that were thereafter supplied. The Plaintiff brought suit alleging claims for breach of contract, breach of warranty, misrepresentation, and unfair trade practices. The Defendant countersued for conversion. The Plaintiff moved for partial summary judgment on its breach of contract and breach of warranty claims as well as Defendant's counterclaim for conversion, and the Defendant moved for summary judgment on the Plaintiff's claims. The Memorandum and Recommendation recommended that the Defendant's motion for summary judgment be granted, that the Plaintiff's motion be denied, so that the counterclaim for conversion would be carried forward. The District Court agreed that the Defendant was entitled to summary judgment on Plaintiff's claims but held that the Plaintiff was entitled to summary judgment on the Defendant's counterclaim for conversion. Accordingly, it partially granted Plaintiff's motion for summary judgment. See attached Memorandum and Recommendation and Memorandum and Order.

10. Ronnie Eugene Conner v. The State of North Carolina, Administrative Office of the Courts et al., 5:97CV 177 (W.D.N.C. 1998).

This was a race discrimination case brought by a state court magistrate against the Administrative Office of the Courts as well as several state court judges who allegedly had supervisory powers over him. The Defendants moved for summary judgment of all claims and I recommended that it be granted on the grounds that the Defendants were not "employers" as that term is defined in Title VII. The District Court agreed in part with the Memorandum and Recommendation, but also found that summary judgment was appropriate due to the Plaintiff's inability to satisfy the three-part test set forth in McDonnell-Douglas. See attached Memorandum and Recommendation and Memorandum and Order.

11. Gaines Motor Lines, Inc., v. MLC Associates, Inc., and Marc S. Schoen, 5:98CV119 (W.D.N.C. 2002).

This was an action by the Plaintiff against its former sales representative and the representative's president after the termination of their relationship and failure to agree to new terms. The Plaintiff alleged a number of causes of action against the Defendant including breach of contract, misappropriation of trade secrets, tortious interference with contract, and UTPA violations. Both sides moved for summary judgment, and I recommended that summary judgment be granted in favor of the Defendants on all claims. The District Court agreed with the Memorandum and Recommendation with one exception: it held that the Plaintiff's breach of contract claim with respect to the 1997 overdraft balance should not be dismissed. See attached Memorandum and Recommendation and Memorandum and Order.

12. Alexis Herman, Secretary of Labor, U.S. Dept. of Labor v. North Carolina Growers, et al., 5:99CV7 (W.D.N.C. 2000).

This case involved a dispute between the Department of Labor and some temporary alien workers who had been admitted under the H-2A program to work in Christmas tree production and harvesting. The issue before the court was whether or not such work falls under the Fair Labor Standards Act ("FLSA"), and whether or not such a classification was reasonable. Due to a discovery dispute that arose between the parties, the Defendants filed a motion to compel. Prior to that time it had submitted a privilege log, the sufficiency of which was also at issue. In short, the Department of Labor was objecting to the production of the documents on the grounds that any predecisional documents would be privileged. However, since the Defendants were only requesting documents generated after the classification was made, the information was not protected. Therefore, I ordered that the documents requested be produced. I also ordered that the Department update its privilege log as it was inadequate under Bornstein v. United States, 977 F.2d 112 (4th Cir. 1992). The Department appealed to the District Court, arguing that it had been ordered to produce predecisional documents, which was not the case. The District Court essentially agreed with my analysis of the privilege issue and agreed that the privilege log was inadequate, but also ordered that I review the privilege log before the documents were produced. The amended log was reviewed and I again ordered that the requested documents be produced, since the Defendants were only requesting documents that were not predecisional. See attached Orders.

13. Kevin L. Welborn and Jane P. Welborn v. United States of America, et al., 5:99CV41 (W.D.N.C. 1999).

This action involved a dispute arising over the location of an easement across property of the United States allowing access to Plaintiff's land. The United States moved to dismiss based on lack of subject matter jurisdiction. I recommended that the motion be granted on the grounds that the case did not constitute a quiet title action under the Quiet Title Act, and also recommended that the Plaintiffs be allowed to amend their complaint to state such a claim. The District Court held that the case did arise under the Quiet Title Act, and that subject matter jurisdiction existed. The District Court also rejected the United States' argument that the case should be dismissed because the statute of limitations had expired, an issue not reached in the Memorandum and Recommendation. See attached Memorandum and Recommendation and Memorandum and Order.

14. Joe E. Miller and Della Sue S. Miller v. PNC Mortgage Corporation, 5:99CV103 (W.D.N.C. 2001).

This was a case involving the Plaintiffs' home mortgage and the Defendant's allegedly wrongful attempt to foreclose on Plaintiff's mortgage after they had filed for bankruptcy. At issue was a motion for summary judgment which was in part based on some requests for admissions to which Plaintiffs' counsel failed to file responses. In addition, Plaintiffs' counsel failed to provide any sufficient reason why the response should not be deemed to be admitted and, therefore, I recommended that they be so deemed. I also recommended that the claims be dismissed based on the expiration of the statute of limitations as established by the requests to admit. The District Court did not address the issue whether or not summary judgment was appropriate based on the imputed admissions. Rather, the District Court held that if the Plaintiffs had no claim under the Bankruptcy Code, then the court lacked subject matter jurisdiction of the remaining state law claims. Accordingly, the case was remanded to state court. See attached Memorandum and Recommendation and Memorandum and Order.

15. Peggy S. Putnam v. Kenneth S. Apfel, Commissioner, Social Security Administration, 5:99CV193 (W.D.N.C. 2001).

This is a social security disability case in which the ALJ had found that the Plaintiff was not disabled. The Plaintiff contended that the ALJ erred by not explaining the reasons for his determination that her impairments, which included carpal tunnel syndrome, did not meet or equal a listed impairment. I recommended affirming the ALJ's decision on the grounds that the ALJ was not required to explain his findings and that even so, the evidence showed that the Plaintiff's impairments did not meet or equal one of the relevant listings. In addition, the evidence showed that Plaintiff was able to do a number of daily activities and that even if she could not perform her previous job, she could perform other light work. The District Court held that the ALJ erred by not setting forth the relevant impairments in the listed criteria and comparing them to the evidence of the Plaintiff's symptoms. Thus, the Court remanded the case back to the ALJ for further proceedings. See Memorandum and Recommendation and Memorandum and Order.

16. Patricia Turner, Individually and as Administratrix of the Estate of Harvey L. Turner, Jr. v. Reliance Standard Life Insurance Company, 5:00CV37 (W.D.N.C. 2000).

This case arose out of a claim for accidental death benefits made by Plaintiff following the death of her husband. The Defendant filed a motion to dismiss and/or for summary judgment on the grounds that Plaintiff's claims were preempted by ERISA. I recommended that the motion be denied on the grounds that the plan at issue was not an "employee benefit plan" as defined by ERISA. The District Court held that although the employer did not fund the program or have any role in administering the program, the employer had "endorsed" the program thereby converting it to an ERISA plan. The District Court then gave the Plaintiff additional time to amend her complaint to bring a cause of action under ERISA. See attached Memorandum and Recommendation and Order.

17. Alan Biglow v. Sentrol Controls Group, 5:00CV89 (W.D.N.C. 2001)

This is a discrimination case in which the Plaintiff, who was terminated from his employment for viewing pornographic, sexually-oriented Internet sites on his workplace computer, claims that he was terminated in violation of the Americans with Disabilities Act ("ADA"), the North Carolina Handicapped Persons Protection Act ("NCHPPA"), the Family and Medical Leave Act ("FMLA"), and the Employee Retirement Income Security Act ("ERISA"). The Defendant moved to dismiss the complaint on the grounds that the Plaintiff did not allege that he had a disability within the meaning of the ADA or the NCHPPA. In particular, the Plaintiff had alleged that he was disabled because of his inability to perform his own particular job, to exercise self-control, or to think properly. The Defendant also moved to dismiss on the grounds that the Plaintiff did not allege that he ever requested leave under the FMLA, and that the Plaintiff did not allege that his termination was made with any intent to violate his ERISA rights. I recommended that the motion to dismiss be granted on the grounds that the complaint failed to state a claim under any cause of action. The District Court agreed that two of the Plaintiff's alleged disabilities were not disabilities under the law but decided to leave open the question as to whether or not "thinking" was a disability. The District Court adopted the recommendation to dismiss the FMLA claim but held that it was possible that the complaint, though inartfully pled, could be construed to state a claim under ERISA. See attached Memorandum and Recommendation and Memorandum and Order.

18. Adrienne Thompson v. Steele Rubber Products, Inc., 5:02CV43 (W.D.N.C. 2002).

This was a racial discrimination claim in which the Defendant moved to dismiss the complaint based on the Plaintiff's alleged failure to exhaust her administrative remedies. In short, the Plaintiff had filed two EEOC charges and had only received a right to sue letter with respect to her first charge. I recommended that the complaint be dismissed on the grounds that the Plaintiff had not received a right to sue letter in connection with the claims that formed the basis of the suit. The District Court agreed that to the extent the claims were based on the second EEOC charge, the court was without jurisdiction to hear them, and adopted the recommendations in that regard. The District Court also held however, that it was possible that the *pro se* Plaintiff was attempting in her complaint to state claims which would relate to the initial charge to which the EEOC had already responded and the court would in fact have jurisdiction to hear those claims. See attached Memorandum and Recommendation and Memorandum and Order.

(3) citations for significant opinions on federal or state constitutional issues, together with the citation for appellate court rulings on such opinions.

Mom n Pops, Inc. v. The City of Charlotte, et al., 979 F. Supp 372 (1997).

This was a suit claiming that the City of Charlotte's zoning ordinance relating to adult establishments and its privilege license tax violated both the First Amendment and the Due Process Clause. The Plaintiff moved for a preliminary injunction preventing the City from enforcing the challenged provisions until such time as the court could rule on the underlying claim. The motion for preliminary injunction was denied. The Plaintiff appealed but the decision was upheld by the Fourth Circuit. See Mom n Pops Inc. v. City of Charlotte, 162 F.3d 1155, 1998 WL 537928 (4th Cir. (N.C.) August 19, 1998)(unpublished). See attached Opinion.

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

See attached opinions and orders referenced above.

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 held only judicial offices.

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 for the judge, the court and dates of the period you were a clerk;

I did not clerk for a judge.

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.

10/82 to 12/88

Assistant District Attorney, Mecklenburg County, North Carolina
700 East Trade Street, Suite 200
Charlotte, North Carolina 28202

Government Agency: State of North Carolina, Office of the Courts
100 East Six Forks Road, Anderson Plaza
Raleigh, North Carolina 28202

1/89 to 5/93

District Court Judge, 26th North Carolina Judicial District
700 East 4th Street, Suite 3304
Charlotte, North Carolina 28202

Government Agency: State of North Carolina, Office of the Courts
2 East Morgan Street
Raleigh, North Carolina 27602

5/93 to present

United States Magistrate Judge, Western District of North Carolina
401 West Trade Street, Room 195
Charlotte, North Carolina 28202

Government Agency: Administrative Office of the United States Courts
Washington, DC 20544

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

From October, 1982, until December, 1988, I was an Assistant District Attorney for the 26th North Carolina Judicial District. I left upon election to a North Carolina State District Court Judgeship in the same district.

For roughly my first two years as an Assistant District Attorney I was responsible for prosecuting misdemeanors, which at that time included crimes punishable by up to two years in prison. These included assaults, property crimes, possession of controlled substances, certain weapons crimes such as carrying a concealed weapon, and driving while impaired and other traffic offenses. I also prosecuted misdemeanor and felony juvenile offenses.

For roughly the last four years of my work as an Assistant District Attorney I was responsible for prosecuting felonies. These included crimes of violence, from capital murder to assault inflicting serious injury, rape and sexual assault, indecent liberties and crimes against children, dissemination of obscenity, narcotics conspiracies and individual drug offenses, weapons crimes, property crimes, and financial crimes such as fraud and false pretenses.

In 1988 I was elected by a 20% majority to an open District Court seat in North Carolina's 26th Judicial District. I was re-elected in 1992 without opposition. The first two and one-half years in this position were spent primarily hearing misdemeanor criminal cases and conducting felony probable cause and detention hearings. After that I focused almost exclusively upon civil and domestic cases in my district, Mecklenburg County, and, on assignment, in adjacent Cabarrus County.

Approximately one-third of my civil terms were "general" and included tort, contract, insurance, personal injury, and landlord-tenant disputes. These sessions mixed jury and non-jury trials.

Two-thirds of my civil terms focused on domestic matters, including divorce, alimony, equitable distribution cases, contested child custody and visitation, child support, enforcement of foreign child support orders, domestic violence orders, and mental commitments.

After four years, I received a 97% approval rating from attorneys polled by Court Watch of North Carolina.

I was appointed a United States Magistrate Judge in May, 1993. Responsibilities for U.S. Magistrate Judges in the Western District of North Carolina extend to the full limits of statutory authority. The civil cases over which I have presided, by consent of the parties, through trial or settlement, have included intellectual property, antitrust, civil rights, 42 U.S.C. 1983 suits, labor, employment, ERISA, breach of contract, shareholder suits, tort, product liability, fraud and Social Security appeals. My criminal case

responsibilities have included felony pretrial motions and hearings, misdemeanors and habeas review. A number of these cases, civil and criminal, have raised Constitutional issues.

Along with members of the Mecklenburg County Bar Alternative Dispute Resolution committee, I drafted Alternative Dispute Resolution rules for the Western District of North Carolina, successfully urged their adoption, organized continuing legal education seminars about them, and helped implement them. An important aspect of my work as a Magistrate Judge has been conducting judicial settlement conferences under these rules. I also represent the federal court in meetings of the Mecklenburg County Bar Board of Directors and on various Bar committees.

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

At all times during my practice as an Assistant District Attorney, my "client" was the State of North Carolina. My focus and expertise was in North Carolina criminal law and procedure.

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 District Attorney I appeared in court frequently:

While assigned to misdemeanor prosecutions, I was ordinarily in District Court five days per week, 45 weeks per year, organizing dockets, negotiating guilty pleas, and trying cases (non-jury). There were two sessions of District Court each day. Roughly 60 to 180 cases were docketed per session. In each session, organization and guilty pleas would take roughly forty minutes and trials, two hours. On average, I tried four to six cases per day.

While assigned to felony prosecutions, I was in arraignment or trial court for some or all of each day, five days per week, 45 weeks per year, arguing pretrial motions, trying cases (jury), and arguing at sentencings.

2. Indicate the percentage of these appearances in:

- a. federal courts:** 0 %
- b. state courts of record:** 67 % (State Superior Court)
- c. other courts:** 33 % (State District Court)

3. **What percentage of your litigation was:**

- a. **civil:** 0 %
 b. **criminal:** 100 %

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

The best records indicate that I tried twenty-one cases to jury verdict in North Carolina State Superior Court. I was sole counsel in approximately eighteen of these and associate counsel in the other three. There exists no record totaling how many cases I tried as an Assistant District Attorney assigned to North Carolina State District Court. As stated above, on average I tried four to six cases per day for approximately two years.

5. **What percentage of these trials that was:**

- a. **jury:** 100% (NC State Superior Court)
 b. **non-jury:** 100% (NC State District Court)

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 v. Eileen M. Smith*, 323 S.E.2d 316 (N.C. 1984).

Date of Representation: November 1983 - December 1984

Issues in this case were heard before the following courts:

- (1) Mecklenburg County District Court, the Honorable Terry Sherrill, Judge Presiding, heard defendant's pre-trial motion to prohibit the State from introducing the affidavit of the chemical analyst to prove her blood alcohol concentration in her trial for driving while subject to an impairing substance.
- (2) Superior Court of Mecklenburg County, the Honorable William T. Grist, Judge Presiding, heard defendant's petition for certiorari review of Judge Sherrill's order denying defendant's motion to suppress the affidavit.
- (3) North Carolina Supreme Court, granted the state's petition for discretionary review of the constitutionality of the use of a chemical analyst's affidavit in lieu of testimony to prove a defendant's blood alcohol concentration.

Summary of the case:

This was the test case in which the North Carolina Supreme Court upheld the constitutionality of N.C. Gen. Stat. § 20-139.1(e1) (1983), which allowed the use of a sworn affidavit of a chemical analyst, in lieu of the analyst's live appearance, to prove a defendant's blood alcohol concentration in a District Court trial.

Prior to October 1, 1983, the date § 20-139.1(e1) went into effect, prosecutors had to subpoena the chemical analyst in virtually every DWI case. In 1983 alone, there were 84,634 arrests for DWI in North Carolina. The Legislature enacted § 20-139.1(e1) in part to ease the burden in the State's over-burdened District Courts.

On November 2, 1983, Eileen M. Smith was charged with driving while subject to an impairing substance (DWI). She was taken before a licensed chemical analyst and submitted to a breath test conducted by that analyst. To prove Smith's blood alcohol concentration, the State intended, pursuant to § 20-139.1(e1), to introduce at trial an affidavit prepared by the chemical analyst rather than call the chemical analyst to testify in person. Prior to trial, the defendant moved to suppress the chemical analyst's affidavit, arguing that use of the affidavit violated her constitutional right to confront and cross-examine the witnesses against her.

At the time the N.C. Supreme Court heard arguments on this issue, eight of North Carolina's 100 counties had 11,590 backlogged DWI cases at the District Court level. In its successful petition for discretionary review, bypassing the Court of Appeals, the State argued that one reason for the backlog was uncertainty about the constitutionality of the affidavit provisions of § 20-139.1(e1). This uncertainty was underscored by the fact that when the Court heard oral arguments in *Smith*, two other cases presenting the same issue were before it. The Court chose *Smith* as the vehicle for its decision because it was the only one of the three that was properly before it from a procedural standpoint. See *In re Redwine*, 322 S.E.2d 769 (N.C.1984) and *State ex rel. Edmisten v. Tucker*, 323 S.E.2d 294 (N.C.1984).

The North Carolina Supreme Court held that § 20-139.1(e1) did not violate the defendant's right to confrontation and cross-examination. *State v. Smith* is still the case law authority for admission of a chemical analyst's affidavit to prove blood alcohol concentration in North Carolina District Courts. Prosecutors use the chemical analysts' affidavit in virtually all DWI prosecutions in district court.

Counsel for the Parties:

Counsel for the State: H. Brent McKnight, Asst. Dist. Atty.

I briefed and argued the State's position on defendant's motion to suppress the chemical analyst's affidavit before the Mecklenburg County District Court and before the Mecklenburg County Superior Court.

Although it is customarily the job of the North Carolina Attorney General's Office to brief and argue cases before North Carolina appellate courts, I assisted in preparing the State's brief for the Supreme Court and assisted Isaac Avery in preparing for oral arguments. Isaac Avery, of the Attorney General's Office, argued the case before the North Carolina Supreme Court; his co-counsel were David Roy Blackwell, Asst. Atty Gen., and Dale Talbert, Asst. Atty. Gen.

Counsel for the Defense: Lyle J. Yurko and Eben T. Rawls were primary counsel. They were assisted by Joseph L. Ledford, and J. Marshall Haywood .

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(This may be a home address. According to the Mecklenburg County Bar Association, disciplinary action of some kind was taken against Mr. Haywood.)

(2) *State v. Leroux*, 390 S.E.2d 314 (N.C.1990).

Date of Representation: January - November 1987

Courts:

- (1) Superior Court of Mecklenburg County, the Honorable Robert M. Burroughs, Judge Presiding, heard pre-trial motions, and presided over the trial and sentencing.
- (2) North Carolina Supreme Court heard Defendant's appeal, bypassing the Court of Appeals upon Defendant's petition.

Summary of the case:

This was a capital murder case in which the defendant, Lawrence Graham Leroux, was convicted of first-degree murder perpetrated by lying in wait, as well as seven other offenses. This is the case in which the North Carolina Supreme Court articulated the legal standard in North Carolina for "lying in wait."

Between midnight and 2:00 a.m. on January 15, 1987, Leroux went on a shooting spree in his neighborhood, shooting into the windows of a number of residences. Two police officers arrived and began searching for the shooter. There was heavy cloud cover that night, making visibility very poor. As the officers walked across the fairway of an adjacent golf course, shots rang out. One of the officers was hit in the neck and killed. Two more officers arrived and a gun fight ensued on the golf course until the defendant was shot. At the hospital, where he was taken for treatment for his gunshot wound, Leroux was found to have a blood alcohol concentration of .16.

The first legal issue was whether first-degree murder perpetrated while lying in wait required the State to prove the defendant stationed himself in a position to attack with the intent to kill the victim and that the defendant's purpose was evident or announced before the killing. The North Carolina Supreme Court held that first-degree murder by "lying in wait" requires neither pre-meditation nor deliberation; nor does it require a specific intent to kill. It held that the State did not have to show that the defendant had an announced purpose or intent to kill the victim. *State v. Leroux*, 390 S.E.2d 314, 320 (N.C.1990)

Another legal issue was whether the State could present evidence of a breaking and entering committed by the defendant two years prior as rebuttal evidence to the defendant's intoxication defense in his murder trial. Defendant's trial strategy was to establish that due to an alcohol induced blackout, he lacked the mental capacity to know what he was doing the night of the shooting. To support this argument, the defendant produced evidence of a prior breaking and entering charge stemming from an allegedly similar blackout. The defendant presented evidence that the charge had been dismissed because he was so intoxicated at the time of the incident that he could not remember much of what occurred. On rebuttal the State called the victim of the breaking and entering, who testified that during the incident, the defendant had told her that he was breaking in because his wife was pregnant and he needed money. The North Carolina Supreme Court held that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *Id.* at 324.

The North Carolina Supreme Court upheld the convictions and found no error in the trial. The holdings in *State v. Leroux* have been discussed or cited in 26 cases, and *State v. Leroux* is listed in at least seven secondary legal sources.

Counsel for the Parties:

Counsel for the State: J. Gentry Caudill, Asst. Dist. Atty; H. Brent McKnight, Asst. Dist. Atty.

I researched legal issues in the case; interviewed witnesses; briefed and argued pre-trial motions; assisted in preparing the case for trial in Superior Court; and assisted in trying the case to its conclusion in Superior Court.

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**(3) *State v. Stephen David Winick*, 87 CRS 16351 Mecklenburg County, North Carolina
State v. Roger Preston Griggs, 87 CRS 11195 Mecklenburg County, North Carolina**

Date of Representation: March 1987 - July 1987

Court: Mecklenburg County District Court, the Honorable Frank W. Snepp, Judge Presiding, heard pre-trial motions, took defendants' plea and sentenced the defendants.

Summary of the case:

This case arose out of law enforcement's and the District Attorney's Office's attempts to crack down on North Carolina's pornography industry in the wake of anti-obscenity legislation passed by the North Carolina General Assembly. (The next litigation summary deals with constitutional challenges to the law.)

The facts of this case were fairly routine, although the outcome was not. Undercover Charlotte-Mecklenburg police officers purchased obscene material from stores in Mecklenburg County operated locally by Roger Griggs, who sent receipts and cash to his boss, Stephen Winick, in Maryland. Griggs and Winick were officers in a large multi-state organization involved in the dissemination and sale of obscene materials. There was strong evidence that both men were connected to an even larger organization operated by Reuben Sturman in Cleveland, Ohio. Griggs was arrested and indicted on one count of conspiracy to disseminate obscenity and 41 counts of accessory before the fact to dissemination of obscenity. We were able to connect Winick to the operation through two informants awaiting trial on similar charges. In fact, both Winick and one of the informants hired the same Colorado lawyer, Arthur Schwartz, to represent them. We obtained indictments, identical to those for Griggs, for Winick, even though he resided in and operated out of Maryland.

When it became clear that at least one of the informants would testify against both Griggs and Winick, we were able to work out a plea agreement with both men. As part of the plea agreement both men agreed not to sell, disseminate or exhibit adult material anywhere in North Carolina. More importantly, Winick agreed to close nineteen businesses throughout the state of North Carolina, including a distribution center in Charlotte. Actual ownership of many of these businesses had been traced to Reuben Sturman, including a Shelby business where three men had been murdered execution-style earlier that year. Additionally, Winick agreed to remove from North Carolina all adult material at these businesses. This brought an end to Winick's organization in North Carolina, and it was the first time his organization had been required to leave an entire state.

Counsel for the Parties:

Counsel for the State: Hon. Peter S. Gilchrist III, Dist. Atty.; H. Brent McKnight, Asst. Dist. Atty.

Because of the importance of this case, the District Attorney was directly involved in its prosecution. I argued pre-trial motions, prepared the cases for trial in Superior Court; and argued at sentencing. I also assisted in negotiating the plea in this case. Police Attorney Robert F. Thomas, Jr. also assisted in the preparation and trial of the case.

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Counsel for Stephen Winick: Theo X. Nixon was primary counsel. Defendant also retained Colorado attorney Arthur M. Schwartz to assist Nixon. Schwartz had to withdraw because he had been previously retained to represent a State's witness in this case who was facing charges in Greensboro, N.C.

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Counsel for Roger Griggs: Eben T. Rawls was primary counsel. He was assisted by Ohio attorney H. Louis Sirkin.

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(4) *State v. Donald Joseph Roland*, 362 S.E.2d 800 (N.C.App.1987) *disc. review denied* 364 S.E.2d 666 (N.C.1988) *and decision aff'd* by 368 S.E.2d 385 (N.C. 1988).
85 CRS 80149-80151 Mecklenburg County, North Carolina

State v. Ernest Eugene Smith. State v. David Michael Schoch, 373 S.E.2d 435 (N.C.1988);
365 S.E.2d 631 (N.C.App.1988)

Smith: 85 CRS 80143, 80144, 80146 Mecklenburg County, North Carolina

Schoch: 85 CRS 80134, 80135, 80137, 80139, 80140 Mecklenburg County, North Carolina

Date of Representation: October 1985 - November 1986

Courts:

- (1) Superior Court of Mecklenburg County, the Honorable Frank W. Snapp, Judge Presiding, held an omnibus motions hearing of issues common to all defendants charged under N.C. Gen. Stat. 14-190.1. The issues are listed below, and a copy of his order denying the motions is attached.
- (2) Superior Court of Mecklenburg County, the Honorable Robert D. Lewis, Judge Presiding, presided over the trials and sentenced the defendants.
- (3) North Carolina Court of Appeals.
- (4) North Carolina Supreme Court.

Summary of the case:

These cases arose out of law enforcement's and the District Attorney's Office's attempts to crack down on North Carolina's pornography industry in the wake of anti-obscenity legislation passed by the North Carolina General Assembly. *See* N.C. Gen. Stat. § 14-190.1. These three defendants were among a group charged during a sting operation by the Charlotte-Mecklenburg police department. I chose these three defendants for inclusion as "significant cases," because they were among the first to test the constitutionality of the statute. Schoch's and Smith's appeal presented an issue of first impression for the North Carolina Appellate Courts.

On October 1, 1985, undercover Charlotte-Mecklenburg police officers conducted a sting operation, purchasing obscene material from stores in Mecklenburg County. Defendant Roland operated one store and sold three magazines and one film to an undercover officer. Defendant Schoch was the manager of another store and Smith was the clerk. Schoch sold a package of magazines and a film to one undercover officer, and later the same day, Smith and Schoch sold two magazines and a film to a different undercover officer. Each defendant received a separate indictment for each piece of material he disseminated.

Prior to trial, a group of defendants, including Roland and Schoch, filed collective motions to dismiss their indictments on the grounds that § 14-190.1 was unconstitutional. Judge Snapp held an omnibus hearing on the following issues:

1. Whether § 14 - 190.1 is facially overbroad in proscribing activities and materials presumptively protected by the First and Fourteenth Amendments of the United States Constitution and the corollary provisions of the North Carolina Constitution;

2. Whether the failure of the statute to specify the relevant “community” permits the use of a localized standard rather than a statewide standard, potentially chilling distribution of presumptively protected material by requiring the disseminator to deal with too many diverse community standards;
3. Whether the failure of N.C.G.S. 14 - 190.1 to require that the value of the material be considered as a whole renders it constitutionally overbroad;
4. Whether the statute’s definition of “sexual conduct” brings within the reach of the statute materials that are presumptively protected;
5. Whether the statute is unconstitutionally vague in so far as it adds new elements to the concept of obscenity and fails to define the relevant community;
6. Whether the indictments should be dismissed due to failure to present materials to a neutral, detached magistrate for a judicial determination of probable obscenity;
7. Whether the indictments should be dismissed for failure to allege intentional dissemination and knowledge of the materials’ content;
8. Whether the indictments should be dismissed for failure to state sufficient facts to indicate that, taken as a whole, the particular magazine or film, applying contemporary statewide standards, appeals to the prurient interest;
9. Whether the State should be required to elect and charge only a single offense in each of the indictments, or whether the indictments should be dismissed on grounds of duplicity;
10. Whether the indictments should be dismissed as multiplicitous: Whether a single distribution of several obscene magazines on the same date constitutes one or more violations of the obscenity statute.

Judge Snepp denied the motions. Roland, Schoch and Smith were tried and convicted on all counts.

Defendant Roland appealed, and the North Carolina Court of Appeals, in a 2-1 opinion, found no prejudicial error and affirmed the convictions. Issues raised included the trial court’s instruction on the “value” prong of the obscenity charge and exclusion of survey evidence. The North Carolina Supreme Court denied the petition for discretionary review and affirmed the convictions on the appeal as of right.

In their appeal, Defendants Smith and Schoch raised eleven assignments of error. The North Carolina Court of Appeals found all eleven to be without merit. Smith and Schoch appealed to the North Carolina Supreme Court, which reversed and remanded on one issue.

The dispositive issue before the Supreme Court was one of first impression. The issue was whether the legislature, when enacting N.C. Gen. Stat. § 14-190.1, intended that a defendant could be convicted of a separate offense for each obscene item disseminated in a single transaction. The Supreme Court majority held that because the wording of the statute was ambiguous as to whether the legislature intended to punish the dissemination of each obscene item or to punish the transaction of disseminating obscenity, the ambiguity should be resolved in favor of the defendants. *State v. Smith*, 373 S.E.2d 435, 438 (N.C.1988). Therefore, Schoch was guilty of two counts of disseminating obscenity, not five, and Smith was guilty of only one count of disseminating obscenity, not three. *Id.* Justice Meyer dissented; like the Court of Appeals, he found no ambiguity in the law. The case was reversed and remanded.

Counsel for the Parties:

Counsel for the State: Hon. Peter S. Gilchrist, III, Dist. Atty.; H. Brent McKnight, Asst. Dist. Atty.

Because of the importance of this case, the District Attorney was directly involved in its prosecution. Along with the D.A., I prosecuted all three cases. I argued pretrial motions, conducted plea negotiations, assisted in preparing the cases for trial in Superior Court; participated as co-counsel in the trial of the cases; and argued at sentencing.

It should be noted that many of the issues raised on appeal were raised in the defendants' collective pre-trial motions listed above. I argued those issues and prevailed before Judge Snepp in Superior Court.

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Counsel for Donald Roland: Edward T. Hinson, Jr. was principal counsel. He was assisted by New York attorney Paul J. Cambria.

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Paul J. Cambria
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Counsel for Ernest Smith: Edward T. Hinson, Jr. (see above for address and phone number)

Counsel for David Schoch: John W. Gresham was primary counsel. He was assisted by Michigan attorney Lee Jeffrey Klein.

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 According to the Michigan State Bar Association,
 disciplinary action of some kind was taken against
 Mr. Klein.)

(5) *State v. Hearn*, 365 S.E.2d 206 (N.C.App.1988).

Date of Representation: August 1986 - May 1988

Courts:

- (1) Superior Court of Mecklenburg County, the Honorable Claude S. Sitton, Judge Presiding, heard pre-trial motions, presided over the trial and sentenced the defendant.
- (2) North Carolina Court of Appeals.

Summary of the case:

This was a murder case in which the defendant, Martha Lynn Hearn, was tried and convicted of the second-degree murder of her housemate, David Martin. The issues in this case centered around which of the two was the primary aggressor, whether the defendant shot the victim in self-defense, and whether the defendant had a duty to retreat.

The victim, his girlfriend, the defendant and her boyfriend all lived in the same house with the victim's grandmother. The shooting occurred after a series of physical fights between a group of the victim's family members, including the victim. The defendant also was involved in a physical fight with the victim's girlfriend. After the fights broke up, the victim and his girlfriend left the house. There was testimony that the defendant threatened to kill the victim if he came back to the house. The victim did return to the house about thirty minutes later to pick up some belongings. There was evidence that he came into the house carrying a metal pipe or tire iron. Defendant went to her bedroom and got a loaded handgun. The victim was in his bedroom when the defendant came out of her room with the gun. While the victim was in his room, the defendant and the victim exchanged angry words. The defendant testified at trial that the victim lunged at her with the pipe, and that when she stepped back, the gun went off. There was conflicting evidence from witnesses present during the shooting about whether the victim had a pipe in his hand at the time of the shooting. Investigators found a metal pipe lying on the victim's bed some distance from his body. There were no fingerprints or bloodstains on the pipe.

The legal issue in this case was whether the trial judge should have instructed the jury that the defendant had no duty to retreat before using deadly force to repel an attack in her own home. The general rule regarding self-defense is that when a defendant who is without fault is attacked in his or her own home, the law does not require retreat before engaging in self-defense. In this case, the North Carolina Court of Appeals held that since there was conflicting evidence as to who was the aggressor, it was up to the jury to determine whether the defendant had a duty to retreat and whether the defendant shot and killed the victim in self-defense. The Court went on to hold that when there is evidence that the defendant was properly defending herself in her own home, the trial court must instruct the jury that she had no duty to retreat. The Court held that the trial judge erred by failing to so instruct the jury and remanded for a new trial.

Counsel for the Parties:

Counsel for the State: H. Brent McKnight, Asst. Dist. Atty.

I researched legal issues in the case; interviewed witnesses; briefed and argued pre-trial motions; and prepared for and tried the case in Superior Court. The jury found the defendant guilty of second-degree murder. The North Carolina Court of Appeals remanded the case for a new trial. During jury selection for her second trial, defendant pled guilty to second-degree murder.

Counsel for the Defense: James Gronquist

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(6) State v. Todd, 87 CRS 49622, Mecklenburg County, North Carolina**Date of Representation:** August 1987 - June 1988**Court:** Superior Court of Mecklenburg County, the Honorable Robert E. Gaines, Judge Presiding, heard the pre-trial motions, took the plea and sentenced the defendant.**Summary of the case:**

This was a murder case in which the defendant, Curtis Anthony Todd, shot the victim four times over a \$10 piece of jewelry. The defendant pled guilty to second-degree murder.

On August 10, 1987, the victim, Walter Lee Richardson, his girlfriend and another friend were standing outside a bar in Charlotte at around 4:00 a.m. The defendant approached the group, bought a gold necklace from the victim for ten dollars and then went into the bar. Ten to fifteen minutes later, the defendant returned to the group claiming that the necklace was junk and demanding his ten dollars from the victim. When the victim told him he no longer had the money, the defendant hit him in the head with a gun. The victim turned and ran. The defendant chased him and shot him four times in the back and legs. Although he never confessed to police, the defendant told several friends that he had killed someone that day over "slum" jewelry.

This case faced problems if it had been tried before a jury. Of the five witnesses who saw the shooter, three gave very different descriptions of what the defendant was wearing at the time of the shooting and only two of the witnesses were able to identify the defendant as the shooter from a photographic line-up. One of the witnesses unable to pick the shooter out of the line-up was standing with the victim both times the defendant approached him about the necklace. Additionally, there was evidence that the victim and at least one of the witnesses were drug addicts and that the victim had used the \$10 to purchase cocaine prior to the shooting. In addition to creating credibility problems for the witness, the drug issue could have reduced the jury's level of sympathy for the victim.

The defendant originally pled not guilty and a trial date was set. Prior to trial, I offered defendant a plea to second-degree murder with no recommendation as to sentencing. Defendant pled guilty as charged to second-degree murder and was sentenced to 22 years in prison.

Counsel for the Parties:

Counsel for the State: H. Brent McKnight, Asst. Dist. Atty.

I researched legal issues in the case; interviewed witnesses; briefed and argued pre-trial motions; and was prepared to try the case in Superior Court. Prior to trial I offered a plea of second-degree murder as charged, which the defendant took.

Counsel for the Defense: Marc Towler and Susan Weigand, Office of the Public Defender.

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(7) State v. Jackson, 87 CRS 26509 & 87 CRS 26510 Mecklenburg County, North Carolina

Date of Representation: May 1987 - July 1987

Court: Superior Court of Mecklenburg County, the Honorable Chase Saunders, Judge Presiding, took the plea and sentenced the defendant.

Summary of the case:

This was a kidnapping and rape case. It was significant more for the fact that the defendant was a violent sexual predator than for any complicated issues in the case.

On May 4, 1987, the defendant, Michael Lamont Jackson, knocked on the door of victim's apartment and asked to use her phone. He told the victim he was with the moving company scheduled to move one of her neighbors. The victim, an 80 year-old woman, let the defendant into her apartment. He pushed her into the bedroom and raped her twice, choking her while he raped her. He then tied the victim to the bed, stole some money and her car. He told the victim he would be back later. The victim freed herself and called the police. The defendant was apprehended after he wrecked the victim's car during a high-speed chase with police. He admitted to raping the victim and laughed about it to the officer interviewing him. Defendant was 19 at the time.

During the investigation of the case, the State discovered that when he was 17, the defendant had been convicted of attempted rape of one of his counselors at a treatment center for mentally and emotionally disturbed children. Another of his counselors reported that the defendant was not deterred by the possibility of punishment and that his acts of sexual assault were particularly violent. The counselor also reported that the defendant did not and would not respond to treatment. In this case, the defendant pled guilty to first-degree kidnapping and second-degree rape. Judge Saunders sentenced him to 25 years in prison and was so concerned about the defendant's future release that he ordered that copies of all psychological studies and evaluations of the defendant be forwarded to the North Carolina Department of Corrections in the event he was considered for parole.

Counsel for the Parties:

Counsel for the State: H. Brent McKnight, Asst. Dist. Atty.

As an Assistant District Attorney, I was assigned this case in May 1987. I researched legal issues in the case; interviewed witnesses; prepared to try the case in Superior Court; and negotiated a plea agreement whereby the defendant pled guilty to first-degree kidnapping and second-degree rape.

Counsel for the Defense: James Williams, Jr., Office of the Public Defender.

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(8) *State v. Vance*, No. 8926SC248, Unpublished Opinion of the North Carolina Court of Appeals; 88 CRS 18396 Mecklenburg County, North Carolina

Date of Representation: March 1988 - August 1988

Courts:

- (1) Superior Court of Mecklenburg County, the Honorable Terry Sherrill, Judge Presiding, heard the pre-trial motions and presided over the trial and sentencing of the defendant.
- (2) North Carolina Court of Appeals heard defendant's appeal.

Summary of the case:

This was a rape case. The victim met the defendant for the first time at a "liquor house" in Charlotte. As the victim and her friend were leaving the liquor house, the defendant convinced the victim to go with him to a house across the street. The victim had been drinking. She went into the house with him while her friend remained outside. The house had no electricity and was very dark. Once inside the victim heard a woman's voice somewhere in the house. Defendant raped the victim three times before she was able to escape. When the police arrived, they found the defendant lying in some bushes next to his house. His face was swollen, and his face and body had several deep scratches. The defendant was under the influence of drugs at the time. When the police searched the defendant's house, they found the defendant's girlfriend in a wardrobe. She had a black eye and a cut and swollen lip. The defendant told the police that the victim had voluntarily had sex with him in exchange for drugs.

This was a difficult case to prosecute because the victim gave inconsistent statements to the police and because she had gone to the defendant's house voluntarily. Additionally, she had been drinking, which could have damaged her credibility. Nevertheless, the jury found the defendant guilty of second-degree rape. The defendant appealed on two issues. The first issue was whether the victim and officers should have been prohibited from describing to the jury the appearance of the woman found in the wardrobe. The second issue was whether the prosecutor had gone outside the record in his argument to the jury.

In an unpublished opinion, the North Carolina Court of Appeals found no merit to the defendant's arguments that the testimony about his girlfriend's appearance tended only to show his bad acts and that its prejudicial effect vastly outweighed its probative value. Likewise, the Court of Appeals found no merit to the argument that the prosecutor had gone outside the record in his closing argument. The Court pointed to evidence in the record that provided the basis for the prosecutor's argument. The Court of Appeals found no error and denied the defendant a new trial (see attached).

Counsel for the Parties:

Counsel for the State: H. Brent McKnight, Asst. Dist. Atty.

I researched legal issues in the case; interviewed witnesses; briefed and argued pre-trial motions; and tried the case to its conclusion in Superior Court.

Counsel for the Defense: Susan Weigand, Office of the Public Defender.

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(9) State v. Whitehead, 85 CRS 61484 Mecklenburg County North Carolina**Date of Representation:** August 1985 - May 1986**Court:** Superior Court of Mecklenburg County, the Honorable Charles Lamm, Judge Presiding, heard pre-trial motions, took defendant's plea and sentenced defendant.**Summary of the case:**

This was a child sex abuse case in which the defendant sexually abused his three-year-old daughter. It is a good example of the difficulties involved in trying child sex abuse cases.

The defendant and the victim's mother were separated, and the abuse occurred during visits the child had with her father. During these visits the defendant would engage in vaginal, anal and oral sex acts with the child. The abuse was discovered when the child's aunt noticed the child engaging in sexual play with her three and four year-old cousins. When questioned by the aunt, the child told her about things her father had done with her. The full details came out when the child talked to the police department's victim assistance counselors and to a child psychologist who specialized in dealing with sexually abused children.

The defendant was indicted for first-degree sex offense and for taking indecent liberties with a child. The State offered to drop the sex offense charge if the defendant pled guilty to indecent liberties. The defendant refused, and the case was set for trial. On the day the trial was scheduled to begin, the State offered a plea of attempted second-degree sex offense and indecent liberties, which the defendant accepted. He pled guilty to the attempted second-degree sex offense and to taking indecent liberties with a child.

The State got a better deal than it originally had offered in a case that faced real difficulties at trial. In the eight months since the abuse and the trial, the child had been receiving psychological treatment, and her ability to articulate what had happened remained strong throughout that time. However, on the day of trial it became apparent that the child, who was then four, regressed visibly when in the presence of her father. She spoke randomly and confusedly and her presence of mind got progressively worse. It also was discovered that in direct violation of the psychologist's orders, the child's mother had taken her to a party attended by her father a few days before the trial was to begin. Neither the psychologist nor I believed that she would be able to endure testifying in front of a jury, so I made a plea offer, and the defendant took it.

Prior to sentencing in this case, the judge ordered a pre-sentence evaluation and diagnosis of the defendant. The diagnosis was that the defendant showed strong inclinations toward pedophilia and the prognosis for successful treatment was minimal due to the defendant's resistance. The evaluators saw no alternative to an active sentence in the defendant's case. The judge sentenced him to six years in prison.

Counsel for the Parties:

Counsel for the State: H. Brent McKnight, Asst. Dist. Atty.

I researched legal issues in the case; interviewed witnesses; briefed and argued pre-trial motions; and was prepared to try the case in Superior Court. I also negotiated the plea agreement whereby the defendant pled guilty to attempted second-degree sex offense and to taking indecent liberties with a child.

Counsel for the Defense: Charles L. Morgan, Jr.

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(10) State v. Howie, 85 CRS 61484 Mecklenburg County North Carolina**Date of Representation:** July 1985 - September 1986**Court:** Superior Court of Mecklenburg County, the Honorable Joseph Pachnowski, Judge Presiding, heard pre-trial motions, took defendant's plea and sentenced defendant.**Summary of the case:**

As an Assistant District Attorney, I was responsible for prosecuting a number of domestic violence cases. This case was indicative of the types of obstacles I faced when prosecuting domestic violence cases.

In the early morning hours of June 30, 1985, the victim awoke to find the defendant on top of her. He had already penetrated her, and it took her several minutes before she was able to push him off. She told him to leave, and he complied. The victim had broken off their relationship four months prior, and since that time, the defendant had refused to leave her alone. A similar incident had occurred the previous week, but the victim did not report it. At the time of the second incident, the defendant had outstanding charges against him for first-degree burglary and assault with a deadly weapon intending to kill or inflict serious injury involving the same victim. The defendant had been arrested in January 1985 on two separate occasions for damage to personal property and for assault by pointing a gun and communicating threats, again all involving the same victim. In April 1985, the defendant was arrested for assault with a deadly weapon on the same victim.

Due to the escalating violence against the victim, the District Attorney's Office was concerned that the defendant eventually would kill this victim, so we were very interested in pursuing a prosecution for first-degree burglary and second-degree rape in this case. However, problems with the case soon arose. The victim contacted the defendant's attorney and told him she wanted to drop all the charges against the defendant. She failed to appear in court for a hearing, and the judge had to issue a show cause order. She wrote the defendant while he was in jail letting him know she was trying to help him get out of the charges, and there was evidence she slept with him after he posted bond and was released pending trial.

Based on the unreliability and hostility of our primary witness, I negotiated a plea whereby the defendant pled guilty to second-degree rape, and the State dismissed the first-degree burglary charge. The judge sentenced the defendant to 12 years in prison but suspended the sentence and placed the defendant on supervised probation. A year later, the defendant violated the terms of his probation by assaulting the same victim. His twelve year sentence for the rape conviction was activated.

Counsel for the Parties:

Counsel for the State: H. Brent McKnight, Asst. Dist. Atty.

I researched legal issues in the case; interviewed witnesses; briefed and argued pre-trial motions; and prepared to try the case in Superior Court. I also negotiated the plea agreement whereby the defendant pled guilty to second-degree rape.

Counsel for the Defense: James Conrad

James Conrad
9009 J.M. Keynes Drive
Suite 11
Charlotte, NC 28266
(704) 549-0511

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).

Over the past twenty years, I have pursued a deeper involvement in and understanding of various legal activities and areas of the law pertinent to the administration of justice, which, for purposes of this question, I have divided into the following categories:

Law Reform – I believe that judges should contribute to the process of clarifying and refining the law and have sought to do so in the following venues:

- Procedural Law: Judicial Conference Advisory Committee on Civil Rules – appointed in October, 2001 by Chief Justice Rehnquist. This committee reviews proposals to clarify and otherwise improve the Federal Rules of Civil Procedure. I currently chair a subcommittee on civil forfeiture and sealed settlements and contribute to the subcommittee on electronic discovery.
- Substantive Law: American Law Institute – elected to membership in May, 2002. I look forward to contributing to its deliberations and to the Restatements.
- Local Rules: As a member of the Alternative Dispute Resolution committee of the Mecklenburg County Bar, I drafted and implemented the current Local Rules for the Western District of North Carolina for Alternative Dispute Resolution.

Alternative Dispute Resolution – I believe that judges should encourage parties to explore resolution of cases short of trial.

- Pursuant to the aforementioned Local Rules, I conduct settlement conferences at the request of the District Court. I have successfully settled a number of cases, ranging from Intellectual Property and Hospital-Local Government disputes to Construction and Employment litigation.
- Encouraging the use of Alternative Dispute Resolution has been a priority since I was a North Carolina State District Court Judge.

Legal Education – I believe that judges should teach within the legal profession and within the community at large. This improves professionalism, fosters understanding of the legal system, and gives judges a valuable opportunity to listen. (Please see Question 12 of this section for details on the following.)

- Teacher - Continuing Legal Education courses.
- Faculty Member of UNC-Charlotte and Wingate University – teaching “Constitutional Law” and “Federal Courts,” and “Legal Environment of Business,” respectively.
- Guest Lecturer - Davidson College, West Point Military Academy, Duke University School of Law, and UNC-Charlotte.

Professionalism – I believe that judges should encourage fealty to the spirit and letter of the Code of Professional Responsibility by enforcing it in the courtroom and contributing to its refinement.

- North Carolina State Bar Ethics Committee - reviews ethics questions and proposed ethics opinions.
- Ethics 2000 committee of the North Carolina State Bar - assessed the proposed ABA Model Code in light of the existing North Carolina Code of Professional Responsibility and recommended which of the new rules to adopt.
- North Carolina Bar Association (NCBA) Professionalism Committee, currently Chair – This committee has been charged with consolidating the current professionalism initiatives of the NCBA, developing new professionalism initiatives, and overseeing the entire professionalism agenda for the NCBA. In 2001, fellow committee members Theresa Newman, a Dean at Duke University School of Law, Elizabeth Oxley of the North Carolina Attorney General’s office, and I collaborated on a comparison of the ABA Model Rules and the North Carolina Code of Professional Responsibility. The paper was used by members of the North Carolina ABA delegation in preparation for ABA deliberations on the Model Rules. Currently, the committee is collecting for publication articles on professionalism written by North Carolina attorneys. This volume will be distributed to attorneys entering practice in North Carolina.
- Community involvement - Board of Directors for the Bioethics Resource Group (formerly) and Advisory Board for the Center for Professional and Applied Ethics in the UNC-Charlotte Department of Philosophy (currently).

Access to the courts - I believe that judges should take measures to improve access to the courts for people who cannot afford to retain lawyers.

- Please see Section III, Question 1 for details about my legal activities in this area.

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.**

Thrift Savings Plan: \$148,151 (01/03)
Federal Employee Retirement System: \$10,612 (12/02)

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 I have as a judge to date, I will continue to abide by the following rules in order to avoid conflict of interest or the appearance of conflict of interest:

1. Maintain thorough and current familiarity with the Judicial Code of Conduct and relevant federal statutory and case law, and adhere strictly to their teaching and mandates. Consult with the Circuit Ethics Officer when necessary to clarify, assign, and apply ethics rules.
2. Require parties at the outset of civil litigation to disclose in writing corporate affiliations and other entities with a direct financial interest in litigation. Conduct whatever further inquiries are needed to determine whether a conflict of interest in fact exists. If there remains a question, recuse myself at the outset.
3. Keep a current list with the Clerk's Office of any companies in which I or my family own stock or have a financial interest, and direct the Clerk not to assign any cases to me involving those companies.
4. If, nonetheless, such a case is assigned to me, disclose the relationship to the parties. Where recusal is mandatory, immediately recuse. Where the parties may consent to my continuing as judge upon full disclosure, and where I am certain I will not be personally influenced or in any way give the appearance of impropriety, continue as judge upon the filing of their written consent.

5. Recuse myself at the outset from cases involving or brought by any organization to which a family member or I belong, whether it be church, civic, educational, or any other.
6. If a party is a family acquaintance, recuse except where recusal is not mandatory and there is express written consent.

Using these personal rules, I have not had any problems with conflicts of interest as a North Carolina State District Court Judge or a U.S. Magistrate Judge. I am not aware of any categories of litigation or financial arrangements that are likely to present potential conflicts of interest during my initial service as a U.S. District Court Judge.

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, explain.**

Since becoming a judge, I have taught some courses in law at area universities when asked by the Deans to do so. I have done this because I enjoy teaching and because I believe that education is something that I can and should give back to my community. I would like to continue occasional law teaching at area universities, subject, of course, to the demands of my cases and to the approval of the Chief Judge of the Circuit.

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

Please see attached Federal Disclosure Report.

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

**HAROLD BRENT McKNIGHT
FINANCIAL STATEMENT**

**NET WORTH
as of
February, 2003**

ASSETS	
Cash on hand and in banks 1/03	\$ 16,221
US Government securities*	8,281
Listed securities*	207,835
Unlisted securities	-0-
Accounts and Notes receivable	-0-
Real Estate Owned*	380,000
Real Estate Mortgages receiv.	-0-
Autos and other personal prop.	100,000 est.
Cash value-life insurance	30,539
Other assets itemize:	
Federal Thrift Savings Plan 1/03	148,151
Federal Emp. Retirement 12/02	10,612
Total Assets	\$901,283

*Please see attached schedule

CONTINGENT LIABILITES

None

LIABILITIES*	
Notes payable to banks-secured	\$ -0-
Notes payable to banks-unsecured	-0-
Notes payable to relatives	-0-
Notes payable to others	-0-
Accounts and bills due	2,917
Unpaid income tax	-0-
Other unpaid income and interest	-0-
Real estate mortgage-residence	177,317
Chattel mortgages and other liens payable	-0-
Other debts-car loan	6,099
Total Liabilities	\$186,333
Net Worth	\$ 714,950
Total Liabilities and Net Worth	\$901,283

*Please see attached schedule

GENERAL INFORMATION

Are any assets pledged? *No*

Are you defendant in any suits or legal actions?

No

Have you ever taken bankruptcy? *No*

**Harold Brent McKnight
Financial Statement**

Schedule of U.S. Government Securities

U.S. Savings Bonds, Series EE	\$ 8,281 est.
Dated 1987-1997, worth \$12,650 at maturity	

**Harold Brent McKnight
Financial Statement**

**Schedule of Listed Securities
as of year end, 2002**

IRA (all mutual funds):	
Fidelity Advisors Overseas Fund	\$ 10,515
Heritage Smallcap Stock Fund	19,199
Income Fund of America	40,323
Investment Co. of America	59,835
IRA: Alliance Premier Growth Fund	14,177
Roth IRAs	
Growth Fund of America - A	4,524
Growth Fund of America - B	3,785
Europacific Growth Fund	8,753
Putnam Classic Equity Fund	11,855
Alliance Premier Growth Fund	8,454
Heritage Smallcap Stock Fund -A	10,341
Heritage Smallcap Stock Fund -B	10,312
Heritage Smallcap Stock Fund -C	5,762
<hr/>	
Total Listed Securities	\$207,835

**Harold Brent McKnight
Financial Statement****Schedule of Real Estate Owned
Estimated market value
February, 2003**

Residence	\$310,000
7 lots (approx. 5 acres) in Ashe County, North Carolina	70,000 est.
<hr/>	
Total Real Estate Owned	\$380,000

**Harold Brent McKnight
Financial Statement****Schedule of Liabilities
February, 2003**

Real Estate Mortgage – Residence Washington Mutual	\$177,317
Other Debts – Car Loan North Carolina State Employees Credit Union	6,099
Accounts and Bills Due Citibank Mastercard	2,917
Total	<u>\$186,333</u>

Please note:

Other bills and credit cards are typically paid in full each month, with occasional rollover of a partial balance to a second month.

AO-10 Rev. 1/2002	FINANCIAL DISCLOSURE REPORT	Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)
Calendar Year 2002		
1. Person Reporting (Last name, First name, Middle initial) McKnight, H. Brent	2. Court or Organization Western District, NC	3. Date of Report 4/29/2003
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time) District Court Judge Nominee	5. Report Type (check appropriate type) <input checked="" type="radio"/> Nomination Date 4/28/2003 <input type="radio"/> Initial <input type="radio"/> Annual <input type="radio"/> Final	6. Reporting Period 1/1/2002 to 4/15/2003
7. Chambers or Office Address Room 195, Chas. R. Jonas Fed. Bldg 401 West Trade Street Charlotte, NC 28202	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 filing instructions)
 NONE - (No reportable positions.)

POSITION	NAME OF ORGANIZATION/ENTITY
1. Adjunct Assistant Professor	Wingate University
2. Adjunct Professor	University of North Carolina at Charlotte
3. Professional Affiliate Member of the Graduate Faculty	University of North Carolina at Charlotte

II. AGREEMENTS. (Reporting individual only; see pp. 14-16 of filing instructions)
 NONE - (No reportable agreements.)

DATE	PARTIES AND TERMS
1.	

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 17-24 of filing instructions)
 NONE - (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME <small>(years, not spouse's)</small>
1.	2002	Self-employed - Director /Shaklee Corp. - Spouse	6,130.00
2.	2002	University of North Carolina at Charlotte	2,200.00
3.	1/03-4/0	Unites States Magistrate Judge Salary	46,000.00

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting McKnight, H. Brent	Date of Report 4/29/2003
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III. NON-INVESTMENT INCOME, (Reporting individual and spouse; see pp. 17-24 of filing instructions)

NONE - (No reportable non-investment income.)

	<u>DATE</u>	<u>SOURCE AND TYPE</u>	<u>GROSS INCOME</u> (years, not spouses)
4.	2002	United States Magistrate Judge Salary	126,508.00

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting McKnight, H. Brent	Date of Report 4/29/2003
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IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children. See pp. 25-27 of instructions.)

NONE - (No such reportable reimbursements.)

	<u>SOURCE</u>	<u>DESCRIPTION</u>
1. Exempt		

V. GIFTS. (Includes those to spouse and dependent children. See pp. 28-31 of instructions.)

NONE - (No such reportable gifts.)

	<u>SOURCE</u>	<u>DESCRIPTION</u>	<u>VALUE</u>
1. Exempt			

VI. LIABILITIES. (Includes those of spouse and dependent children. See pp. 32-34 of instructions.)

NONE - (No reportable liabilities.)

	<u>CREDITOR</u>	<u>DESCRIPTION</u>	<u>VALUE CODE</u>
1.			

FINANCIAL DISCLOSURE REPORT
Page 1 of 1

Name of Person Reporting McKnight, H. Brent	Date of Report 4/29/2003
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VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-37 of filing instructions.)

A. Description of Assets (including trust assets) Place "00" 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)	(2)	(1)	(2)	(1)	If not exempt from disclosure			
	Amount Code 1 (A-H)	Type (e.g. div. rent. or int.)	Value Code 2 (J-P)	Value Method Code 3 (Q-W)	Type (e.g. buy, sell, merger, redemption)	(2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)									
1. U.S.Savings Bonds		None	J	T	Exempt				
2. Raymond James IRA:	C	Dividend	M	T					
3. - Income Fund of America Class A - American Funds									
4. - Investment Co. of America Class A - American Funds									
5. - Fidelity Advisor Overseas Fund									
6. - Heritage Smallcap Stock Fund									
7. Europacific Growth Fund A	A	Dividend	J	T					
8. Putnam Classic Equity Fund C1-M	A	Dividend	K	T					
9. Heritage Series Trust Smallcap Stock Fund A - A	A	Dividend	J	T					
10. Heritage Series Trust Smallcap Stock Fund A - B	A	Dividend	J	T					
11. Heritage Series Trust Smallcap Stock Fund A - C	A	Dividend	J	T					
12. Growth Fund of America IRA - A	A	Dividend	J	T					
13. Growth Fund of America IRA - B	A	Dividend	J	T					
14. Heritage Money Market	A	Dividend	J	T					
15. Alliance IRA		None	J	T					
16. Alliance Premier Growth Fund	A	Dividend	J	T					

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

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting McKnight, H. Brent	Date of Report 4/29/2003
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VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

Information in Section VII is current as of year end, 2002.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	McKnight, H. Brent	4/29/2003

IX. CERTIFICATION.

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

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

Signature H. Brent McKnight

Date 4/29/03

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

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

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 North Carolina Assistant District Attorney, State District Court Judge, and United States Magistrate Judge, I have been prohibited from engaging in the private practice of law. Therefore, I have not done *pro bono* legal work or directly provided legal services to disadvantaged persons. Nevertheless, it has been and remains a central concern of mine to make courts more accessible to disadvantaged and indigent people. I have worked in three areas to accomplish this end.

First, while I was an Assistant District Attorney I saw first-hand that courts were largely inaccessible to victims of domestic violence, unaware of the magnitude of the problem, and insensitive to its effects. Over roughly a three-year period I devoted many hours to the issue of domestic violence and its relationship to the state courts. I served on the Charlotte-Mecklenburg Citizens Committee on Domestic Violence and the Domestic Violence Advocacy Council. I was named to the Domestic Violence Task Force, which co-authored a report and later an update on domestic violence in Mecklenburg County, NC. I encouraged training for police officers in recognition and response to domestic violence, urged the District Attorney's Office to respond aggressively to domestic violence, helped to develop temporary restraining order petitions which domestic violence victims could complete and file quickly without having to hire an attorney, and fostered judicial understanding and sensitivity to the problem.

Second, while a judge in state and federal courts I have become acutely aware that the civil courts often are not open to poor persons because they cannot afford attorneys. They are thereby denied the full measure of justice that is their right as United States citizens. Since 1994, I have served as a judicial advisor to Legal Services of the Southern Piedmont to further my own understanding and to consider how the courts could be rendered more accessible.

Third, I have worked to improve the quality and availability of indigent criminal defendant representation. Our district does not have a federal public or community defender. The caseload has remained consistently high. I successfully urged the Mecklenburg County Bar Board of Directors to form a working group to encourage attorneys in large local firms to take these cases. I served as a member of the working group and helped communicate this need to managing partners. (Please see attached article.)

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?**

Delta Upsilon fraternity at the University of North Carolina-Chapel Hill
 Fall, 1973 to Spring, 1974
 Membership restricted to male students at the University

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? N/A

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

During the past few years I have had conversations with colleagues, friends, and political leaders about the need for additional judges in Charlotte, my desire to be a District Court Judge, and the possibility of my nomination.

In early January, 2002, I received a telephone call from the Office of White House Counsel, asking me to come for an interview regarding possible nomination to a District Court Judgeship in the Eastern District of North Carolina. I was interviewed by the White House staff on January 25, 2002. The interview consisted of general questions about my judicial philosophy and questions about my background

In October, 2002, Congress created two additional District Court judgeships for the Western District of North Carolina. I telephoned the Office of the White House Counsel to express my continued interest.

In January, 2003, I received a telephone call indicating that I was being considered and that forms would be sent for me to fill out toward that end. Since that time I have been interviewed by the FBI, which was conducting a background check, and by the Department of Justice official assigned to review my forms and writings.

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, 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 provides a separation of powers among the three branches of government, maintained by checks and balances. Federal courts are not to reach out and decide what is not properly before them as defined by Article III and the justiciability doctrines (the prohibition against advisory opinions, the political question doctrine, mootness, ripeness, and standing). The courts should decide actual disputes and stay out of the legislative process. By limiting who may bring suit in federal court, the standing rules set boundaries on the types of issues federal courts may hear, including matters addressed by the legislative and executive branches. The ripeness and mootness doctrines insure that federal courts do not address an issue prematurely or become involved in matters unnecessarily.

It is the task and solemn duty of a judge to apply the law – Constitution, statute, precedent – as written, to the facts of the case at hand. Properly performed, the work of a judge is derivative, not creating law but clarifying, by deduction or analogy, the conditions of its application. (Analogy requires finding relevant similarities with what already is in the law, and is thus bounded and constrained.) A judge interprets and applies law. A judge should respect *stare decisis* and approach judicial work with humility and restraint.

In our system of representative government, writing law to achieve social or political ends is the province of the elected legislature, not the judiciary. The Constitution, laws, and precedents bind and define a judge’s authority and method in our Constitutional order. To borrow from Kant, judges should not view the law as a means to an end but as an end in itself, to be applied faithfully, impartially, and accurately. For fourteen years, both as a state and federal judge, I have followed these principles.

Senator SESSIONS. David Proctor.

**STATEMENT OF R. DAVID PROCTOR, NOMINEE TO BE
DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ALABAMA**

Mr. PROCTOR. Yes, sir. Thank you, Mr. Chairman, and thank you, Senator Schumer.

My lovely wife, you've heard the line my better half, she's my better nine-tenths. Teresa is here, along with our children, Luke, Jake and Shelly Grace. And Senator Shelby was nice enough to mention Shelly's birthday is tomorrow. We are very pleased that she could be here for that.

Also I have—my mother is unable to travel. She's in a retirement community in St. Petersburg, Florida, but her brother and sister, David Ames and Tootie Brown are here, along with David's wife, Carol, and Tootie's children Alec Brown and Liz Repass, who are my cousins, and Liz's son, John Thomas. They've traveled up from Salem, Virginia to be with us today.

I would like to thank you. It's an honor and privilege to be here before you.

Senator SESSIONS. Thank you. If you would please stand. Happy birthday, Shelly Grace. Since it is not today, I will not sing, not that I could.

Senator SCHUMER. He would not sing tomorrow either, Shelly Grace. [Laughter.]

[The biographical information of Mr. Proctor follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).
Robert David Proctor.
2. Address: List current place of residence and office address(es).
Residence: Birmingham, AL
Office: 2021 Third Avenue North, Birmingham; AL 35203
3. Date and place of birth.
December 5, 1960; Atlanta, Georgia.
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 Teresa A. Proctor, homemaker, on May 19, 1984.
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 Tennessee College of Law; 1983-86; J.D., with honors, May 1986.
 - 2) Carson-Newman College; 1979-82; B.A., May 1983.
 - 3) Ferrum College; August - December 1978; No Degree.
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

 - 1) 1993 to Present - Lehr Middlebrooks Price & Proctor, P.C.; Attorney.
 - 2) 1987-93 - Sirote & Permutt, P.C.; Attorney.
 - 3) 1986-87 - U.S. Court of Appeals, Fourth Circuit; Law Clerk for the Honorable H. Emory Widener, Jr.
 - 4) 1986 - Sirote & Permutt, P.C.; Summer Law Clerk.
 - 5) 1986 - Strasburger & Price, L.L.P.; Summer Law Clerk.

- 6) 1985 - Woods Rogers & Hazelgrove; Summer Law Clerk.
- 7) 1985 - Winstead Sechrest & Minick, P.C.; Summer Law Clerk.
- 8) 1984 - Gentry & Wagner; Summer Law Clerk.
- 9) 1983-85 - UT Veterinary Teaching Hospital; Security Guard.
- 10) 1983 - Florida Progress Corp.; Summer Helper.
- 11) 1983 - Montgomery Ward; Summer Weekend Lawn & Garden Salesperson.

Board of Directors

- 1) 1989-2001 - Alabama Goodwill Industries.
 - 2) 1993 to Present - Lehr Middlebrooks Price & Proctor, P.C.
 - 3) 1998 to Present - O'Neil Building, L.L.C.
 - 4) 2003 to Present - Drew Battle Memorial Foundation.
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.
- Knoxville Auxillary to the Bar Scholarship during first year of law school (1983-84).
 - Carson-Newman Scholarship during last year of college (1982).
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 (Labor Section, Litigation Section); Alabama State Bar (Labor and Employment Section, Seminar Speaker); Birmingham Bar Association (Civil Courts Procedures Committee, Mentor Volunteer, Seminar Speaker); Defense Research Institute (Employment Section, Employment Committee, Seminar Speaker, Regional Co-Editor for Employment Section Newsletter).

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 currently belong to the following organization that participates in lobbying activities from time to time: Defense Research Institute. I will resign from this organization if appointed.

I also currently belong to the following organizations that do not engage in lobbying activities: Briarwood Presbyterian Church (Deacon, Chair of Human Resources Committee, Deacon Administrative Team, Youth Sunday School Teacher); Project Corporate Leadership (Steering Committee); Birmingham Monday Morning Quarterback Club; Altadena Country Club; and The Drew Battle Memorial Foundation (Board Member).

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 Court Admissions: Alabama (1988).

Federal Court Admissions: The Supreme Court of the United States (2001); United States Court of Appeals: Fifth (1998), Seventh (2001), and Eleventh Circuits (1988); United States District Courts: Northern District of Alabama (1988), Middle District of Alabama (1988), and Southern District of Alabama (1993).

I have also been admitted *pro hac vice* in the following federal courts: Southern District of New York; Eastern District of Texas; Middle District of Tennessee; Western District of Tennessee; Southern District of Georgia; Northern District of Georgia; Middle District of Georgia; Northern District of Mississippi; Southern District of Mississippi; Eastern District of Louisiana; Western District of North Carolina; Northern District of Ohio; Northern District of Indiana; Southern District of Florida; and the Middle District of Florida.

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.

My formal publications include the following:

- Note, Gift Taxation - Interest Free Loans - Dickman Court Declares the Crown Loan a Taxable Gift, 52 Tenn. L.Rev. 331 (Winter, 1985).
- Qualified Immunity and the First Amendment, Governmental Liability DRI Newsletter (August/September 1991).

I have attached written materials from the following non-client presentations I have made during the past five years:

- **Cumberland School of Law - Annual Employment Law Update** (Panel discussion with the Honorable Karon O. Bowdre, Judge, Northern District of Alabama, and John Saxon, Esq.) (December 12, 2002).
- **Cumberland School of Law - Annual Employment Law Update** (Panel discussion with the Honorable Sharon Blackburn, Judge, Northern District of Alabama, and the Honorable John Ott, Magistrate Judge, Northern District of Alabama) (December 7, 2001).
- **Cumberland School of Law - Annual Employment Law Update** (Panel discussion with the Honorable U.W. Clemon, Chief Judge, Northern District of Alabama, and John Saxon, Esq.) (December 7, 2000).
- **Birmingham Society for Human Resource Management - Legal and Legislative Update** (May 17, 2000).
- **Defense Research Institute Annual Employment Seminar - Defending Employment Based Class Actions** (May 4-5, 2000).
- **Cumberland School of Law - Annual Employment Law Update** (Panel discussion with the Honorable U.W. Clemon, Judge, and the Honorable John Ott,

Magistrate Judge, Northern District of Alabama)
(December 9, 1999).

- **Birmingham Bar Association** – Litigating the Sexual Harassment Case – Defending the Sexual Harassment Lawsuit (March 19, 1999).
- **Cumberland School of Law** – Annual Employment Law Update (Panel discussion with the Honorable U.W. Clemon, Judge, Northern District of Alabama, and Michael Quinn, Esq.) (December 10, 1998).
- **Birmingham Society of Human Resources Management** – Sixth Annual Employment Issues Update (July 23, 1998).

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

I am healthy and aware of no medical conditions that would in any way interfere with my ability to fulfill my duties. My last physical examination was in 1998.

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.

I have not served as 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.

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;

- The Honorable H. Emory Widener, Jr., United States Court of Appeals for the Fourth Circuit, 1986-87, Law Clerk.

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;

- Sirote & Permutt, P.C., 2311 Highland Avenue South, Birmingham, AL 35205-2973; Associate from 1987-91; Shareholder from 1991-93.
- Lehr Middlebrooks Price & Proctor, P.C., 2021 Third Avenue North, Birmingham, AL 35203; Shareholder from 1993 to 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?

- Throughout my career, I have practiced in the area of labor and employment law.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.
- My typical clients include business entities, states, municipalities and individuals. My practice has concentrated in the area of labor and employment 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 court frequently throughout my legal career.
2. What percentage of these appearances was in:
- (a) federal courts;
 - (b) state courts of record;
 - (c) other courts.
- I estimate that approximately 85% of my appearances have been in federal courts; 10% have been in state courts; and 5% before administrative agencies.
3. What percentage of your litigation was:
- (a) civil;
 - (b) criminal.
- 100% of my litigation has been 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.
- I have tried seven cases to verdict or judgment. In five of those cases I was chief counsel, in one I was co-counsel, and in one I was associate counsel.

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

- 57% of the above-referenced cases involved jury trials.

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.

The following are ten cases that are representative of significant litigated matters I have personally handled.

- (1) Maddox v. Norwood Clinic, Inc., 783 F. Supp. 582 (N.D. Ala. 1992).

Client: Norwood Clinic, Inc.

Dates of representation: 1991-1992.

Judge: The Honorable James H. Hancock, United States District Court Northern District of Alabama.

Counsel: Samuel Fisher, Esq. (For the Plaintiff)
Gordon, Silberman, Wiggins & Childs, P.C.
1400 SouthTrust Tower
420 North 20th Street
Birmingham, AL 35203
(205) 328-0640

Summary: After the passage of the Civil Rights Act of 1991, a widely litigated issue was whether

the Act applied retroactively to cases that were pending on or before its effective date. The United States Supreme Court ultimately ruled that, at least with respect to Sections 101 and 102 of the Act, the statute was not to be applied retroactively to conduct or trials occurring before the statute's effective date. Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994); Landgraf v. USI Film Products, 511 U.S. 244 (1994). Before the Supreme Court decided the issue, however, and even before the various courts of appeals began to weigh in on it there was substantial litigation and different interpretations of the statute among the district courts, I was counsel in the Maddox case in which Judge Hancock decided that the Act was not to be retroactively applied. Maddox, 783 F. Supp. at 583-86. I also was counsel for Shelby Medical Center in an earlier case which was decided by Judge Acker and in which he arrived at an opposite conclusion. King v. Shelby Medical Center, 779 F. Supp. 157 (N.D. Ala. 1991). During the raging debate regarding retroactivity, the Maddox and King cases were cited by scores of courts addressing the issue.

(2) Cunningham v. Bessemer State Technical College, CV-91-P-1240-S (N.D. Ala.).

Clients: Bessemer State Technical College; Dr. W. Michael Bailey; Mr. Ron Moon; Mr. John Hayes; Mr. Al Craig.

Dates of representation: 1991.

Judge: The Honorable Samuel C. Pointer, Jr., United States District Court, Northern District of Alabama.

Counsel: Byron R. Perkins, Esq. (For Plaintiff)
Gordon, Silberman, Wiggins & Childs, P.C.
1400 SouthTrust Tower
420 20th Street North
Birmingham, AL 35203-3204
(205) 328-0640

Michael J. Antonio, Jr., Esq. (For Plaintiff)
Attorney at Law
2516 11th Avenue North
Birmingham, AL 35234
(205) 323-0011

Lee Bains, Esq. (Co-Counsel)
Retired - Bessemer Attorney

Summary: Plaintiff sued a two-year state college and four individuals claiming violation of 42 U.S.C. § 1983 (race discrimination) and Title VII of the Civil Rights Act of 1964 (race discrimination and retaliation). The case was tried in early December 1991, the month following the passage of the Civil Rights Act of 1991 (which changed the law to permit jury trials in Title VII cases). On the morning of trial, the Court granted Plaintiff's motion to permit his Title VII claims to be tried to a jury under the 1991 Act. The trial lasted approximately one week and, to my knowledge, became only the second Civil Rights Act of 1991 case in the country to be tried to a jury. The jury returned a verdict in favor of all the Defendants, and thus it is my understanding that the trial also resulted in the nation's first ever defense verdict under the 1991 Act.

(3) Farrar v. O'Neal Steel, Inc., et al., CV-92-P-1662-S (N.D. Ala. Nov. 19, 1993), aff'd, 40 F.3d 390 (11th Cir. 1994).

Clients: O'Neal Steel, Inc.; Robert Hood.

Dates of representation: 1992-1994.

Judge: The Honorable Samuel C. Pointer, Jr., United States District Court, Northern District of Alabama.

Counsel: Ann K. Wiggins, Esq. (For the Plaintiff)
Gregory O. Wiggins, Esq. (For the Plaintiff)
Gordon, Silberman, Wiggins & Childs, P.C.
1400 SouthTrust Tower
420 20th Street North
Birmingham, AL 35203-3204
(205) 328-0640

Summary: This was one of - if not the - last non-jury Title VII cases tried before Judge Pointer. This hard fought case involved a large number of witnesses and exhibits. Plaintiff claimed that she was the subject of gender discrimination and retaliation when she did not receive a promotion to a management-level position. One of the witnesses who supported her claims was the former Vice President of Human Resources, who had been terminated from the Company and was disgruntled. Trial began on September 30, 1993, and after a lengthy continuation was granted at the request of Plaintiff's counsel, was concluded on November 19, 1993. Judge Pointer entered judgment in favor of the Defendants with respect to all claims and that decision was affirmed on appeal.

(4) Goffer v. Marbury, 956 F.2d 1045 (11th Cir. 1992).

~~Clients: Alabama A & M University; Carl Harris Marbury; Leon Frazier; Jay Carrington Chunn; Franklin Perry; Dinsimore G. Robinson; Irmatine Bealyer; Thomas Fuller; Lucian Blankenship; Chris McNair; Elliott Miaselliot; George A. Miller; Wayman Sherrer; John Stallworth; Oscar D. Tucker; Clifford Walker; and Guy Hunt, Governor of the State of Alabama.~~

Dates of representation: 1990-1992.

Judge: The Honorable Edwin L. Nelson, United States District Court, Northern District of Alabama.

Counsel: John A. Wilmer, Esq. (For Plaintiff)
Wilmer & Lee, P.A.
P. O. Box 2168
Huntsville, AL 35804
(256) 533-0202

Stuart Edwin Smith, Esq. (For Plaintiff)
200 Clinton Avenue West, Suite 301
Huntsville, AL 35801-4918
(256) 533-3090

Roscoe Roberts, Jr., Esq.
(Trial Counsel For Defendants)
P.O. Box 287
Huntsville, AL 35804
(205) 536-8882

Roderic G. Steakley, Esq. (Co-Counsel
on Appeal)
Sirote & Permutt, P.C.
P.O. Box 18248
Huntsville, AL 35804
(256) 536-1711

Summary: Plaintiff, former in-house counsel to Alabama A & M University, sued the Defendants for defamation, stigmatization, and violation of her First Amendment right to free speech after her employment was terminated. At trial, the District Court entered judgment in favor of Plaintiff and awarded her compensatory and punitive damages.

Rod Steakley and I were retained to represent the Defendants on appeal; we did not try the case. I performed the research and drafted the brief, and Rod Steakley argued the appeal. We also consulted with another counsel for Alabama A & M University, Joe Whatley, Jr., Esq., Whatley Drake, L.L.C., 2323 2nd Avenue North, Birmingham, AL 35203, (205) 328-9576.

We were successful in obtaining a reversal of the judgment in Plaintiff's favor with the exception of the defamation and stigmatization claims against Defendant Frazier. In doing so, we persuaded the

Eleventh Circuit that the District Court misapplied the balancing test of Pickering v. Board of Education, 391 U.S. 563 (1968) and Connick v. Myers, 461 U.S. 138 (1983). The trial court "treated Goffer's expressions as one unitary incident of speech when, in fact, Goffer spoke on a number occasions, over a substantial period of time, on divergent subject matters, to various audiences, and under different circumstances." Goffer, 956 F.2d 1047-48. Also, the Court failed to give proper consideration to whether an attorney/client relationship existed between Goffer and the Defendants and, if it did, what effect that relationship should have on the First Amendment claims. Accordingly, the Court of Appeals reversed and remanded the lion's share of the case (which was later resolved via settlement).

(5) Saville v. Houston County Healthcare Authority, 852 F. Supp. 1512 (M.D. Ala. 1994).

Clients: Houston County Healthcare Authority;
Southeast Alabama Medical Center; Virginia
Gale Holiday.¹

Dates of representation: 1993-1996.

Judge: ~~The Honorable Myron H. Thompson, United States District Court, Northern District of Alabama.~~

Counsel: Samuel Fisher, Esq. (For Plaintiff)
Ann C. Robertson, Esq.
Gordon, Silberman, Wiggins & Childs, P.C.
1400 SouthTrust Tower
420 North 20th Street
Birmingham, AL 35203
(205) 328-0640

¹ Holiday was dismissed from the case prior to trial.

Gary Claborn Sherer, Esq.
(For Michael Shanks, an Individual Defendant)
Rhodes and Sherrer, P.C.
P.O. Box 7122
Dothan, AL 36302-7122
(334) 792-6213

Mary E. Pilcher, Esq.
(For Michael Shanks, an Individual Defendant)
Stein & Brewster
P.O. Box 1051
Mobile, AL 36633-1051
(251) 433-2002

Dow T. Huskey, Jr., Esq.
(For Troy State University)
P.O. Drawer 550
Dothan, AL 36302-0550
(334) 794-3366

Summary: Plaintiff, an employee and student in a nurse anesthetist program, alleged that the Defendants were liable under a broad range of legal theories: sexual harassment, retaliation, violations of the First and Fourteenth Amendments, invasion of privacy, outrageous conduct, outrage, assault and battery, and breach of contract. Plaintiff alleged that Michael Shanks, who was sued ~~individually and represented by separate~~ counsel, acted inappropriately towards her and that our clients were responsible for that misconduct. Our clients investigated Shanks' conduct and concluded that he had sexually harassed the Plaintiff. Furthermore, after that investigation was completed, Shanks was instrumental in causing the Plaintiff to be placed on probation and thereafter terminated.

The trial court granted our motion for summary judgment in part, and the issues that remained in the case involved whether the Defendants were liable to Plaintiff under her claims of sexual harassment, retaliation, assault and battery, and breach of contract.

On the eve of trial, Shanks paid a substantial sum of his own personal money to settle the claims against him, and, as part of the settlement, he and his counsel agreed to meet with Plaintiff's counsel and to discuss with them every facet of the Defendants' trial plan. This obviously necessitated a last moment change of our trial strategy.

At trial, the Plaintiff conceded the contract claim and the case went to the jury on her sexual harassment and retaliation claims. The jury, through special interrogatories, found that while the Plaintiff had been sexually harassed by Shanks (and our clients were vicariously liable for it), she was not the victim of retaliation and, in fact, the reason she was terminated from employment and from the nurse anesthesia program was due to her own poor performance unrelated to the sexual harassment. On the harassment claim, the jury awarded the Plaintiff \$100,000 in compensatory damages and \$50,000 in punitive damages.²

On behalf of our clients, we filed post-judgment motions challenging the Court's application of law and instructions to the jury on the harassment claim. Our post-judgment motions raised substantial issues and were pending before the trial court for three years when the case was finally settled by the parties. The memorandum opinion ruling on our motion for summary judgment has been cited over forty times by a variety of courts and in a number of states and circuits. It has also been cited in a considerable number of law reviews and periodicals.

² The \$50,000 punitive damage award was not recoverable against our clients (who were state actors), so the actual verdict was for \$100,000.

(6) McAnnally v. WynSouth Molded Products, 912 F. Supp. 512 (N.D. Ala. 1996).

Client: WynSouth Molded Products.

Dates of representation: 1995-1996.

Judge: The Honorable Edwin L. Nelson, United States District Court, Northern District of Alabama.

Counsel: Robyn Bufford-Bennitt, Esq. (For Plaintiff)
Bennitt & Bufford, L.L.C.
300 Cahaba Park South, Suite 116
Birmingham, AL 35242
(205) 408-7240

James R. Crockrell, Esq. (Co-Counsel)
Attorney at Law
725 Parkway Drive, S.W.
Leeds, AL 3509
(205) 699-3169

Summary: This lawsuit was filed under the Family and Medical Leave Act of 1993. Plaintiff asserted that her alleged loss of job security and the resulting mental distress were damages for which she could seek recovery under the statute's "other compensation" language. The District Court held that the argument was contrary to the plain language of the FMLA. See 29 U.S.C. § 2617(a)(1)(A)(i)-(ii). The Court concluded that because the statutory provision did not demonstrate that Congress used the term "other compensation" in a fashion to encompass damages for mental distress, the employee's claim for mental distress was due to be stricken. This was one of the first cases which interpreted the "other compensation" language and addressed the remedies available to FMLA plaintiffs. It has been cited by numerous courts from virtually every circuit, as well as in annotations to 29 U.S.C. § 2617, law reviews, legal periodicals, and ALR Annotations.

(7) Dyke v. O'Neal Steel, Inc., 00-CV-92 (N.D. Ind. June 7, 2001), aff'd, - F.3d -, (7th Cir. May 5, 2003).

Client: O'Neal Steel, Inc.

Dates of representation: 1999-Present.

Judge: The Honorable Roger B. Cosby, United States Magistrate Judge, Northern District of Indiana.

Counsel: Christopher C. Myers, Esq. (For Plaintiff)
Shane C. Mulholland, Esq. (For Plaintiff)
Christopher C. Myers & Associates
809 S. Calhoun Street, Suite 400
Fort Wayne, IN 46802
(219) 424-0600

Laura C. O'Donnell, Esq.
(Local Counsel for O'Neal Steel, Inc.)
Baker & Daniels
111 E. Wayne Street, Suite 800
Fort Wayne, IN 46802
(260) 424-8000

Summary: Plaintiff brought this action alleging that he was terminated from his temporary employment and not hired for regular employment in violation of the Americans With Disabilities Act. Plaintiff suffered from monocular vision and, therefore, was unable to pass the vision test required for work in O'Neal Steel's warehouse. To pass the test, employees must have vision in both eyes, be able to distinguish color, have normal depth perception, and possess a normal field of vision. These standards were designed so that persons who were hired would have adequate vision to safely and effectively perform their job duties in a warehouse where they must navigate their environment, avoid walking into protruding pieces of metal, avoid being struck by forklifts and other moving equipment, and see hazards in the warehouse as they move around in O'Neal's facility.

At the same time that Plaintiff was contending that O'Neal should have hired him,

notwithstanding his monocular vision, he was in the process of applying for and receiving Social Security disability benefits based upon his representation (and the Social Security Administration's finding) that he was disabled.

The District Court granted O'Neal Steel's summary judgment motion. In doing so, the trial court found (1) Plaintiff did not have a substantially limiting impairment; (2) Plaintiff was not a qualified individual with a disability, and was estopped from asserting that he was a qualified individual because he could not sufficiently explain the inconsistencies between what he told the Social Security Administration and what he claimed in his lawsuit; (3) even if not estopped to assert otherwise, Plaintiff was clearly not a qualified individual for a full-time position at O'Neal Steel; (4) O'Neal was entitled to prevail on its affirmative defense that its qualification standards are proper under 42 U.S.C. § 12113(a); and (5) in any event, Plaintiff would not have been hired at O'Neal Steel because his criminal history would have precluded his employment. (Plaintiff admitted to prior convictions for three crimes of violence, which disqualified him from working at O'Neal Steel).

Plaintiff appealed this case to the Seventh Circuit Court of Appeals. The case has been fully briefed and was argued on January 10, 2002. The parties await a decision from the Court of Appeals.

(8) Michael v. Xerox Corporation, Case No. 8:99-CV-1177-T-17TBM (M.D. Fla. Feb. 5, 2002).

Client: Xerox Corporation.

Dates of representation: 1999-2002.

Judge: The Honorable Elizabeth A. Kovachevich, Chief Judge, United States District Court, Middle District of Florida (Tampa Division).

Counsel: Thomas John Dandar, Esq. (For Plaintiff)
Dandar & Dandar, P.A.
P.O. Box 24597
Tampa, FL 33623-4597
(813) 289-3858

Jona J. Miller, Esq. (For Michael Masters)
King & Spalding
5156 Siesta Woods Drive
Sarasota, FL 34242
(941) 346-9438

Summary: Plaintiff, a former marketing executive of Xerox, filed suit claiming, among other things, sexual harassment, retaliation, and assault and battery. She also sued Michael Masters, an individual who worked at Xerox. Xerox filed a counterclaim against Plaintiff for her failure to return a commission to Xerox on a sale she made that never produced revenue. At the conclusion of lengthy discovery, the trial Court granted Xerox's summary judgment motion on all of Plaintiff's claims, and denied the motions of Plaintiff (in full) and Masters (in part). The case was set on the trial docket and the only jury issues to be tried were (1) whether Masters was liable to Plaintiff, and (2) whether Plaintiff was liable to Xerox. The case settled before trial.

(9) Skrinska v. Board of Regents of the University of Wisconsin System, CV-0106282 (Jefferson County Circuit Court, May 24, 2002), aff'd, 2002 Ala. Civ. App. LEXIS 1141 (Ala. Civ. App. Nov. 22, 2002), cert. denied, _____ So. 2d _____ (Ala. Mar. 11, 2003).

Clients: The Board of Regents of the University of Wisconsin System; University of Wisconsin - Milwaukee ("UMW"); Dean Randall Lambrecht.

Dates of representation: 2001-2003.

Judge: The Honorable N. Daniel Rogers, Jr., Circuit Court Judge, Jefferson County, Alabama.³

Counsel: Susan Williams Reeves, Esq. (For Plaintiff)
 Attorney at Law
 714 South 29th Street
 Birmingham, AL 35233-2810
 (205) 322-6631

Summary: Plaintiff is a former UWM professor who moved to Alabama and initiated a declaratory judgment action in Jefferson County Circuit Court seeking a determination that he was the rightful owner of certain research equipment he removed from UWM's campus. UWM contested his claim and filed a motion to dismiss based on lack of personal jurisdiction and venue. Plaintiff then amended his complaint to assert certain tort claims against the Defendants and the Defendants responded by renewing their motion to dismiss. The major issues presented in this case were: (1) Should an Alabama court recognize, under the doctrine of comity, the immunity defenses of a Wisconsin university and its public official? (2) Did an Alabama court have in personam jurisdiction over a university in Wisconsin and one of its deans? (3) Was venue proper in Alabama or Wisconsin? (4) ~~Should the Court dismiss the case under the doctrine of forum non conveniens?~~ The trial court, in a sixteen-page opinion, ruled in the Defendants' favor on each of these issues. The decision was affirmed on appeal.

(10) Burleson v. Colbert County - Northwest Alabama Healthcare Authority, 221 F. Supp. 2d 1265 (N.D. Ala. 2002).

Clients: The Colbert County-Northwest Alabama Healthcare Authority, d/b/a Helen Keller Hospital; Mr. William H. Anderson.

Dates of representation: 2000-2003.

³ Judge Rogers opinion was affirmed by the Alabama Court of Civil Appeals and the Alabama Supreme Court denied Plaintiff's petition for writ of certiorari.

Judge: The Honorable Karon O. Bowdre, United States District Court, Northern District of Alabama.

Counsel: Henry F. Sherrod, III, Esq. (For Plaintiff)
Henry F. Sherrod, III, P.C.
P. O. Box 606
Florence, AL 35631-0606
(256) 740-8367

Summary: Plaintiff was terminated as part of a reduction-in-force. He claimed that his termination was motivated by his candidacy for a seat on the Colbert County Commission. (He was subsequently elected). The Court granted summary judgment to the Defendants finding that (1) Plaintiff's mere candidacy was not protected speech under the First Amendment; (2) Plaintiff did not present substantial evidence that his candidacy was a substantial or motivating factor in the decision to terminate his employment; and (3) Defendants would have made the same decision even if Plaintiff's candidacy were protected and had been a substantial or motivating factor.

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 following matters reflect that I have participated in a broad range of litigation and non-litigation tasks as a practicing attorney.

(1) I have defended a number of class actions. In some of these, the class claims were dismissed and/or not certified. See e.g., Hackworth v. Department of Public Safety, 2:88-CV-962 (M.D. Ala.) Cunningham v. Xerox Corporation, CV-95-N-270-S (N.D. Ala.); Reyna v. HealthSouth, Inc., CV-97-J-3090-S (N.D. Ala.);

and Justice v. Denver Thomas, Inc., CV-93-AR-1114-S (N.D. Ala.). I was the Chief Counsel in all these cases except Hackworth.⁴

In other cases in which I have served as Chief Counsel, the court certified the class and, at various stages of litigation, the cases were settled with the approval of the court. See e.g., Washington v. O'Neal Steel, Inc., CV-93-2407-S (N.D. Ala.); Cox v. Industry Service Company, Inc., CV-93-P-2249-S (N.D. Ala.); EEOC v. Aladan Corporation/London International Group, CV-99-T-1089-N (N.D. Ala.) (non-Rule 23 Class).⁵ This experience has allowed me to litigate a number of complex class action issues and provided me a solid foundation in understanding Federal Rule of Civil Procedure 23.

(2) In recent years, my litigation practice has been augmented by a mediation practice. I have been retained as a mediator in approximately ten matters and have successfully mediated all but two of those cases. While my mediation practice has concentrated on employment cases, I also have been asked to serve in a case involving a partner leaving a law firm and the disputes that consequently arose. My litigation practice has limited my ability to mediate more cases, but I have truly enjoyed serving other attorneys and their clients in this role.

In addition to my mediation practice, I have also been called upon to serve as an arbitrator. Recently, I was retained by Plaintiffs' and Defendants' counsel to arbitrate more than 150 commercial fraud cases.

⁴ The Hackworth case involved a challenge under the Fourth Amendment to the Department of Public Safety's Drug Testing Program for highway patrol officers. The judge was the Honorable Truman Hobbs, Chief Judge of the Middle District of Alabama. The Attorney General, Don Siegelman retained David Middlebrooks and me to defend this case. In my first year of practice, I successfully argued that the Plaintiff could not meet the requirements of Rule 23(a)(2) or (3).

⁵ The Cox case was successfully mediated by Frank S. James, III, of Berkowitz, Lefkovits, Isom & Kushner, after the court had certified the class. To my knowledge, this was one of the first times that such a large class action was resolved through the Northern District's then new alternative dispute resolution process. Subsequently, the Aladan case was also successfully mediated by another attorney, J. Allen Schreiber, of Schreiber & Petro, P.C.

(3) In a case I litigated in the Northern District of Mississippi, Rogers v. Kellwood Corporation, CV-96-105 (N.D. Miss.), I utilized technology during the Magistrate-conducted mediation to display in the courtroom excerpts from the Plaintiff's deposition that were contained on a compact disk. Although this technique is fairly common today, it was a relatively new technique (particularly in this geographic area) seven years ago. My use of that technology was highlighted in an article published in the Summer 1997 edition of the AmLaw Tech. See "Depositions Go Digital," AmLaw Tech, at p. 23 (Summer 1997).

(4) Several years ago, one of my clients, a state college, was the target of an FBI investigation that centered around an adult learning program. Unbeknownst to the college, one of its faculty members had been submitting fraudulent reports regarding the number of students who attended her off-campus classes. I was the lead counsel for the college in cooperating with the FBI's investigation, conducting a separate investigation for the college, and defending the Teacher's Fair Dismissal Act claim that was later brought by the employee. During that process, I was called upon to deal with several matters, including issues related to the Fourth, Sixth, and Fourteenth Amendments, and Alabama state law regarding dismissal of teachers. The matter was concluded when the teacher's termination was upheld by a Fair Dismissal Act hearing officer and the United States was successful in obtaining a guilty plea from her. The college was absolved of any wrongdoing.

Similarly, another non-litigation matter in which I served as lead counsel involved my coordination of a client's response to reports of drug activities taking place in its warehouse on the graveyard shift. I assisted in an investigation which involved the Jefferson County Sheriff's Department and Pinkerton's Security. A private investigator was "hired" in the facility and posed as a janitor on the shift. He was able to make "drug buys" from several company employees and met with law enforcement officials immediately after each buy. I also coordinated the conclusion of the sting operation when Jefferson County Sheriff's Deputies came to the facility during the midnight shift and arrested those involved in the drug activity. Later, I was called as a prosecution witness during the trial of one of the criminal defendants.

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 anticipate receiving any such funds with the exception of amount(s) I will be paid by my firm if I am called upon to resign in order to accept an appointment. Although those amounts cannot be determined at this time, I expect that my firm and I would agree on any such payments before I took the bench.

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 I am fortunate enough to be appointed, when confronted with any potential conflict of interest, I will consult the Code of Conduct for United States Judges. In addition, I would: (1) utilize the checklist for financial and other conflicts which is available online at www.uscourts.gov/publications.html; (2) keep informed of any and all published advisory opinions of the Committee on Codes of Conduct of the Judicial Conference of the United States, as well as all other relevant sources; (3) seek guidance from my fellow judges; and (4) if necessary, seek advice from the Committee.

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 Financial Statement.

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

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	5	800	00	Notes payable to banks-secured (Equity Line of Credit)	29	000	00
U.S. Government securities-add schedule		0	00	Notes payable to banks-unsecured		0	00
Listed securities-add schedule		0	00	Notes payable to relatives		0	00
Unlisted securities--add schedule		0	00	Notes payable to others		0	00
Accounts and notes receivable:		0	00	Accounts and bills due		0	00
Due from relatives and friends		0	00	Unpaid income tax		0	00
Due from others		0	00	Other unpaid income and interest		0	00
Doubtful		0	00	Real estate mortgages payable-add schedule	273	900	00
Real estate owned-add schedule	1)	440	000	Chattel mortgages and other liens payable		0	00
	2)	39	600				
Real estate mortgages receivable		0	00	Other debts-itemize:			
Autos and other personal property	42	000	00	Master Card	2	800	00
Cash value-life insurance	23	400	00	CMAC	10	200	00
Other assets itemize:				Parisians		900	00
401(k)	291	000	00				
Income Tax Refunds	1	500	00				
Personal Household Items	240	000	00	Total liabilities	316	800	00
				Net Worth	766	500	00
Total Assets	1083	300	00	Total liabilities and net worth	1083	300	00
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, cosmaker or guarantor 3)	258	000	00	Are any assets pledged? (Add schedule)		No	
On leases or contracts		0	00	Are you defendant in any suits or legal actions?		No	
Legal Claims		0	00	Have you ever taken bankruptcy?		No	
Provision for Federal Income Tax		0	00				
Other special debt		0	00				

Notes from Financial Statement:

- 1) This represents the value of my residence
- 2) I have a one-quarter interest in O'Neill Building, LLC which owns the building my firm leases. As the fair market value of the building owned by the O'Neill Building, LLC has not been determined, it is impossible to properly value my ownership interest. My equity interest is \$39,600.00 and for purposes of this statement that is the only amount I have used. I expect my ownership interest, once determined, would be substantially more than my equity interest.
- 3) This amount represents the maximum amount of my guarantee for the financing of the building referred to in footnote 2 and owned by the O'Neill Building, LLC.

REAL ESTATE SCHEDULE

PERSONAL RESIDENCE (as of April 20, 2003)				
Property Address	Legal Owner	Purchase Year/Price	Present Loan Balance	Market Value*
2508 Aspen Cove Circle Birmingham, AL 35243	R. David Proctor & Teresa A. Proctor.	1998/ \$368,000	\$273,900	\$440,000

*Estimate

84019.wpd

FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2002		Report Required by the Ethics in Government Act of 1978. (5 U.S.C. App., §§101-111)
AO-10 Rev. 1/2002		
1. Person Reporting (Last name, first, middle initial) Proctor, R. David	2. Court or Organization United States District Court Northern District of Alabama	3. Date of Report 4/29/2003
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) U.S. District Judge	5. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date _____ ___ Initial ___ Annual ___ Final	6. Reporting Period 1/1/2002 - 4/20/2003
7. Chambers or Office Address 2021 Third Avenue North Birmingham, AL 35203	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 Shareholder, Vice President; Trustee	Lehr Middlebrooks Price & Proctor, P.C.
2 Member	O'Neill Building, LLC
3 Board Member	The Drew Battle Foundation

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

DATE	PARTIES AND TERMS
<input checked="" type="checkbox"/> NONE (No reportable agreements.)	
1	* My law firm and I will in the future discuss an agreement regarding appropriate payment for my interest
2	in the firm. It is contemplated that such an agreement will be for an exact amount and payable over one
3	year or less. At present, however, there are no such agreements.

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 2002	Lehr Middlebrooks Price & Proctor, P.C. (attorney compensation)	\$ 298,561.03
2 2003	Lehr Middlebrooks Price & Proctor, P.C.	\$ 42,333.32
3		\$
4		\$
5		\$

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting R. David Proctor	Date of Report 4/29/2003
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IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)

	SOURCE	DESCRIPTION
1	<input type="checkbox"/> NONE (No such reportable reimbursements.)	
2		
3	Exempt	
4		
5		
6		
7		

V. GIFTS. *(Includes those to spouse and dependent children. See pp. 28-31 of Instructions.)*

	SOURCE	DESCRIPTION	VALUE
1	<input type="checkbox"/> NONE (No such reportable gifts.)		
2	Exempt		\$
3			\$
4			\$
5			\$

VI. LIABILITIES. *(Includes those of spouse and dependent children. See pp. 32-33 of Instructions.)*

	CREDITOR	DESCRIPTION	VALUE CODE*
1	<input checked="" type="checkbox"/> NONE (No reportable liabilities.)		
2			
3			
4			
5			

*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 P1=\$1,000,001-\$5,000,000 P2=\$5,000,001-\$25,000,000
 P3=\$25,000,001-\$50,000,000 P4=\$50,000,001 or more

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting R. David Proctor	Date of Report 4/29/2003
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VII. 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) <i>Place "N/A" after asset name if 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)	HF Type (See instructions)	If Not Exempt from disclosure				
	Asset Code (A-01)	Type (See instructions)	Value Code (F-01)	Value Method Code (G-W)		DT Date	Q1 Value Code (F-01)	Q2 Value Code (F-01)	Q3 Value Code (F-01)	Q4 Value Code (F-01)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)										
¹ Fidelity Advisor Div. Growth	A	Div.	K	T	Exempt					
² Evergreen Select Adj.	A	Div.	L	T						
³ Oppenheimer Quest	A	Div.	K	T						
⁴ Calamos Market Neutral	B	Div.	K	T						
⁵ Salomon Capital Fund	A	Div.	K	T						
⁶ Fidelity Advisor Small Cap		None	K	T						
⁷ Delaware Corporate Bond	C	Div/STCG	K	T						
⁸ Merrill Lynch Global Allocation	A	Div.	K	T						
⁹ Ener Plus Res. Trust	A	Div.	K	T						
¹⁰ Fidelity Advisor		None	K	T						
¹¹ Delaware Select Growth		None	K	T						
¹² Merrill Lynch Global Growth (LB)		None	K	T						
¹³ United Technologies Corp.	A	Div.	J	T						
¹⁴ CMA Money Fund	B	Int.	K	T						
¹⁵ O'Neill Building LLC		None	M	W						
¹⁶										
¹⁷										

1. Income/Gain Codes: A=\$1,000 netless; B=\$1,001-\$2,500; C=\$2,501-\$5,000; D=\$5,001-\$75,000; E=\$75,001-\$100,000; F=\$100,001-\$1,000,000; G=\$1,000,001-\$1,800,000; H=\$1,800,001-\$3,000,000; I=\$3,000,001-\$5,000,000; J=\$5,000,001-\$10,000,000; K=\$10,000,001-\$50,000,000; L=\$50,000,001-\$100,000,000; M=\$100,000,001-\$500,000,000; N=\$500,000,001-\$1,000,000,000; O=\$1,000,000,001-\$5,000,000,000; P=\$5,000,000,001-\$9,999,999,999	2. Value Codes: F=\$15,000 or less; G=\$15,001-\$50,000; H=\$50,001-\$100,000; I=\$100,001-\$250,000; J=\$250,001-\$500,000; K=\$500,001-\$1,000,000; L=\$1,000,001-\$5,000,000; M=\$5,000,001-\$25,000,000; N=\$25,000,001-\$50,000,000; O=\$50,000,001-\$100,000,000; P=\$100,000,001-\$500,000,000; Q=\$500,000,001-\$9,999,999,999	3. Value Method Codes: Q=Appraisal; R=Cost (real estate only); S=Assessors; T=Cash/Market; U=Book value; V=Other; W=Estimated
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FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	R. David Proctor	4/29/2003

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

I. Positions

POSITION	NAME OF ORGANIZATION/ENTITY
Steering Committee Member	Project Corporate Leadership

IX. CERTIFICATION.

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

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

Signature RDP Date 5/5/03

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

FILING INSTRUCTIONS:	
Mail signed original and 3 additional copies to:	Committee on Financial Disclosure Administrative Office of the United States Courts Suite 2-201 One Columbus Circle, N.E. Washington, D.C. 20544

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 served from 1989-2000 on the Board of Alabama Goodwill Industries. Alabama Goodwill Industries provides employment opportunities for persons with disabilities.
 - When asked to do so, I have provided pro bono work for organizations such as Alabama Goodwill Industries, A Baby's Place (a home for HIV-positive children), and other charitable organizations.
 - As a member of the Monday Morning Quarterback Club of Birmingham since 1991, I have been active in fund-raising for the Crippled Children's Foundation and other children's charities.
 - I am a deacon at Briarwood Presbyterian Church and currently serve on the Diaconate Administrative Team ("DAT"). The Church's Diaconate and the DAT are often called upon to give input to the Mercy Committee of the church, which is commissioned to provide material and other aid to persons who are disadvantaged.
 - I have recently been asked to serve as a Board Member for the Drew Battle Memorial Foundation. The mission of this organization is to organize and offer a baseball clinic for fathers and sons and the organization's emphasis will be to target at risk children and families and provide an opportunity for improved relationships between fathers and sons. Drew Battle was a good friend, classmate, and baseball teammate of my eight-year-old son, Jake. Drew passed away in October 2002 after a courageous bout with cancer.
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 my jurisdiction to recommend candidates for nomination to the federal courts.

Over the past two years, I have been encouraged by persons close to me to seek an appointment to the federal bench and consequently expressed my interest in becoming a federal judge to both Senators Shelby and Sessions. I have been interviewed by both of them⁶ as well as members of their respective staffs. In April 2003, I was invited to the White House to interview with Judge Al Gonzales and David Leach. Also, that month, I was interviewed by a FBI agent and attorney with the Justice Department. On Wednesday, April 30, 2002, I was informed that I would be nominated for a federal district court judgeship. 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.

⁶ I had also interviewed with the Senators and their staff for a previous district court judgeship that was filled in 2001.

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.

My experience as a former law clerk and federal litigator have helped shape my views regarding the proper role of the federal judiciary. Pursuant to Article III of the United States Constitution, judges are to decide "cases" and "controversies." Judges are not legislators. Their decisions must be based on legal judgments, not political will or personal views.

Only if an actual case or controversy is properly before the Court (e.g., the Court has jurisdiction, the parties have proper standing and the issues are ripe for adjudication) is judicial action warranted. In that event, the judge must apply the rule of law as the Framers or

Congress drafted it, and as higher courts have interpreted it. In other words, any judicial decision must show fidelity to the Constitution, applicable statutes, and precedent.

Senator SESSIONS. Mr. Robinson.

STATEMENT OF STEPHEN C. ROBINSON, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK

Mr. ROBINSON. Thank you, Mr. Chair. Senator Schumer, thank you so much for your kind remarks. In particular, thank you for mentioning my wife, who I hope is watching and would be proud, not so much that I'm here today, but mostly proud of our daughter, who has grown to be a fine young lady, and she is here with us today, Victoria.

Unfortunately, my mother, Yvonne Robinson, and my two brothers, Guy and Chester, are not here today, but they are back at Brooklyn anxiously awaiting word on the events of today.

I also would like to thank Senator Clinton and Senators Dodd and Lieberman for their long-term friendship and support that I've enjoyed over the years. Thank you very much and I'm very happy to be here.

Senator SESSIONS. Very good.

Mr. ROBINSON. If Victoria could just stand for a moment.

Senator SESSIONS. Yes, excuse me. Hello.

[The biographical information of Mr. Robinson follows:]

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

1. **Name:** Full name (include any former names used).
Stephen Craig Robinson
2. **Position:** State the position for which you have been nominated.
United States District Judge, Southern District of New York
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.
59 Elm Street, Suite 410, New Haven, CT, 06510. (203) 776-2777 ext. 210
4. **Birthplace:** State date and place of birth.
January 25, 1957, Brooklyn, 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.
Kathleen Ann Sullivan, wife (deceased). Professor of Law, Yale Law School.
One dependant child.
6. **Education:** List in reverse chronological order, listing most recent first, each college, law school, and any other institutions of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.
Cornell Law School, (September 1981 - May 1984), Juris Doctor (1984)
Cornell University, College of Arts and Sciences, (September 1975 - May 1979) BA (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.

Empower New Haven, Inc., 59 Elm Street, New Haven, CT 06510. (December 2002 - Present) Interim President and CEO. Empower New Haven, Inc., is a nonprofit corporation which was established to administer the \$21 million the city of New Haven

received as a result of its empowerment zone designation by the federal government.

Yale Law School, 127 Wall Street, New Haven, CT 06511 (January 2002 - December 2002). Senior Research Fellow. I taught a course entitled "Prosecuting Crimes of Public Disruption".

Federal Grievance Committee, United States District Court, District of Connecticut, Member (2002 - present)

Cornell University, University Councils, Member (2002 - present)

Shearman & Sterling, 599 Lexington Avenue, New York, New York (May 2001 - September 2001). Partner. I was voted a partner in the litigation department in May 2001. However, after my wife's death I resigned my partnership.

U.S. Attorney's Office for the District of Connecticut, 157 Church Street, P.O. Box 1824, New Haven Connecticut. (March 1998 - May 2001). United States Attorney.

Greater New Haven United Way, Chairman of Federal Campaign (2000).

Connecticut Bar Foundation (2000 - present).

Stein Center for Law and Ethics, Fordham Law School, Board of Directors (2001 to present).

Aetna Inc., 151 Farmington Avenue, Hartford, Connecticut (October 1995 - March 1998). Counsel; Chief Compliance Officer of Aetna US Healthcare.

Cornell Law School, Executive Committee of Alumni Association, Member (1998 - 2001)

Federal Bureau of Investigation, 10th and Pennsylvania Avenues., N.W., Washington, DC (November 1993 - October 1995). Principal Deputy General Counsel; Special Assistant to the Director.

Kroll Associates, 900 Third Avenue, New York, New York (August 1991-1993). Managing Director and Associate General Counsel.

U.S. Attorney's Office for the Southern District of New York, 1 St. Andrew's Plaza, New York, New York (May 1987 - July 1991). Assistant U.S. Attorney.

MFY Legal Services, Inc., Secretary and Member of Board of Directors (1989 - 1992).

Christy & Viener, 620 Fifth Avenue, New York, New York (December 1986 - May 1987)

Litigation Associate.

Alexander & Green, 299 Park Avenue, New York, New York (September 1984 - December 1986) Litigation Associate.

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.

International Trial Advocacy Award, Cornell Law School (1984).
 U.S. Customs Service Award for Dedication and Professionalism (1989).
 Drug Enforcement Administration award for Outstanding Contributions in the Field of Drug Enforcement (1990).
 U.S. Department of Justice's Director's Award for Superior Service as an Assistant U.S. Attorney (1991).
 Aetna Chairman's Award (1997).
 George W. Crawford Law Association (CT Black Bar Association) "Tomorrow Award" (1998).
 Phi Alpha Delta Fraternity International (Law Service Fraternity) Honorary Membership in the William O. Douglas Chapter (Quinnipiac Law School) (1999).
 Greater New Haven United Way Award of Appreciation (2000).
 U.S. Coast Guard Barque Eagle Award from U.S. Coast Guard Academy (2000).
 Kids for Life Foundation Award (2000).
 Connecticut District Exchange (Connecticut State Chiefs of Police) Award (2000).
 U.S. Secret Service Honor Award (2001).
 New Haven Police Department Distinguished Service Award (2001).
 Department of Treasury IRS Criminal Investigation
 Honorary Special Agent Award (2001).

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.

New York City Bar Association (1984 - present)
 New York State Bar Association (1984 - present)
 American Bar Association (1994? - present)
 U.S. District Court, District of Connecticut, Federal Grievance Committee (2002 to 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.

New York State Courts (February 1985 - present).
 U.S. District Court, Southern District of New York (1985 - present).
 U.S. District Court, Eastern District of New York (1985 - present).
 U.S. Court of Appeals for the Second Circuit (1988 - present)
 Connecticut State Courts (December 1996 - present)
 U.S. District Court, District of Connecticut (February 1998 - 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.

To the best of my knowledge I have not been a member of any of any organization that has discriminated on the basis of race, sex, or religion.

Executive Committee of the Alumni Association, Cornell Law School
 Council, Cornell University
 Secretary and Member of the Board of Directors, MFY Legal Services
 Phi Alpha Delta Fraternity (Law Service Fraternity) Honorary Membership
 Fellow, Connecticut Bar Foundation.
 Member of the Board of Directors, Stein Center for Law and Ethics, Fordham Law School.

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

None.

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

None.

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

I am of generally good health. My last physical examination was in 1995.

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.

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.

From May 1987 through July 1981, I served as an Assistant United States Attorney in the Southern District of New York. I was hired by U.S. Attorney Rudolph Giuliani and appointed by Attorney General Meese.

From November 1993 - October 1995, I was the Principal Deputy General Counsel of the Federal Bureau of Investigation. I was hired by FBI Director Louis J. Freeh.

From March 1998 - May 2001, I served as the United States Attorney for the District of Connecticut. I was appointed by President Clinton and confirmed by the United States Senate.

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

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 clerk for a judge.
- (2) whether you practiced alone, and if so, the addresses and dates;
- I have not practiced law as a solo practitioner.
- (3) the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

Alexander & Green, 299 Park Avenue, New York, New York (September 1984 - December 1986). Associate in litigation department.

Christy & Viener, 620 Fifth Avenue, New York, New York. (December 1986 - May 1987). Associate in litigation department.

U.S. Attorney's Office for the Southern District of New York, 1 St. Andrew's Plaza, New York, New York. (May 1987 - July 1991). Assistant U.S. Attorney.

Kroll Associates, 900 Third Avenue, New York, New York (August 1991 - October 1993). Managing Director and Associate General Counsel.

Federal Bureau of Investigation, 10th and Pennsylvania Avenues., N.W., Washington, DC (November 1983 - October 1995). Principal Deputy General Counsel; Special Assistant to the Director.

Aetna Inc., 151 Farmington Avenue, Hartford, Connecticut (October 1995 - March 1998). Counsel and Chief Compliance Officer at Aetna US Healthcare.

U.S. Attorney's Office for the District of Connecticut, 157 Church Street, P.O. Box 1824, New Haven, Connecticut (March 1998 - May 2001). United States Attorney.

Shearman & Sterling, 599 Lexington Avenue, New York, New York, (May 2001 September 2001). Partner. I was voted a partner in the litigation department in May 2001. I resigned the partnership after my wife's death.

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

For the first three years of my legal career I served as a litigation associate in two corporate law firms working almost exclusively on civil matters. In 1987, I joined the US Attorney's Office for the Southern District of New York. At the US Attorney's Office I represented the United States in criminal matters and trials. In 1991, I joined Kroll Associates as an Associate General Counsel and later became a Managing Director. I advised the company on legal matters and conducted investigations for governments, corporations and law firms. In 1993, I joined the Federal Bureau of Investigation. While at the FBI, I provided advice and counsel to the FBI regarding various policy issues in criminal and civil matters. In 1995, I joined Aetna as Counsel and later served as the Chief Compliance Officer for Aetna US Healthcare. While there I provided advice to the internal audit, compliance and investigative services departments. I also supervised outside counsel in litigation matters. As the compliance officer I set up and supervised the compliance organization for Aetna US Healthcare. As United States Attorney for the District of Connecticut I supervised 50 Assistant United States Attorneys in 3 offices. I set prosecution guidelines and policy for all criminal and civil matters. As "Chief Law Enforcement Officer" in the district I coordinated investigative strategy for federal law enforcement agencies. I managed all aspects of office operations including budget, personnel and press issues. In 2001, I briefly joined Shearman & Sterling as a partner. However, after my wife's death I resigned my partnership.

- (2) Describe your typical former clients, and mention the areas, if any, in which

you have specialized.

In my practice at law firms our typical clients were American and foreign corporations. At Kroll Associates our clients consisted of corporations, law firms and foreign governments. At Aetna I provided advice and counsel to various Aetna business components. In my three stints in the federal government as an Assistant US Attorney, Deputy General Counsel of the FBI and US Attorney for the District of Connecticut I represented the United States.

I have specialized in litigation and investigations.

- (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.

From 1984 to 1987, as a litigation associate I appeared in court very infrequently. From 1987 to 1991, as an Assistant U.S. Attorney, I appeared in court frequently. From 1991 to present I appeared in court infrequently.

- (2) Indicate the percentage of these appearances in

- (A) federal courts; 95%
- (B) state courts of record; 5%
- (C) other courts.

- (3) Indicate the percentage of these appearances in:

- (A) civil proceedings; 15%
- (B) criminal proceedings. 85%

- (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 an Assistant US Attorney from 1987 to 1991, I tried approximately ten cases to verdict. In two of the cases another Assistant US Attorney served as co-counsel. In addition to the ten cases I tried I also supervised new Assistant US Attorneys in three trials.

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

All of the cases I tried were to a jury.

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

None.

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

For three years I served as Secretary and a member of the Board of Directors of MFY Legal Services, in New York City, which provides legal services to the poor.

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.

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.

All of the following cases were matters before the Southern District of New York .

- (1) United States vs Galanis,
875 F 2d.857 (2nd Cir. 1991).

I tried this case along with (former) AUSA Vincent Briccetti (Mr. Briccetti currently practices at Briccetti, Calhoun & Lawrence LLP., 81 Main Street, Suite 450, White Plains, NY 10601. 914-946-5900) before the Honorable Charles L. Brieant, United States District Judge, and a jury. AUSA Briccetti and I briefed the case and AUSA Briccetti argued the appeal before the United States Circuit Court for the Second Circuit. Anthony Marchese was represented by John Byrnes, Esq., New York Legal Aid Society, 52 Duane Street, New York, NY 10007, (212) 417-8760. John Galanis was represented by Brian Barrett, Esq., who has since died.

John Galanis, Anthony Marchese and five other defendants were charged in a fifty-eight count indictment with conspiring to defraud the government in the collection of its taxes in violation of Title 26, U.S.C., Section 7206(2), aiding and assisting in the filing of false tax returns in violation of Title 18, U.S.C., Section 371 and participating in and conducting the affairs of a racketeering enterprise, comprised of various individuals and business entities through a pattern of racketeering activity, in violation of Title 18, U.S.C. Section 1962 (d) ("RICO").

The Government's case established the participation of Galanis, Marchese and others in a sophisticated criminal enterprise. The organization was headed by Galanis through numerous "front men" and a web of corporate "shell" entities. The organization perpetrated highly sophisticated financial crimes through the promotion and sale of fraudulent tax shelter programs. They bribed bank officials, took over then looted mutual funds and established fraudulent tax shelters for their investors.

After a thirteen week trial a jury convicted Galanis and Marchese on the RICO and various other counts. Prior to trial, four of the eight named defendants entered guilty pleas and agreed to testify as Government witnesses at trial. Two of the defendants were acquitted of all charges.

Judge Brieant sentenced Galanis to an aggregate term of imprisonment of twenty-seven

years. Marchese was sentenced to a fifteen year term of imprisonment. The Second Circuit Court of Appeals affirmed the verdict and the sentence.

- (2) United States vs. Pedro J. Charria,
919 F. 2d 842 (2nd Cir. 1990).

I tried this case before the Honorable John F. Keenan, United States District Judge, and a jury. I also briefed and argued the appeal in the United States Court of Appeals for the Second District of New York. The defendant was represented by Martin L. Schmuckler, Esq., 41 Madison Avenue, New York, New York 10010, (212) 213-9400.

Pedro Charria and fifteen other defendants were charged in a twenty-eight count indictment with conspiracy to distribute and possess with intent to distribute cocaine in violation of Title 21, U.S.C., Section 846, and money laundering in violation of Title 18, U.S.C., Sections 1956 (a)(1)(B)(I) and 2.

The Government's proof at trial established that beginning in March 1987, until his arrest on October 9, 1988, Charria, who was the New York accountant for one of the members of a drug cartel in Medellin, Colombia, conspired with others to distribute cocaine and to conceal and disguise the source and ownership of the proceeds (launder the cash) of a vast drug distribution network.

Charria was convicted by a jury on July 25, 1989. Judge Keenan sentenced Charria pursuant to the Sentencing Guidelines to a term of imprisonment of 25 years. The Second Circuit Court of Appeals affirmed the verdict and the sentence.

- (3) United States vs. Gonzalez,
922 F. 2d 1044 (2nd Cir. 1990).

I tried this case before the Honorable Robert J. Ward, United States District Judge, and a jury. I also briefed and argued the appeal before the United States Court of Appeals for the Second Circuit. Hector Gonzalez was represented by Kenneth J. Schreiber, Esq., Kew Gardens, New York 11415, (718) 793-2700.

Hector Gonzalez was charged in a single count indictment with murdering a confidential informant for the Drug Enforcement Administration in order to prevent the communication of information by the informant to law enforcement officers in violation of Title 18, U.S.C., Section 1512(a)(1)(C), (g), (h) and 1111.

The Government's proof at trial established that on August 13, 1989, Hector Gonzalez

carried out his previously stated intention to murder Felix Pichardo, Gonzalez's former partner in drug dealing, to prevent Pichardo, a confidential informant for the DEA, from communicating information about Gonzalez's narcotics operation to law enforcement officials.

After a one week trial the jury returned a verdict of guilty. On April 26, 1990, Judge Ward sentenced Gonzalez pursuant to Title 18, U.S.C. Sections 1512 (a)(1)(C) and 1111 and the Sentencing guidelines to a term of life imprisonment without parole. The Court of Appeals for the Second Circuit affirmed the verdict and the sentence.

- (4) United States vs. Manko and Edelman,
979 F. 2d 900 (2nd Cir 1992).

Along with AUSA Robert Cleary, (531 E20th Street, Apt. 3A, New York, New York 10010, (201) 645-2762, (415) 553-7493) I tried this case before the Honorable Mary Johnson Lowe, United States District Judge, and a jury. The lead defense attorneys were Earl Nemser and Pamela Chepiga, Esq. of Cadwalader, Wickersham and Taft, New York, New York, 10038, (212) 504-6626.

Bernhard Fred Manko and Jon Edelman were charged with making and subscribing to false tax returns in violation of 26 U.S.C., Section 7206(2), and conspiring to violate the tax laws and to defraud the United States in violation of 18 U.S.C. Section 371.

The Government's proof at trial established that Manko and Edelman were professionals in the once thriving field of tax shelters. Once the laws in that area changed, Manko and Edelman devised a complicated scheme which involved the use of repurchase transactions in U.S. Treasury Bills to create interest deductions in one year and corresponding gains in the next year, with little or no risk. The ultimate result was to create transactions which had a net effect of zero and little or no risk, but created large "phantom" tax deductions. The tax deductions were sold to investors in their shelters who then used the deduction to decrease their tax liabilities.

After a four-month jury trial, both Manko and Edelman were found guilty and sentenced to five years imprisonment and fined \$450,000. The second Circuit Court of Appeals affirmed the verdict and the sentence.

- (5) United States vs. Castillo,
1993 US Dist. Lexis 1905 (SDNY 1992)

I tried this case before the Honorable Peter K. Leisure, United States District Judge, and a jury. I also briefed and argued the appeal before the United States Court of Appeals for

the Second Circuit. Francisco Castillo was represented by Paul Davison, Esq. The New York Legal Aid Society, 52 Duane Street, New York, New York 10007 (212) 417-8760.

Francisco Castillo was charged in a two count indictment with conspiracy to distribute and possess with intent to distribute cocaine, in violation of Title 21, U.S.C., Section 846 and with distributing and possessing with intent to distribute cocaine in violation of Title 21, U.S.C., Sections 812, 841 (a)(1)m and 841 (b)(1)(B), and Title 18, U.S.C., Section 2.

The Government's proof at trial established that on November 28, 1988, Francisco Castillo was introduced to an informant for the Drug Enforcement Administration ("DEA") and negotiated a two-kilogram cocaine deal. Castillo and a coconspirator arrived at a meeting with two kilograms of cocaine whereupon DEA agents arrested Castillo and his coconspirator.

After a short jury trial Castillo was found guilty on both counts. Judge Leisure sentenced Castillo to 84 months' imprisonment. The Second Circuit Court of Appeals affirmed the verdict and the sentence.

- (6) United States vs. Glauberman,
90 Cr. 0517 (SDNY)

I directed the investigation and presented the evidence to a grand jury leading to the indictment of Steven L. Glauberman a senior associate at the New York law firm of Skadden, Arps, Slate, Meagher and Flom. Steven Glauberman was represented by Martin Perschetz, Esq. 900 Third Avenue, New York, New York, 10022, (212) 758-0404.

Glauberman was charged with disclosing inside information to Eben Putnam Smith then a broker in the Stamford, Connecticut, office of Smith Barney & Co. The indictment covered 29 actual and proposed take-over deals in which the law firm of Skadden, Arps, represented one of the prospective parties. The indictment alleged that Glauberman used his position as an associate of the firm to gather information about the actual and proposed take-over deals, some of which he worked on for the firm. Glauberman passed on information regarding the take-over to Eben Smith a personal friend who both placed trades based on the inside information and passed the information on to others.

Glauberman plead guilty to the indictment before the Honorable Miriam Cedarbaum, United States District Judge. He was sentenced to six months at a half-way house and 5 years probation and 200 hours of community service.

- (7) United States vs. Velez,
89 Cr. (SDNY)

I investigated, indicted and tried this case before the Honorable John F. Keenan, United States District Judge, and a jury. Carmelo Velez was represented by Martin Edelman, New York, New York.

Carmelo Velez was charged with making false statements to a federal officer in violation of Title 18 U.S.C., Section 1001 and possession of cocaine with intent to distribute.

The Government's proof at trial established that in 1987 Carmelo Velez, the estranged husband of Drug Enforcement Administration ("DEA") Special Agent Lizette Yrizzary, plotted to frame his estranged wife so that she would be forced to give up her position as staff assistant to the Special Agent in Charge of the New York office of the DEA. Velez executed his plan. He purchased a small amount of cocaine and planted it in the trunk Agent Yrizzary's DEA issued car. Velez then placed several anonymous telephone calls to the New York office of the DEA reporting that he had witnessed Yrizzary purchasing cocaine on the streets of Manhattan and placing it in her car.

After a week-long jury trial Carmelo Velez was found guilty of making false statements to the DEA (the anonymous telephone calls) and of the possession and distribution of the cocaine he planted in Yrizzary's car. Velez was sentenced to probation and community service.

- (8) United States vs. Maduka,
88 Cr. 0384 (SDNY 1988)

I tried this case before the Honorable Thomas P. Griesa, United States District Judge, and a jury. Johnson Maduka was represented by Leonard J. Levenson, Esq., 225 Broadway, New York, New York, 10007, (212) 732-0522.

Johnson Maduka and six co-defendants were charged in a multi-count indictment with conspiracy to distribute and possess with intent to distribute heroin in violation of Title 21, U.S.C., Section 846. The trial commenced against Maduka with his co-conspirators pleading guilty before trial.

The Government's proof at trial established Maduka's participation in a drug importation and distribution scheme that started in Nigeria and involved the use of individuals as "mules" to carry the drugs (in body cavities) into the United States for distribution.

Johnson Maduka was convicted after a one week trial. Judge Griesa sentenced Maduka to a term of imprisonment followed by a order of deportation.

- (9) United States vs. Garbarino,
87 Cr. 0860 (SDNY 1987)

I indicted and brought this case before the Honorable Pierre Leval, United States District Judge. Mr. Garbarino was represented by Andrew Lawler, Esq., 220 East 42nd Street, New York, New York 10017, (212) 687-8850.

Isidoro Garbarino was charged in a seventy count indictment with the entry of goods into the United States upon a false classification and by use of fraudulent or false invoices which reduced the amount of duty legally owed in violation of Title 18, U.S.C., Section 541 and 542.

The Government alleged that Garbarino engaged in a scheme to falsely identify Russian Beluga, Osetra and Sevruga caviar to customs officials as he sought to import them into the United States. By falsely identifying the imported goods Garbarino saved over \$9 million dollars in duty owed to the United States.

Prior to trial Garbarino fled and is still a fugitive today.

(10) United States vs. Lebron-Urrutia,
87 Cr. 0189 (SDNY 1987).

I tried this case before the Honorable Morris E. Lasker, United States District Judge, and a jury. Juan Lebron-Urrutia was represented by Michelle Weston Patterson, Esq., One Flatbush Avenue, Brooklyn, New York, 11217, (718) 625-5748.

Juan Lebron-Urrutia and two co-defendants were charged in a multi-count indictment with conspiracy to distribute and possess with intent to distribute cocaine in violation of Title 21, U.S.C., Section 846. The trial commenced against Lebron-Urrutia with his co-conspirators pleading guilty before trial.

The Government's proof at trial established Lebron-Urrutia's participation in a drug importation and distribution scheme to distribute cocaine.

Juan Lebron-Urrutia pled guilty to the full indictment after the Government and defense case but prior to the jury rendering its verdict. Judge Lasker sentenced Maduka to a term of imprisonment followed by a order of deportation.

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.

Robert Markey v. Magistrate Donna F. Martinez, et al., civil No. 3:99CV23355 (AWT) (USAO #2000V00041).

As U.S. Attorney for the District of Connecticut I was named as a defendant along with a Magistrate Judge, an FBI agent and several supervisors in the U.S. Attorney's Office in a Bivens action alleging that the plaintiff, Richard Markey, had been maliciously prosecuted. Federal District Judge Alvin W. Thompson granted a motion to dismiss on April 27, 2000. Judgement for the defendants was entered on May 2, 2000. No appeal was taken

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.

To the extent that I am currently affiliated with any organization that might create a conflict of interest I would resign that position whether that conflict was actual or potential. Furthermore, I would alert the Chief Judge of the District, the clerk of the court and my law clerks of my previous employers and affiliations and my financial affiliations so that the appropriate questions can be asked and disclosures made. I am not currently aware of any categories of litigation or financial arrangements that are likely to present potential conflicts of interest. I will follow the Code of Judicial Conduct 28 U.S.C. Section 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.

No.

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

Please see my financial disclosure form (AO-10).

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

See attached Net Worth Statement.

25. **Selection Process:** 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?

Senator Schumer's judicial screening panel selected me, along with other candidates, to be interviewed by Senator Schumer.

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

The Chairman of Senator Schumer's screening panel called me and informed me that the panel was meeting to consider potential candidates for recommendation to President Bush. I submitted a resume to the committee and completed a questionnaire. I was interviewed by the screening panel and subsequently by Senator Schumer. I was next interviewed by Deputy White House Counsel Flanigan and later by White House Counsel Judge Gonzales. I was interviewed by staff from the Department of Justice, Office of Legal Policy. I was also interviewed by Special Agents from the Federal Bureau of Investigation.

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

No.

Senator SESSIONS. Senator Schumer?

Senator SCHUMER. Thank you. I always enjoy seeing the families. It is a nice day. And to see the family's pride in their loved one before us is a wonderful thing.

I just have one question. Before I do that, I do want to ask you something, Mr. Castel. I have a daughter, Allison, a young daughter, who is also in camp right now, so we share something in common. My daughter is 14.

Mr. CASTEL. Mine is going to be 13 on September 7th, and she also plays CYO basketball, as I know your daughter does.

Senator SCHUMER. Yes, she does. My daughter is a—I loved sports, but I was not—our team's motto in high school was: "We may be small, but we are slow."

[Laughter.]

Senator SCHUMER. My daughter has a gift from God. She is just a great athlete, and she loves sports, and she is at sports camp actually up in the Catskills, Kutcher Sports Academy.

Anyway, my one question for all the nominees is this, and unfortunately you have to answer it first, Mr. Castel. Can you name for me a judge, could be at your local level, could be at the national level, but a judge you admire and would hope to—we all have role models we look up to as we move forward. That is what I would ask each of you.

Mr. CASTEL. Well, I may be criticized for being someone who is trying to influence a future colleague, but Chief Judge Mike Mukasey in the Southern District is somebody who I do admire greatly. He has a terrific temperament. He has shown backbone and courage, and I have a very high regard for him, and I have a very high regard for him, and I have to quickly mention before—not to take Senators' time—but my own personal mentor, Hon. Kevin Thomas Duffy for whom I clerked and who is still sitting on the Southern District Bench. He has been a great influence on me.

I thank you for the question, Senator. So I don't get into trouble, I want to mention that my brother-in-law, Kevin McLernon, has arrived in the Senate room and is here. Thank you.

Senator SCHUMER. Thank you.

Judge Feuerstein?

Judge FEUERSTEIN. I actually can't think of one person in particular, but there are certainly—

Senator SCHUMER. Name a few.

Judge FEUERSTEIN. There are attributes that I think go into making a good judge, and beyond being a good judge, a good person, and as far as judges go, I would have to say Judge Arthur Spatt, who sits in the Court which hopefully I will someday sit in; and Judge Leo McGinity, with whom I worked for many years, and who is now a colleague of mine on the appellate division. Judge Marie Santagata, and of course, as a role model for women, Justice Sandra Day O'Connor in the Supreme Court.

Senator SCHUMER. Mr. Holwell?

Mr. HOLWELL. Thank you for the question, Senator. The two that stand out in my mind of the judges I've practiced before, I would have to mention Judge Gagliardi from the Southern District, who was a man of great demeanor and great measure, and Judge

Weinfeld, also of the Southern District, who was a man of great intelligence and brilliance.

Senator SCHUMER. Thank you.

Judge McKnight?

Judge MCKNIGHT. Thank you, Senator. If I could name a few as well?

Senator SCHUMER. Please.

Judge MCKNIGHT. In terms of a judge that's known nationally, someone I greatly admire, is Learned Hand, for his fidelity to the law and to the facts, his precision of analysis and language, his courage in his defense of liberty.

At the local level, I've been a judge on the State Court as well as the Federal Court, and four come to mind. The Honorable Sam Ervin of the Fourth Circuit Court of Appeals, again for his courage and fidelity to the law, and understanding of trials and how they work; James B. McMillan for his courage in the Charlotte-Mecklenburg integration; Graham Mullen, my chief, for his attention to the details of the Court as well as to the ideals of the Court; and Frank W. Snapp, who is now deceased, but on the North Carolina State Superior Court, who taught me much.

Senator SCHUMER. Thank you.

Mr. Proctor?

Mr. PROCTOR. Yes. Senator Schumer, thank you for the question. I would have to start with Judge Widener, who I had the privilege of clerking for and who really introduced me to the Federal Court system. We've had two very high-quality chief judges, one retired now, Sam Pointer, who works at the Birmingham firm of Lightfoot, Franklin and White, and I look forward to hopefully, if I'm fortunate to be confirmed, to serve under Judge Clemon, who I've gotten to know quite well over the years in both a legal and a personal way.

Senator SCHUMER. Mr. Robinson?

Mr. ROBINSON. Thank you for the question, Senator Schumer. If I am fortunate enough to be confirmed, I would have the great honor of serving with several judges whom I have practiced before and have gotten to know and admire and respect greatly. One has been mentioned by Mr. Castel, Chief Judge Mike Mukasey. He's a judge who has shown great integrity, great courage in the work that he's done, and also a sense of humor and a good rapport with both colleagues on the bench and the practitioners before him.

Secondly, I would mention Judge Keenan. As a young Assistant United States Attorney I was fortunate enough to try three cases before Judge Keenan, and admired the way he conducted his courtroom, and treated even a very green, young Assistant United States Attorney, and did one of the most impressive things that ever happened to me in my career. He actually asked me to bring my mother in so that he could talk to her in chambers without me present. And to this day I've never found out the content of that conversation, but at least I am happy to say my mother did not disown me. But I've always respected him, and the way he worked a courtroom, the way he treated counsel, and then both of their knowledge and fidelity to the law.

And the last I'll mention is Judge Lynch, who was the Chief of the Criminal Division when I was an Assistant United States At-

torney, and has been a person who has been very influential to me and very supportive of me. He's a giant intellect, a person of great integrity, and someone I admire greatly.

Senator SCHUMER. Thank you. I want to thank you all. I apologize to the Chair and all of you that I have to be gone, but I congratulate all of you on your nominations and look forward to your confirmations.

Mr. CASTEL. Thank you, Senator.

Judge FEUERSTEIN. Thank you, Senator.

Mr. HOLWELL. Thank you, Senator.

Mr. PROCTOR. Thank you, Senator.

Mr. ROBINSON. Thank you, Senator.

Senator SESSIONS. I just have a few questions I would ask you. One of the questions that is important is understanding the role of courts. This is the last opportunity the people just about, except when the matter is on the floor and then there are no questions to be asked, this is really the only chance in which the people get to ask you, will you be true to the constitutional framework? Because when a judge declares that the Constitution says something, you have a lifetime appointment, and it is difficult to deal with if that is not accurate.

So we would like to know, do you understand the role of the court, what do you understand with regard to the role of the court and your responsibility to follow the law as it is existing, as exposed to expansive interpretations of the law?

Mr. CASTEL. Thank you for the question, Mr. Chairman.

I think an affection for the rule of law in our constitutional system means a tremendous respect for the separation of powers. The role of the legislature, the executive, and the judiciary have to be confined to their respective domains if our system is going to work. I would view my job, if I were confirmed, as not only following the precedent handed down from the Supreme Court and the Court of Appeals, but also at the same time, respecting the boundaries, not trying to play amateur legislator in any respect. I appreciate the question. It's a very important question, and I believe in the separation of powers doctrine down to my toes.

Thank you very much.

Senator SESSIONS. Thank you very much.

Judge

Judge Feuerstein. Thank you for the question, Mr. Chairman. I agree with Mr. Castel as far as the separation of powers and following precedent. I presently sit on an appellate court, so I am really in favor of this.

[Laughter.]

Judge FEUERSTEIN. I view a judge's role as interpreting and not creating law. That is the job of the legislature, and I believe that my career on the bench has demonstrated my execution of my duties with respect for separation of powers and precedent. And that would be the end of my statement. Thank you.

Senator SESSIONS. Thank you.

Mr. Holwell?

Mr. HOLWELL. Thank you, Mr. Chairman. I agree with Mr. Castel and Judge Feuerstein. Judicial restraint surely has to be the touchstone of the court system, particularly at the District Court

level. No one elects a District Court Judge, and yet he sits or she sits for a lifetime, and it's particularly imperative for judges to understand that great power cannot be abused, and the deference must be paid to the other branches of the Government.

Senator SESSIONS. Judge McKnight?

Judge MCKNIGHT. Thank you, Mr. Chairman. If I am so fortunate as to be confirmed, it is my deep-seated belief, one that I've acted on in 14 years now as a judge, that the role of the judge is precisely to interpret the law as it is given to him or her, not to make law, not to expand beyond the law, not to play legislator, but to follow precedent, honestly, fairly, with integrity, to respect precedent that is established, to follow the statutes and give a precise and fair interpretation of the statutes, and do my best with what is given to me, to apply it to specific fact situations accurately and justly. Thank you.

Senator SESSIONS. Thank you.

Mr. Proctor?

Mr. PROCTOR. Thank you, Mr. Chairman. When I clerked for Judge Widener, that was ingrained in my from the beginning of my legal career, that we should respect the rule of law; we should decide cases and controversies from the meaning of the Constitution and not try to legislate, and that we should seek the narrowest holding possible and not overwrite from the bench. And I'm committed to virtually all the things I've heard my co-panelists say, but I think you know from our conversations before, I am committed deeply to the rule of law and the fact that a judge has an inherently limited Federal judicial power invested in him by the Constitution, and I would uphold that duty if I was so fortunate to be confirmed.

Senator SESSIONS. Very good.

Mr. Robinson?

Mr. ROBINSON. Thank you, Mr. Chair, for that question. I think it is an important one, and let me start briefly by saying I agree with my colleagues. I have a deep and abiding respect for the rule of law. I have tried to show that and live that as an Assistant U.S. Attorney, as Deputy General Counsel of the FBI, and again as a U.S. Attorney.

I believe that the way this system works well is for judges to follow the precedent that has been set before them and to rule narrowly, as narrowly as possible, with an eye towards the law as it has been set forth. We are not legislators. We have not been elected. We have not chosen that path in life. But we have chosen to participate in an executive—I mean in a judicial, in a co-equal branch of the Government, and that's important, but it's also important for us to understand our role in that process, and that is not to legislate, but to interpret and follow the law.

Senator SESSIONS. I think you have answered that well. There will be temptations. There will be times when somebody would want you to rule in a way that you think would really be good public policy perhaps, but it is not supported by the law, and the more I look at the strength of the United States, the more I am convinced that this Nation's fundamental power and ability to grow and progress is based on the rule of law. You look at the countries like Hong Kong, that have a legal system, how they flourish when

other countries around them are not doing well. New York, for example, has these complex commercial cases affecting the whole world a lot of times, and plus we are having those all over the country now, in Alabama and everywhere else.

But people invest here. They believe in doing business with Americans. We are able to be competitive in the world marketplace because people think they can get justice in our courts, and they are not worried about an investment. You think about the idea of an average citizen can borrow \$150,000 to buy a house and pay it back at less than 6 percent interest over 30 years, this is a tribute to our legal system. It has really been a source of our strength, and I do believe that some opinions in recent years have gone beyond a legitimate interpretation of our law, and I think it undermines public respect for law, and if the public ever believes that judges are nothing more than politicians too like us, then I think that great respect and reservoir of respect that exists could be undermined.

Let me ask you this, now briefly, each one of you. The challenge of a Federal District Judge is great. There are a lot of pressures and a lot of intensity, a lot of deadlines that have to be met. Frequently there are injunctions and things that require weekends and nights. The backlog is there. Clients have large amounts of money at stake. Are you willing to see yourself as a servant to the system, and if need be, put in extraordinary hours and manage your docket effectively? It is certainly not an easy job.

Do you have any thoughts about that, Mr. Castel?

Mr. CASTEL. Thank you, Mr. Chairman. I do have some thoughts. First of all, I think, and I probably can say this about my co-panelists, you don't get to this table unless you have an incredible work ethic, and I think you really particularly—my familiarity tends to be more with the Federal Courts in New York. It is a crushing load. It is hard work. I've told my family, because they've asked the question, you know, will I be working harder or less hard than I am now, a partner in a law firm. My answer is probably over at least the next 3 years until I get my sea legs, I anticipate probably working harder, but it's responsibility that I eagerly embrace.

Thank you, Senator.

Senator SESSIONS. Thank you.

Judge Feuerstein?

Judge FEUERSTEIN. Thank you for the question, Mr. Chairman. I presently sit in what I believe is the busiest appellate court in the country, and so I am used to work, and as Mr. Castel has said, I believe everyone on this panel probably is. I have never shirked it. I look forward to the challenges if I am fortunate enough to be confirmed. And frankly, when you love what you do, it's not a hardship.

Senator SESSIONS. Well said.

Mr. Holwell?

Mr. HOLWELL. Mr. Chairman, I agree with a statement you made earlier, that if it were ever true, it certainly is not the case that one can retire to the bench. The extraordinary demands on the judiciary can only be met by people continuing to put their shoulder to the wheel of labor. I think what Mr. Castel said is correct, we've

all done that to get this far, and should we be so lucky as to be confirmed by the Senate, we will continue in that vein.

Senator SESSIONS. Good.

Judge McKnight?

Judge MCKNIGHT. Mr. Chairman, thank you for the question. In my time on the bench I have seen the importance of it over and over again. When I was a State judge we have a very overburdened court system in Charlotte, and I worked hard to manage the docket there and did so. Likewise on the Federal bench as a Magistrate Judge, we have one of the highest weighted caseloads in the country, and I have, I believe, effectively manage the cases.

But let me just say this. My commitment is to work hard, to put in the hours and give each case the time and thought it deserves, and I will do so.

Senator SESSIONS. Judge McKnight, do you have any comments on the role of the magistrate for your fellow judges to be? I know in the Southern District of Alabama, where I practiced for a number of years, the magistrates were given a lot of work and they responded very well. It is a prestigious position, and you got quality nominees and they did quality work. Do you think some judges, district judges around the country could use magistrates more effectively?

Judge MCKNIGHT. Thank you, sir. I believe so. I have been very fortunate in the Western District, that the District Judges who reviewed and supervised my work, have allowed me to work to the full extent of the statute, which has been expanded in terms of the responsibility of the magistrate judge several times since 1980, and I would encourage judges to make full use of it. It, of course, takes loads off of them and gives them time to focus on their role, what is important. And yes, sir, I would underscore their role as strongly as I could.

Senator SESSIONS. Mr. Proctor?

Mr. PROCTOR. Thank you, Mr. Chairman. I think the reason that I have sought this position is a call to service, a call to service of my country, the people of Alabama and my colleagues in the bar. I plan to bring the diligence and work ethic I've demonstrated as a lawyer and that I've been taught by my partners, such as Richard Lehr and David Middlebrooks, and from some of my former partners at my old firm, like Steve Brickman and Brad Sklar. I hope to bring that diligence and work ethic to the bench. And I certainly agree with your comment that you've shared with me before, that this is not a retirement job, this a roll-your-sleeves-up-and-get-to-work job.

Senator SESSIONS. You have that reputation as a worker.

Mr. Robinson?

Mr. ROBINSON. Thank you, Mr. Chairman. I agree with my colleagues again. I have always been a person who has worked extremely hard, in large part because I enjoy that, and that's what the jobs that I've been in require. And should I be fortunate enough to be confirmed, I would pledge that the question for me will not be am I putting in the hours that I will work diligently so that everyone who appears before the bench has the confidence that their case has been heard, that their voice has been not only listened to but heard by the Court, and that a careful and thoughtful process

has been engaged in and a decision reached. And I think that that's important, not only for myself going forward in the job, but for the confidence that litigants and parties have before the Court. So I think that's extremely important that we all do that, and have tremendous faith, having gotten to know my colleagues at the table recently, that we will all do that.

Senator SESSIONS. I agree. This is a first rate panel. We are glad you are here. There are litigants that have filed motions that ought to be granted, and the sooner they are granted, the better things happen in the legal system. I know you will do that. Your backgrounds have held up. You have been investigated by your bar association and by the President and by the FBI, by the staff of the U.S. Senate, and you have passed a whole lot of hurdles to get here. I think each one of you represent the best of the legal system of America. I look forward to your confirmations.

If there is nothing else at this point, we will be adjourned. But I will note that the record will be open for further questions that you may receive in the form of written questions. Anything else? If not, we are adjourned.

[Whereupon, at 11:11 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

**RESPONSES OF STEVEN M. COLLTON TO WRITTEN QUESTIONS OF
SENATOR PATRICK J. LEAHY**

1. You have served as an attorney on the Whitewater investigation and in the investigation into the so-called "Filegate" - the case involving the alleged improper possession by the White House of personal FBI files on Republican political appointees in which both the President and Mrs. Clinton were both cleared by the Independent Counsel's office. Having played a role in investigations which became extremely partisan fights, what assurances can you give the committee that you will act impartially as a judge, specifically in politically-contentious cases?

I believe that a judge must carry out his or her duties to interpret and apply the law without regard to the personal policy preferences of the judge, and certainly without regard to partisan political considerations. Generally speaking, it is the responsibility of a judge to determine what the law is, based on the traditional tools of the judicial craft, such as binding precedent of the Supreme Court of the United States and the governing court of appeals, and the text, structure, and history of any constitutional, statutory, or regulatory provisions at issue. It is not the role of a judge to make policy decisions entrusted to the Legislative or Executive branches of government, or to consider the partisan political ramifications of any judicial decision. I believe that a good judge must have the self-discipline to separate the judicial inquiry from any policy or political preferences.

I respectfully suggest that my performance as a member of the Office of Independent Counsel ("OIC") should give the Committee reason to believe that I would follow the law and act impartially in any politically-contentious matters that might come before me as a judge. I am honored that opposing counsel in the principal matter on which I worked for the OIC - a tax fraud prosecution involving the former Governor of Arkansas - has written to the Committee in support of the nomination.

As noted in your question, I was also assigned to perform investigative work for the OIC in a matter relating to confidential FBI background reports that had been requested from the FBI by White House officials. This matter was assigned to the OIC after the Attorney General requested appointment of an independent counsel to investigate. I believed that the responsibility of the OIC was to follow the evidence, wherever it led, without regard to the partisan political consequences of the investigation. The Independent Counsel's final report dated March 16, 2000, explains the careful and detailed work conducted by investigators and attorneys with the OIC to reconstruct the process by which the FBI files were obtained by the White House Office of Personnel Security. The investigative work of the OIC led to the conclusion that there was no conspiracy involving senior White House officials or Mrs. Clinton to secure derogatory information from FBI background reports of former Republican political appointees for improper political use. I hope the Committee will find that this conclusion of the Independent Counsel - exonerating

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subjects of the investigation after careful investigation – represents a successful discharge of the duties of the OIC, and demonstrates the dedication to impartiality of the attorneys and investigators involved in that matter.

2. You are 40 years old and nominated to a lifetime seat on a court just one step below the Supreme Court. You received an usual three-part ABA rating - Substantial Majority Qualified; Minority Well Qualified and Minority Not Qualified. What do you think contributed to such a disparate analysis of your qualifications?

I do not know what led various members of the ABA Standing Committee on the Federal Judiciary to vote as they did. I am pleased that a substantial majority of the committee concluded that I was either qualified or well qualified for the position of United States Circuit Judge. The only communication I received from the ABA committee concerning the rating was a letter that set forth the voting totals that you describe.

3. In several cases you prosecuted, including U.S. v. Jackson, U.S. v. Clark, and U.S. v. Conner, an issue was raised as to the admissibility of the evidence. Please describe your view of what happened regarding the evidentiary issues in those cases at trial and on appeal. Also, if confirmed as a circuit court judge, what will you do to ensure that the constitutional rights of the defendants who come before you are protected?

In *United States v. Jackson*, 67 F.3d 1359 (8th Cir. 1995), the principal evidentiary issue concerned the defendant's challenge to the admissibility of evidence seized pursuant to three search warrants. The warrants were issued by state court judges to local law enforcement officers, and were then subject to challenge in federal court when the case was adopted for federal prosecution. As an attorney for the government, I argued in favor of admissibility of the evidence in the district court. I had departed the United States Attorney's Office at the time of the appeal, and thus did not brief and argue the appeal.

The district court and the court of appeals concluded that two of the warrants were supported by probable cause, and that evidence seized pursuant to those warrants was admissible. The defendant challenged a third warrant on the ground that it was a so-called "indicia" warrant that sought evidence of the defendant's membership in, or affiliation with, a street gang. The Eighth Circuit previously had held that when a search warrant implicates certain associational rights under the First Amendment, the particularity requirement of the Fourth Amendment must be accorded "scrupulous exactitude," *United States v. Apker*, 705 F.2d 293, 300 (8th Cir. 1983), although the district court in *Jackson* said there was serious question about the scope of *Apker* in light of the Supreme Court's decision in *Maryland v. Macon*, 472 U.S. 463 (1985). See *Wabun-Inini v. Sessions*, 900 F.2d 1234, 1240-41 n.4 (8th Cir. 1990).

In any event, under Eighth Circuit precedent, a court presented with such a challenge could properly analyze whether the evidence was admissible pursuant to the "good-faith exception" to the exclusionary rule announced in *United States v. Leon*, 468 U.S. 897 (1984), with or without reviewing whether the warrant was issued in compliance with the Fourth Amendment. See *United States v. Chambers*, 987 F.2d 1331, 1334 (8th Cir. 1993). The district court found that the state search warrant violated the Fourth Amendment under the standards of the Eighth Circuit's decision in *Apker*, but that the evidence seized was admissible under the "good faith exception." The court of appeals concluded that the officers' reliance on the warrant was not objectively unreasonable, and that the evidence seized pursuant to the warrant was thus admissible under the "good faith exception."

In *United States v. Clark*, 22 F.3d 799 (8th Cir. 1994), the principal issue was whether the defendant had a reasonable expectation of privacy while seated voluntarily in the back seat of a marked patrol car, such that a surreptitious tape recording of his conversations constituted a "search" under the Fourth Amendment. The defendant urged the district court to suppress statements he made while in the patrol car and physical evidence (i.e., illegal narcotics) seized by law enforcement officers as a result of the recorded statements.

A magistrate judge and the district judge concluded that the defendant had a reasonable expectation of privacy in the patrol car, that the tape recording constituted a "search," and that the evidence should be suppressed. The district court concluded that the back seat of the patrol car was "more like a taxi cab, where presumably there would be an expectation of privacy." *United States v. Clark*, No. CR 92-3002, Order (June 1, 1993), at 14.

As an attorney for the government, I believed that an appeal was warranted, and the Solicitor General authorized an appeal of the district court's ruling. A unanimous panel of the court of appeals reversed. Consistent with a decision of the Eleventh Circuit in *United States v. McKinnon*, 985 F.2d 525 (11th Cir. 1993), the Eighth Circuit held that "a person does not have a reasonable or legitimate expectation of privacy in statements made to a companion while seated in a police car." 22 F.3d at 801. This decision appears to be consistent with a long line of decisions issued both before and after *Clark*. E.g., *People v. Todd*, 26 Cal.App.3d 15, 17, 102 Cal. Rptr. 539 (1972); *State v. Ramirez*, 535 N.W.2d 847, 850 (S.D. 1995) (collecting cases); *State v. Timley*, 975 P.2d 264, 267 (Kan. App. 1999) (collecting cases); *United States v. Turner*, 209 F.3d 1198, 1200-01 (10th Cir. 2000).

In *United States v. Conner*, 127 F.3d 663 (8th Cir. 1997), the principal evidentiary issue was whether police officers violated the Fourth Amendment during their encounter with two burglary suspects at the door of a motel room, such that evidence seized pursuant to search warrants obtained after the encounter should be suppressed. The defendants filed motions to suppress evidence, and the litigation in the district court was conducted by one of my colleagues in the United States Attorney's Office. The district court held that the police officers violated the

Fourth Amendment when they demanded, without a warrant, that the suspects open the door of a motel room in which they were located. Because the officers used information gleaned from observations of the motel room to obtain search warrants, the district court held that evidence seized pursuant to the warrants should be suppressed.

The United States Attorney asked me to pursue an appeal of the district court's ruling, and the Solicitor General authorized appeal. The principal issues on appeal were whether the officers were permitted to command the occupants of the motel room to open the door for brief, investigatory questioning, see *United States v. Winsor*, 816 F.2d 1394, 1397-1400 (9th Cir. 1987) (command permissible based on reasonable suspicion), vacated, *United States v. Winsor*, 846 F.2d 1569 (9th Cir. 1988) (en banc) (command to open door requires probable cause), and if not, whether the warrantless command by the officers was justified in the *Conner* case by probable cause and exigent circumstances. A majority of the Eighth Circuit panel concluded that the command of the officers to open the motel room door constituted an "entry" to the room that required probable cause and a search warrant. *Conner*, 127 F.3d at 666. The panel further concluded that exigent circumstances did not justify a warrantless entry. *Id.* at 667. A dissenting opinion by Judge Diana Murphy concluded that the officers had probable cause to believe the burglars and stolen property were inside the motel room, and that the risk of flight or of danger to others in the vicinity constituted exigent circumstances that justified immediate police action without a warrant. *Id.* at 668-69 (Murphy, J., dissenting).

If confirmed as a circuit court judge, it would be my duty to protect the constitutional rights of defendants who come before the court of appeals. Although I have represented the United States in criminal cases as an attorney in the Department of Justice, the litigating positions I have taken as an advocate do not necessarily reflect the views that I would reach on issues that might come before me as a judge. To the contrary, with respect to any issue on which I may have taken a litigating position that was later rejected by the court of appeals or the Supreme Court, I would be obligated to follow any applicable binding precedent.

In the course of my duties as a federal prosecutor, I have recognized the constitutional rights of criminal defendants. My office and I have declined to pursue cases presented for prosecution when it appeared that evidence was obtained illegally or when there was insufficient evidence to overcome the presumption of innocence. I have declined to pursue appeals in cases where it appeared that the district court's determination that evidence was obtained illegally would be sustained on appeal. My staff and I have participated in periodic training designed to educate law enforcement officers on developments in the law and to achieve compliance with constitutional rules in the investigation of criminal cases. If confirmed as a circuit court judge, I believe this experience would assist me in discharging the duties of a judge to protect the constitutional rights of the accused.

**Responses of R. David Proctor, Nominee to the Northern District of Alabama,
to Written Questions from Senator Edward M. Kennedy**

1. Last summer, the Wall Street Journal reported on a troubling issue regarding the use of your law firm as a so-called poison pill. As a founder and shareholder of Lehr, Middlebrooks, Price & Proctor, how do you respond to public perception and judicial findings that your firm has been intentionally retained by corporations who seek to disqualify the only African-American judge in the Northern District from presiding over civil rights cases in which they are the defendant?

Thank you for your questions concerning the Wall Street Journal article dated August 7, 2002. I am pleased to have the opportunity to respond, particularly in light of the media reports concerning this matter.

The Wall Street Journal article referred to a partner at my firm, Terry Price, whose uncle is a judge on the U.S. District Court for the Northern District of Alabama. Because Judge Clemon happens to be Mr. Price's uncle, under 28 U.S.C. § 455, Judge Clemon cannot sit on cases in which Mr. Price either appears or has an interest; therefore, Judge Clemon is required to recuse himself in all cases in which our firm appears.

For several reasons outlined below, I would respectfully disagree that there is any commonly held public perception that clients have retained Mr. Price or our firm to disqualify Chief Judge Clemon. I would also clarify that the only judicial finding which has resulted in our firm's disqualification is still under review and has already been found to be the product of a flawed analysis by a panel of the Eleventh Circuit Court of Appeals because it placed the burden on BellSouth to prove it had not improperly retained our firm. In re BellSouth Corp., 2003 U.S. App. LEXIS 12258 (11th Cir. June 17, 2003).

The Wall Street Journal article to which you refer in your question specifically addresses the BellSouth litigation in the Northern District of Alabama. I am not counsel in that matter, and consequently cannot speak to many of the details of that case. However, I am reliably informed about certain aspects of the case because the court's ruling has had an obvious impact on our firm. BellSouth approached Mr. Price about handling the case before it was filed; it thereafter retained Mr. Price to represent it when it was filed. In addition, BellSouth has been a client of the firm since Mr. Price joined us in 1996. In fact, Lehr Middlebrooks Price & Proctor has listed BellSouth in its Martindale-Hubbell listing as a representative client since at least 1997 or 1998. (Due to publication deadlines, that was the first opportunity the firm would have had to list BellSouth as such a client after Mr. Price joined in 1996).

Upon Terry Price's appearance in the case, Plaintiffs filed a motion to disqualify him. The ostensible reason for their doing so was their claim that BellSouth hired Mr. Price in order to cause Judge Clemon's recusal. I can tell you with confidence that neither Terry Price nor our firm have been a participant in any such attempt to cause an "offensive" recusal of Chief Judge Clemon. Nor to my knowledge has there ever been any such assertion or finding made by anyone. For example, Plaintiff's counsel in that case, Byron Perkins, who practices here in Birmingham, has told me he does not believe that I have been involved in any way in attempts to cause Judge Clemon's recusal. In addition, Chief Judge Clemon has written a letter to Senator

Sessions' staff expressing his support me and indicating that he does not believe I have been involved in any of this type of conduct. He had also stated in a July 25, 2003 Birmingham Post Herald article that he has "the highest regard for [my] legal ability and personal ethics."

Although Terry Price has been practicing for almost twenty-five years (and more than seven years at our firm), the BellSouth case is the first time he or Lehr Middlebrooks has ever been disqualified in any litigation. The majority opinion of the Eleventh Circuit panel let stand the district court order disqualifying Mr. Price and our firm based upon its conclusion that the very high standard required for a mandamus petition to be granted had not been met. Even so, each member of the panel criticized the district court's rationale and even the majority opinion invited, but did not require, the district court to revisit its unclear findings. The panel's ruling is currently the subject of a motion for rehearing en banc. With all respect, the BellSouth case is the only judicial finding that has ever led to either Terry Price's or our firm's disqualification and even that order is not final. Accordingly, I do not believe it is fair to say that there is a public perception that the general reputation of this firm and its partners includes the retention of the firm for the purpose of causing Judge Clemon's recusal. Byron Perkins (the African-American plaintiff's attorney who represented the BellSouth Plaintiffs), Chief Judge Clemon, and the ABA have all examined this issue and concluded that I have conducted myself in a fair and ethical manner.

My firm and I have also taken good faith steps to deal with this issue since Mr. Price joined the firm in 1996. Our firm has maintained and utilized a screening procedure that our firm applies whenever a prospective client seeks representation in a case involving Judge Clemon. In utilizing the screening procedure, we attempt to ensure that we are not being hired for the purpose of causing Judge Clemon's recusal. Any partner who is approached by such a client is authorized to reject such representation if he or she believes that our firm is being hired for that purpose.

I know this screening procedure has worked well in the past. I have utilized it. Although I cannot reveal any confidences or privileged communications, I can represent to you that I have declined representation of potential clients on several occasions. This has occurred not only when prospective clients have called me directly to attempt to hire me, but also when lawyers outside our firm have attempted to refer matters to me.

Similarly, I have also, on behalf of my firm, offered to Chief Judge Clemon and the other judges in the Northern District a proposal which would eliminate any opportunity for a defendant to hire our firm (or any other firm) in order to cause disqualification of a judge. In a January 2003, letter to Chief Judge Clemon and all the other judges in the Northern District, I proposed an administrative solution to this problem involving the court adopting either a blind assignment or no initial assignment procedure. See Attachment 1. The proposal was well received by Chief Judge Clemon and, although it has not yet met with success (see Attachment 2), it is my hope that, ultimately, such a procedure will be adopted.

I would also add that Terry Price is one of the premier labor and employment lawyers in the State of Alabama, who has earned a reputation as a terrific litigator. Mr. Price has practiced labor and employment law for over twenty-three years and has represented employers in employment discrimination matters for over seventeen years. There certainly is no perception in

Alabama that a client would hire him because of his familial relationship and not his skill as a lawyer. For any article to suggest such a thing is both inaccurate and offensive to a highly talented African-American attorney.

2. What role did you play recruiting Mr. Price? What role did the wide-spread view that Mr. Price was being used as a poison pill for corporate clients have in your decision to recruit to Mr. Price in 1996 to join the firm?

I interviewed Mr. Price at our office on one occasion, and believe I attended dinner with he and his wife that night. I also spoke with Judge Clemon about his (Judge Clemon's) desire that Mr. Price return to Birmingham and work with our firm if he did so. Most likely, I also spoke with Mr. Price by phone on occasion to answer questions he may have had. Another of my partners took the lead in discussions with Mr. Price about his joining our law firm.

In my response to question number 1, I believe I addressed why it is unfair to label Mr. Price a "poison pill." Contrary to any assertion that Mr. Price was hired so that our firm's clients could cause Judge Clemon's recusal, Mr. Price and the firm agreed at the outset that we would be vigilant of any attempts by prospective clients to do so. Therefore, from the beginning, our firm adopted a screening policy. If any partner suspects that a prospective client is attempting to hire him or her in order to cause Judge Clemon's recusal, that lawyer will decline the representation. As I indicated in response to question number 1, I have utilized that procedure before on several occasions.

3. Once you recruited Mr. Price, how did the firm decide whether to take on clients whose cases had been assigned to Judge Clemon, given that you knew that Judge Clemon would have to recuse himself?

From the outset of Mr. Price joining our firm, we developed a screening procedure to assist us in identifying instances where a prospective client might attempt to hire us to cause Judge Clemon's recusal. We review all the circumstances of the prospective retention, including but not limited to, our initial interview of the client, previous representation by our firm, previous representation by other firms, and our firm's prior relationship with referral sources. As stated above, if any partner suspects that our prospective retention was motivated by an attempt to cause recusal, we decline the representation.

4. Do you agree with the purpose of the existing standing order in the Northern District that was entered in 1996 to govern the consideration of motions to add or substitute counsel where such appearance would raise a conflict with the assigned judge? Do you agree that this standing order was issued in direct response to use of Mr. Price as a poison pill to force Judge Clemon to recuse himself?

I understand that the purpose of the Standing Order is to avoid the disruption caused by the appearance of lawyers whose clients seek to disqualify a judge in an ongoing case. I also note that the Standing Order on its face - and according to the Eleventh Circuit panel that reviewed the BellSouth case - only applies to cases in which there is an appearance of additional or substitute counsel after the case has been filed and original counsel for a party has appeared. I fully agree with the purpose of the Standing Order. Further, as described in more detail in

response to your question number 5 below, I have recommended that the Northern District go beyond the Standing Order and adopt a rule that would prevent all parties from "judge shopping," even at the beginning of a case.

After the entry of the Standing Order in 1996, our firm was specifically told by then Chief Judge Sam Pointer that its adoption was not related to Terry Price joining our law firm. Judge Pointer, who signed the Standing Order, is widely respected and I take him at his word. It is important to note that ours is not the only firm in Birmingham to employ a close relative of a United States District Judge in the Northern District. For example, Chief Judge Clemon has a daughter who practices at the Birmingham firm of Maynard Cooper & Gayle, P.C. (In fact, I am aware that, in the recent past, companies that have retained Michelle Clemon and/or Maynard, Cooper to defend employment discrimination cases have also been accused of seeking to cause Judge Clemon's recusal in doing so. I do not believe that either Michelle Clemon or the lawyers at Maynard, Cooper, for whom I have great respect, would permit that to occur.)

In addition, several other judges in the Northern District have relatives who practice law there. For example, Judge Sharon Lovelace Blackburn was married to Joe Blackburn, who practiced with Sirote & Permut of Birmingham. Judge Inge Johnson's husband practices in the Northern District. The same is true of Judge Foy Guin's son. Judge William Acker has a son and a daughter-in-law who practice in the Northern District and with whom our firm has litigated. Judge James Hancock has two sons who are attorneys in Birmingham. Almost all of these judges were on the bench in 1996 when the Standing Order was entered and it has been our understanding over the years that the order was adopted due to the large number of judges' relatives practicing in the Northern District. Accordingly, for these reasons, I do not think one could say that the Standing Order was issued in "direct response" to Terry Price joining our firm.

5. What is your view of the appearance of impropriety that occurs when corporations are able to eliminate the only African-American judge in a district by simply retaining a particular law firm?

I have taken affirmative steps seeking to avoid not only the appearance of impropriety but also the waste of judicial and other resources unrelated to the merits of a case that occur when a motion to disqualify is filed. As I mentioned in response to question number 1, I wrote to Chief Judge Clemon and all the other judges in the Northern District to propose an administrative solution to this issue. I respectfully suggested that the Court adopt a case assignment procedure that either involved a "blind assignment" or no initial assignment until counsel for all parties had appeared. See Attachment 2. I also spoke with Chief Judge Clemon about my proposal. We agreed that motion practice related to recusal and disqualification of judges (and attorneys) was not only distasteful and wasteful, but diminished professionalism within the Bar and was of no help to the Court. It was my hope that a rule or order could be adopted that would prevent everyone from knowing which judge was assigned to a case when both plaintiffs and defendants were selecting counsel. This, in turn, would negate any argument or assertion of judge shopping. The proposal was well received by Chief Judge Clemon but, despite his support, it has not yet met with success. See Attachment 3. It is my hope that, ultimately, a procedure such as it will be adopted and resolve these issues.

89626

07/30/03 08:04 FAX 205 328 3194

LEHR, MIDDLEBROOKS, PRICE.

015

ATTACHMENT 1**LEHR MIDDLEBROOKS
PRICE & PROCTOR**A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS8021 THIRD AVENUE NORTH
IRVING TO: P.O. Box 870463
BIRMINGHAM, ALABAMA 35287
205 328-3007
FACSIMILE: 205 328-3008DAVID PROCTOR
IRECT DIAL: 205 223-9264DECATUR OFFICE:
256 308-2767

January 24, 2003

VIA HAND-DELIVERY

The Honorable U. W. Clemon, Chief Judge
 The Honorable William M. Acker, Jr.
 The Honorable Sharon Lovelace Blackburn
 The Honorable Karon O. Bowdre
 The Honorable James H. Hancock
 The Honorable Inge P. Johnson
 The Honorable J. Foy Guin, Jr.
 The Honorable Edwin L. Nelson
 United States District Court, Northern District of Alabama
 Hugo Black United States Courthouse
 1729 North 5th Avenue
 Birmingham, AL 35203

VIA FACSIMILE TRANSMISSION

The Honorable Robert B. Propst
 United States District Court, Northern District of Alabama
 P.O. Box 820
 Anniston, AL 36202

The Honorable C. Lynwood Smith
 United States District Court, Northern District of Alabama
 101 Holmes Avenue, N.E.
 Huntsville, AL 35801

Dear Judges:

In the last few months, our firm has been the target of accusations that we have been retained by clients to avoid certain judges rather than because of our legal ability. In addition to being personally offensive, these assertions have caused parties, lawyers, and this Court to be involved in substantial motion and hearing practice, and appeals. This sort of collateral litigation drains the judiciary's resources, causes lawyers to devote time and attention to issues that are not related to the merits of any case, and causes parties to endure great delay and expense.

07/30/03 08:05 FAX 205 326 3194

LEHR, MIDDLEBROOKS, PRICE,

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**LEHR MIDDLEBROOKS
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January 24, 2003

Page 2

Our firm offers a solution to these problems, at least as related to cases in which counsel initially appear on behalf of a plaintiff or defendant. These cases are outside the plain language of this Court's Standing Order dated July 12, 1996. Our proposal would, in most cases, foreclose any suggestion of impropriety in selecting counsel and avoid the delay and expense involved in litigating choice of counsel.

Here is our proposal: We recommend that there either be no assignment or a blind assignment (i.e., no notice to the public or the parties of an assignment) of a judge to a case until counsel for the defendant(s) have appeared or a motion requiring the Court's immediate attention (e.g., a motion for a temporary restraining order) has been filed. This procedure should moot most questions about why clients have hired any firm for a particular case and would avoid accusations (which we maintain are baseless) that our firm has been hired for an improper purpose.

We stand ready and willing to discuss this matter with any of you and to cooperate with you in addressing these issues. We hope that you will give serious consideration to our proposal and that it will be a constructive part of any dialogue seeking a solution to the issues addressed confronting the Court.

Sincerely,



R. David Proctor
FOR THE FIRM

cc: Albert L. Vreeland, II, Esq.,
Managing Shareholder, Lehr Middlebrooks Price & Proctor, P.C.
Byron R. Perkins, Esq.

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ATTACHMENT 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
519 HUGO L. BLACK UNITED STATES COURTHOUSE
BIRMINGHAM, ALABAMA 35203
(205) 278-1850



CHAMBERS OF
U. W. CLEMON
CHIEF JUDGE

March 6, 2003

R. David Proctor, Esq.
Lehr, Middlebrooks, Price & Proctor
P. O. Box 370463
Birmingham, Alabama 35237

Byron R. Perkins, Esq.
Gordon, Silberman, Wiggins & Childs
2017 - 5th Avenue, North
Birmingham, Alabama 35203

Dear Messrs. Proctor and Perkins:

Thank you for your letters concerning the Court's case assignment procedures.

The Court has carefully considered the suggestion of Mr. Proctor. After such consideration, and consultation with the Administrative Office of the United States Courts, the Court has decided not to implement the suggestion.

We are grateful for your efforts to assist us.

Very truly yours,

U. W. Clemon

**Responses of R. David Proctor, Nominee to The Northern District of Alabama,
to Written Questions From Senator Patrick Leahy**

1. According to your law firm's website, you have been "appointed a Deputy Attorney General by the Alabama Attorney General to represent the State of Alabama in civil rights matters." However, there is no indication of such "appointment" in your Senate questionnaire on which you were asked to list all employment, public service and significant legal activities. In a footnote to a list of cases that were not certified as a class action and therefore not extensively litigated, you note a case (Hackworth v. Dept of Public Safety) where then-Attorney General Siegelman retained your firm to defend the state's drug testing program for highway patrol officers. Please explain to the Committee why you did not list this appointment as Deputy Assistant Attorney General for the State of Alabama in the employment or public service section? Do you not consider being appointed Deputy Attorney General of the State of Alabama to be a significant legal activity? Have there been any other instances in which you represented the State in other cases or have been appointed by any other Attorneys General to represent the State of Alabama? If so, please describe them.

I did not list an appointment as Deputy Attorney General for the State of Alabama in the employment or public service section related to Hackworth v. Dept. of Public Safety matter because I was never so appointed. Rather, one of the partners at my former law firm received the appointment. He was not a litigator but, pursuant to the appointment, had the authority to delegate work on the case to others within our firm. With the client's knowledge, he asked David Middlebrooks and me to defend the case. As noted in my Senate questionnaire responses, early in the case, I was assigned the task of arguing against class certification and did so successfully.

In other matters I have handled for the State of Alabama and its instrumentalities, I did not consider myself to be an employee of the State or a public official because all fees for such representation were paid to my law firm, not to me directly. Accordingly, it did not occur to me to list such appointments in those sections of the questionnaire.

In assessing whether a matter would qualify as one of the most significant legal matters I have ever litigated, I would examine the type of case that I was appointed to handle, not the mere fact that I received an appointment from an Attorney General. Further, in my view, the provision of such an appointment does not itself make the work for which a lawyer is appointed more significant than other work he or she performs for the State, or other clients.

I consider each and every matter that I am retained to handle for any client to be significant and important, for undoubtedly it is significant and important to that client. However, I believe the question to which you are referring asked me to "[d]escribe the most significant legal activities [I] have pursued. ..." (Emphasis added). I respectfully submit I have done that and that my answer included very significant work I performed for the State of Alabama. In particular, you will note that in response to questions 18 and 19 in the Senate questionnaire, I listed a number of cases in which I represented the State or one of its instrumentalities. See e.g.

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subparts (2), (4), (5), and (10) of my response to question 18 & subparts (1) and (4) of my responses to question 19.

Finally, listed below are the lawsuits (that I have been able to recall or discern from my records in the time since I received your questions) in which I represented the State of Alabama or received an appointment to do so.¹ Again, I have already listed some of these cases in my Senate questionnaire because I believed them to be among most significant that I have handled. For your convenience, I have listed them again. In all events, I certainly believe that this list is representative of the cases I have handled for the State and its instrumentalities over the years.

Scott v. Bessemer State Technical College, CV-89-0605. I represented the college (and I believe some of its employees) in this case in which the Plaintiff alleged discrimination. My recollection is that the case was either dismissed based upon our client's demand or a motion for summary judgment.

Allen v. Bessemer State Technical College, CV-90-0222. I represented the college (and I believe some of its employees) in this case in which the Plaintiff alleged discrimination. My recollection is that the case was either dismissed based upon our client's demand or a motion for summary judgment.

Jackson v. Bessemer State Technical College, CV-90-0223. I represented the college (and I believe some of its employees) in this case in which the Plaintiff alleged discrimination. My recollection is that the case was either dismissed based upon our client's demand or a motion for summary judgment.

Holderfield v. Bessemer State Technical College, CV-90-0224. I represented the College (and I believe some of its employees) in this case in which the Plaintiff alleged discrimination. My recollection is that the case was either dismissed based upon our client's demand or a motion for summary judgment.

Davis v. Bessemer State Technical College, CV-91-1152. I represented the college (and I believe some of its employees) in this case in which the Plaintiff alleged discrimination. My recollection is that the case was either dismissed based upon our client's demand or a motion for summary judgment.

Cunningham v. Bessemer State Technical College, CV-91-1240 (N.D. Ala.). I represented the college and four of its employees in this case in which the Plaintiff alleged discrimination. A defendants' verdict was returned on Plaintiff's allegations of race discrimination and retaliation. I have discussed this case in more detail in my Senate questionnaire responses.

¹ Our firm's database containing my time records and information about our cases was changed in September 1997. As evidenced below, I am able to recall some of the cases I handled before that date and since, but I may not have remembered all of them. Please note also that our firm's computer system does provide information about whether I received an appointment. Accordingly, I have listed the cases that I was able to recall or identify and that fall into either or both categories about which you have inquired.

31/03 01:00 FAX 200 222 2222

Antonio v. Bessemer State Technical College, CV-92-1668. I represented the college in this case in which the Plaintiff alleged discrimination. The case was settled after its filing.²

Estelle Willingham v. Bessemer State Technical College. I represented the college in this matter which involved one of the college's faculty members who, unbeknownst to my client, was submitting fraudulent reports regarding the number of students who attended her off-campus classes. I was the lead counsel for the college in cooperating with an FBI investigation, conducting a separate investigation for the college, and successfully defending the teacher's Fair Dismissal Act claim. I have discussed this case in more detail in my Senate questionnaire responses.

Goffer v. Marbury, 956 F.2d 1046 (11th Cir. 1992). I represented Alabama A&M University, its Board Members, and other University officials. We were retained to handle an appeal from, and were successful in obtaining a reversal of, a verdict in Plaintiff's favor. We also represented the Defendants in the district court after remand. The case was settled. I have discussed this case in more detail in my Senate questionnaire responses.

Saville vs. Southeast Alabama Medical Center, 852 F.Supp 1512 (M.D. Ala. 1994). I represented the Houston County Healthcare Authority, Southeast Alabama Medical Center, and Virginia Gale Holiday. Plaintiff made a variety of claims based on a number of legal theories. Holiday was dismissed from the case. The trial court also granted in part the remaining defendants' motion for summary judgment and the case went to trial on Plaintiff's claims of sexual harassment, retaliation, assault and battery, and breach of contract. Plaintiff prevailed only on one count: the harassment claim. I have discussed this case in more detail in my Senate questionnaire responses.

USX v. Tisco, CV-95-C-3237. I represented the Attorney General, his office, and an employee of the office when the Defendants asserted third-party claims against them arising out of that office's investigation and prosecution of the Defendants. Before our clients were even required to answer, a status conference was held by the Court. The claims lacked any merit and within days after the preliminary status conference, the Defendants voluntarily dismissed our clients from the case. One of my partners and I thereafter represented several current and former employees of the Attorney General's office in related matters, including their non-party depositions which were taken both in this case and collateral litigation.

Ross v. State of Alabama Board of Pardons and Paroles, CV-01-HGD-2538-S. I represented Bertha Maxwell, an individual defendant. Ms. Maxwell, an African-American supervisor in the Birmingham office of the Alabama Board of Pardons and Paroles, was wrongly accused of discrimination by one of her Caucasian subordinates. Based upon our demand that they do so, Plaintiff and Plaintiff's counsel dismissed Ms. Maxwell from the case.

Henson v. Eubanks, CV-99-401 (Circuit Court of Colbert County, Alabama). I represented the Colbert County-Northwest Alabama Healthcare Authority d/b/a Helen Keller Hospital. Plaintiff filed suit after she was injured by Dr. Eubanks' scalpel in the operating room.

² In this same time frame, I may have represented Bessemer State Technical College in other cases. I believe I represented another local college, Jefferson State Community College, in litigation, also. However, any such litigation occurred over ten years ago and I no longer have any information about any such cases.

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The circuit court granted our client's summary judgment motion because Ms. Henson, as an employee, could only file her claim under the Worker's Compensation Act.

Burleson v. Colbert County-Northwest Alabama Healthcare Authority, 221 F.Supp.2d 1265 (N.D. Ala. 2002). I represented the Colbert County-Northwest Alabama Healthcare Authority, d/b/a Helen Keller Hospital and Mr. William H. Anderson. Plaintiff claimed that his termination, which was part of a reduction in force, was motivated by his candidacy for a seat on the Colbert County Commission. The court granted summary judgment for the Defendants. I have discussed this case in more detail in my Senate questionnaire responses.

Jackson v. Helen Keller Hospital Foundation, Inc., CV-01-286 (Circuit Court of Colbert County, Alabama). I represent Helen Keller Hospital Foundation, Inc. in this matter. Plaintiff has asserted that her termination was due to age discrimination and in breach of a contract. We have filed a motion for summary judgment in this case and it is currently pending before the Court.

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 256 308-2767

July 31, 2003

Via Telefax

The Honorable Orrin G. Hatch
 Senate Judiciary Committee
 104 Hart Office Building
 Washington, DC 20510

RE: R. David Proctor, Nominee to the Northern District of Alabama

Dear Senator Hatch:

After being provided with questions from Senator Leahy, I contacted the Alabama Attorney General's office and asked that they provide me with a list of those cases in which I previously have been appointed as a Deputy Attorney General by any Alabama Attorney General.

Please note that the following appointments, made by Attorney Generals Jimmy Evans and Bill Pryor, are in addition to those provided in my previous responses:

Watkins v. Bessemer State Technical College, CV-91-2773. I represented the College in this case in which Plaintiff alleged discrimination. The case was settled.

Berry v. Alabama Forestry Commission. I represented the Forestry Commission in this case which involved employment claims asserted by the Plaintiff. I am unable to recall the details of the case.

Fletcher Yielding v. State of Alabama, (Circuit Court of Montgomery, Alabama). This is a lawsuit that was threatened by Yielding, the owner of Tieco, Inc., but never filed. It was collateral to the USX v. Tieco case, in that it asserted parallel claims that were never prosecuted.

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~~07/31/03~~ 08:11 FAX 205 328 3184

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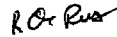
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**LEHR MIDDLEBROOKS
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The Honorable Orrin G. Hatch
July 31, 2003
Page 2

Thank you for the opportunity to supplement my initial response.

Sincerely,



R. David Proctor

cc: The Honorable Patrick Leahy

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**Responses of R. David Proctor, Nominee to the Northern District of Alabama,
to Written Questions from Senator Jeff Sessions**

1. There have been some allegations that your firm hired Terry Price, the nephew of Judge U.W. Clemon, for the sole purpose of requiring the recusal of Judge Clemon. I do not believe there is any merit to those allegations. It is my understanding that Judge Clemon encouraged Mr. Price to interview with your firm and then encouraged him to join your firm over a number of other firms. Is that correct?

Your understanding is correct in both respects. An August 7, 2002 Wall Street Journal article referenced in other questions I have received accurately relates that Mr. Price has often sought Chief Judge Clemon's advice, particularly regarding educational and career choices. In fact, Mr. Price relayed to me that he consulted with Judge Clemon before opting to begin a career as an employment defense lawyer. Judge Clemon was a highly esteemed civil rights lawyer before taking the bench. Mr. Price was concerned that Judge Clemon may disapprove of his decision to represent management. Judge Clemon quickly dismissed that worry, telling Mr. Price that he had fought the good fight so that he (Mr. Price) would have the opportunity to make such a career choice. Mr. Price has told me that he again consulted with Judge Clemon before joining our firm. He also has stated that Judge Clemon was extremely supportive of him doing so.

In 1996, while Mr. Price was contemplating moving back to Birmingham and considering which firm to join, Judge Clemon played a significant role in Mr. Price's decision to return home and to become my partner. I know this because Judge Clemon and I discussed his desire that Mr. Price return to Birmingham. He also indicated to me that he believed Mr. Price and our firm would be a good fit and hoped he would accept an offer from us. Mr. Price later confirmed to me that Judge Clemon's advice played a major part in his decision.

2. It is my understanding that these allegations arise primarily from litigation with BellSouth and that Mr. Price, an outstanding attorney in his own right, was already representing BellSouth when he joined the firm. Please highlight the qualifications of Mr. Price and what the firm considered in finally hiring him.

Mr. Price is an exceptional African-American employment lawyer who has earned a reputation as a terrific litigator. In fact, this week Mr. Price has been in Montgomery trying a race discrimination case before Judge Myron Thompson of the Middle District of Alabama. Those who have litigated with Mr. Price, as well as those who know him, will testify to his keen intellect, methodical approach to litigation, and integrity.

Mr. Price was born in Fairfield, Alabama. He received his undergraduate degree from Columbia College of Columbia University in New York, where he was a member of the Dean's List. He graduated law school from the University of California at Davis, where he was a member of both the Law Review and the Honors Moot Court Team, and clerked for a California state court judge. He is admitted to practice in Alabama, California, the District of Columbia, and Georgia; all federal courts in Alabama and Georgia; the Eleventh Circuit Court of Appeals; and the Supreme Court of the United States. Additionally, Mr. Price is admitted to practice before the Fifth and Sixth Circuits, the Northern District of California, and the Eastern District of

Wisconsin. On a pro hac basis, he has litigated cases throughout the country in federal and state courts in New York, North Carolina, Texas, Tennessee, Mississippi, Ohio, Kentucky, Missouri, and Florida.

For the first six years of his practice, he was a trial attorney for the Office of the Solicitor of the United States Department of Labor. There he represented the federal government in investigations and litigation involving equal employment opportunity and affirmative action, employee benefits, minimum wage, overtime, child labor, government contract labor standards, occupational safety and health, mine safety and health, black lung disability, fraud in employment and training programs, whistle blower protections, migrant and seasonal farm workers, the regulation of labor unions, and veterans' reemployment rights. He litigated in Alabama, Florida, and Mississippi.

Since leaving the Department of Labor in 1984, Mr. Price has devoted his practice to representing local, regional and national employers in individual and class action civil rights, employment and labor cases, and in the development and day-to-day management of EEO, employee benefits, safety and health, and management training programs. Since entering private practice in 1984, Mr. Price has continuously provided counsel regarding, and defended matters arising under, various local, state, and federal laws, including, but not limited to, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 1981, 1983, and 1985, fraud, conversion, breach of confidentiality, assault, battery, defamation, invasion of privacy, the due process clause, intentional infliction of emotional distress, the Fair Labor Standards Act, the Occupational Safety and Health Act, the Age Discrimination in Employment Act, as well as the Employee Retirement Income Security Act. Mr. Price is a lawyer's lawyer.

Before joining us in April 1996, Mr. Price was a partner in the law firm of Constangy, Brooks & Smith in its Atlanta, Georgia office. Since becoming my partner, he has been my colleague and friend. I have learned a great deal from him, about life and the law.

Mr. Price has practiced labor and employment law for over twenty-three years and has represented employers in employment discrimination matters for over seventeen years. Moreover, Mr. Price has successfully defended five employment class action complaints filed since April 1996 and has experience defending cases brought by Gordon, Silberman, Wiggins & Childs, one of the law firms representing the plaintiffs in the BellSouth case.

You are also correct in your understanding of Mr. Price's representation of BellSouth. In the mid-1990s, Mr. Price began representing BellSouth in employment litigation matters. While working at Constangy, Brooks, Mr. Price represented BellSouth in a putative class action involving claims of sex and age discrimination filed against the company. Carroll, et al. v. BellSouth Telecommunications, Inc., et al. After leaving Constangy, Brooks, and upon joining Lehr Middlebrooks, Mr. Price continued to represent BellSouth in the Carroll case and other employment discrimination matters. With Mr. Price's excellent representation, BellSouth defeated plaintiffs' motion for class certification in the Carroll case. Also, based upon his ongoing work for the Company, our firm and he listed BellSouth as a representative client in our Marundale-Hubbell listing in the first publication of that book after he joined us, years before the current BellSouth case was even filed.

Mr. Price, an experienced employment lawyer, with a special focus on class actions alleging discrimination, has been retained by BellSouth on numerous prior occasions. In fact, at the time the BellSouth case was filed, Mr. Price was actively representing BellSouth in seven different EEOC charges involving claims of race discrimination, including one filed by a member of one of the putative classes in that case. In all, Mr. Price has worked with BellSouth in over twenty separate billing matters since joining Lehr, Middlebrooks.

3. As I understand it, Judge Clemon does not believe you were involved in any judge shopping and at one point you proposed a solution to any recusal problems in matters involving Mr. Price. I also received a letter from Judge Clemon in which he stated the following:

"I have known David Proctor for several years. He is an excellent lawyer; and I have great personal and professional respect for him. I have no knowledge or reason to believe that he was involved in any of the efforts to cause my disqualification in the cases involving BellSouth."

Please describe your relationship with Judge Clemon and the solution you proposed.

Before Mr. Price joined our firm in 1996, I had the opportunity to try one employment case before Judge Clemon. The case was a bench trial. Judge Clemon entered judgment in favor of my client. Since that time, we have presented continuing legal education programs together and I believe that we have shared a friendship, particularly in the time frame since Mr. Price joined our firm.

Chief Judge Clemon is among those who have encouraged me to express my interest in a federal judgeship. Both before and since my nomination, Judge Clemon has been supportive of me. I was pleased that in a July 25, 2003, Birmingham Post-Herald news story concerning my Judiciary Committee hearing, Chief Judge Clemon stated "I have the highest regard for his legal ability and his personal ethics," and stated his view that I have "the capacity to listen." See Attachment 1. I am honored by his statements.

You are correct that I proposed a solution that would eliminate any opportunity for a party to hire a lawyer to disqualify a judge and therefore avoid expensive collateral litigation related to any such assertion. In January 2003, I wrote to Chief Judge Clemon and all the other Judges in the Northern District. My letter respectfully asked the court to consider adopting either a blind assignment or no initial assignment procedure. See Attachment 2. The proposal was well received by Chief Judge Clemon and, although it has not yet met with success (see Attachment 3), it is my hope that, ultimately, a procedure such as it will be adopted.

4. In addition to the letter from Judge Clemon, I received a letter from Byron Perkins, a top civil rights attorney in Alabama, who practices at one of the most reputable plaintiff's firms, Gordon, Silberman, Wiggins & Childs. Mr. Perkins said of your nomination:

"I have known David Proctor personally for more than twelve years, and during those twelve years we have litigated cases

against each other and I believe him to be a fair and honest attorney. I consider David to be highly qualified for the position of a District Court Judge. My understanding is that there is concern that David's firm has used the relationship of his partner Terry Price to cause the recusal of Judge U.W. Clemon, Terry's uncle. I have no knowledge or facts which would lead me to believe that David has personally participated in this kind of conduct."

Please explain your relationship with Mr. Perkins and explain to the Committee whether there is any truth to the allegations that Mr. Price was hired for the sole purpose of having Judge Clemon recused.

Byron Perkins is one of the Plaintiff's attorneys in the BellSouth case. I first met him in 1991. In December 1991, Mr. Perkins and I were on opposite sides of a case that was tried before Judge Sam Pointer. We have continued our friendship to this day.

I can also tell you with confidence that there is no truth to the allegations you have referenced in your question. Terry Price was hired by our firm because he is a high quality and able attorney. Mr. Price, who is originally from the Birmingham area, had discussions over ten years ago with one of my partners about the prospect of practicing at our former firm. When our new firm developed a need for a senior litigation partner in 1996, my partner contacted Terry Price. Far from being hired to cause Judge Clemon's recusal in certain cases, Mr. Price was hired because of his abilities, and with the full support of Judge Clemon, who was himself instrumental in "recruiting" Mr. Price back to Birmingham. Mr. Price has told me that Judge Clemon also recommended to him that our firm was the place he should practice. My partners and I are extremely thankful that Mr. Price followed his uncle's advice.

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ATTACHMENT 1

POST-HERALD
METRO-STATE

Friday, July 25, 2003

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Metro editor:
John Staed
325-2342 or
jstaed@postherald.com

Lawyer closer to bench

By JOSH KELLEY

BIRMINGHAM POST-HERALD

WASHINGTON — After testifying before the Senate Judiciary Committee on Tuesday, Birmingham attorney R. David Proctor appears destined for the federal bench. Colleagues said he deserves the job.

"I have the highest regard for his legal ability and his personal ethics," said U.W. Clemon, chief judge of the Birmingham-based U.S. District Court of Northern Alabama, to which Proctor has been nominated.

Clemon said Proctor "has the capacity to listen," a sentiment echoed by attorney Richard Lehr, Proctor's friend of 15 years and partner in their law firm that handles labor and employment law



Proctor

cases. "He is a real strong listener who approaches issues and matters with an open mind," Lehr said.

Proctor, 42, has quickly ascended the legal ranks in his still young but successful law career, culminating in his nomination by President Bush to the federal bench.

Lehr said Proctor's experience after law school as a clerk under Judge H. Emory Widener, who sits on the 4th Circuit Court of Appeals, "planted the seed" for Proctor's success. Widener remembered Proctor as a hard-working apprentice with a "willingness to take on anything."

Widener said he was impressed by Proctor's discipline to make good grades in college while also playing championship-level football at Carson-Newman College in Jefferson City, Tenn., where Proctor earned his undergraduate degree in 1981.

He later graduated with honors from the University of Tennessee School of Law in 1986.

Widener, who said he still talks to Proctor occasionally, said he stressed to his young protégé the importance of restraint by federal courts when Proctor clerked under him.

Please turn to PROCTOR, page B2

B2 Birmingham Post-Herald, Friday, July 25, 2003

Proctor

From page B1

During his testimony before the judiciary committee, Proctor described how Widener established his understanding of the federal court's role. Proctor said his mentor instilled in him a respect for the rule of law.

"We should decide cases and controversies using the Constitution and not by legislating," he said in response to a question about his view of the law from Sen. Jeff Sessions, R-Mobile, who sits on the committee.

Sessions warned of the difficulties that Proctor and the five other nominees at the hearing would face as federal judges.

"There are a lot of pressures and a lot of intensity and a lot of deadlines that have to be met," Sessions said. "Frequently there are cases that require weekends and nights. The backlog is there. Clients have large amounts of money at stake. It's certainly not an easy job."

Clemson agreed that the job is challenging.

"Our workload in the Northern District is particularly busy," he said.

After hearing Sessions' laundry list detailing the woes in the life of a federal judge, Proctor said he would face the challenge with the same approach to his career he's always taken.

"I plan to bring the diligence and

work ethic I've demonstrated as a lawyer," Proctor said.

Lehr said Proctor, while in private practice, has taken on a heavy load that he manages efficiently.

"He can handle a tremendous amount of work," Lehr said.

The father of three children, Proctor married his wife, Teresa, while still in law school. Lehr, who originally hired Proctor at a previous law firm before the two joined with two other lawyers to form a new firm, said Proctor is not all about work.

When he has spare time, Proctor spends it with friends and family, Lehr said. He's also a youth Sunday school teacher and active deacon at Blitarwood Presbyterian Church and has coached little league baseball, football and basketball.

After musing over the loss of his partner to the federal bench, Lehr said, "It's an honor for our firm, but, yeah, we're going to miss him."

07/30/03 08:03 FAX 205 328 3184

LEHR, MIDDLEBROOKS, PRICE.

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ATTACHMENT 2**LEHR MIDDLEBROOKS
PRICE & PROCTOR**A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS2051 THIRD AVENUE NORTH
SUITE 201 P.O. BOX 370463
BIRMINGHAM, ALABAMA 35207
205 328-3000
FACSIMILE 205 328-3008E. DAVID PROCTOR
DIGEST DATA 205 323-9264DECATUR OFFICE:
256 300-2707

January 24, 2003

VIA HAND-DELIVERY

The Honorable U. W. Clemon, Chief Judge
 The Honorable William M. Acker, Jr.
 The Honorable Sharon Lovelace Blackburn
 The Honorable Karon O. Bowdre
 The Honorable James H. Hancock
 The Honorable Inge P. Johnson
 The Honorable J. Foy Guin, Jr.
 The Honorable Edwin L. Nelson
 United States District Court, Northern District of Alabama
 Hugo Black United States Courthouse
 1729 North 5th Avenue
 Birmingham, AL 35203

VIA FACSIMILE TRANSMISSION

The Honorable Robert B. Propst
 United States District Court, Northern District of Alabama
 P.O. Box 820
 Anniston, AL 36202

The Honorable C. Lynwood Smith
 United States District Court, Northern District of Alabama
 101 Holmes Avenue, N.E.
 Huntsville, AL 35801

Dear Judges:

In the last few months, our firm has been the target of accusations that we have been retained by clients to avoid certain judges rather than because of our legal ability. In addition to being personally offensive, these assertions have caused parties, lawyers, and this Court to be involved in substantial motion and hearing practice, and appeals. This sort of collateral litigation drains the judiciary's resources, causes lawyers to devote time and attention to issues that are not related to the merits of any case, and causes parties to endure great delay and expense.

**LEHR MIDDLEBROOKS
PRICE & PROCTOR**
A PROFESSIONAL CORPORATION

January 24, 2003
Page 2

Our firm offers a solution to these problems, at least as related to cases in which counsel initially appear on behalf of a plaintiff or defendant. These cases are outside the plain language of this Court's Standing Order dated July 12, 1996. Our proposal would, in most cases, foreclose any suggestion of impropriety in selecting counsel and avoid the delay and expense involved in litigating choice of counsel.

Here is our proposal: We recommend that there either be no assignment or a blind assignment (i.e., no notice to the public or the parties of an assignment) of a judge to a case until counsel for the defendant(s) have appeared or a motion requiring the Court's immediate attention (e.g., a motion for a temporary restraining order) has been filed. This procedure should moot most questions about why clients have hired any firm for a particular case and would avoid accusations (which we maintain are baseless) that our firm has been hired for an improper purpose.

We stand ready and willing to discuss this matter with any of you and to cooperate with you in addressing these issues. We hope that you will give serious consideration to our proposal and that it will be a constructive part of any dialogue seeking a solution to the issues addressed confronting the Court.

Sincerely,



R. David Proctor
FOR THE FIRM

cc: Albert L. Vreeland, II, Esq.,
Managing Shareholder, Lehr Middlebrooks Price & Proctor, P.C.
Byron R. Perkins, Esq.

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ATTACHMENT 3

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
519 HUGO L. BLACK UNITED STATES COURTHOUSE
BIRMINGHAM, ALABAMA 35203
(205) 278-1850**



**CHAMBERS OF
U. W. CLEMON
CHIEF JUDGE**

March 6, 2003

R. David Proctor, Esq.
Lehr, Middlebrooks, Price & Proctor
P. O. Box 370463
Birmingham, Alabama 35237

Byron R. Perkins, Esq.
Gordon, Silberman, Wiggins & Childs
2017 - 5th Avenue, North
Birmingham, Alabama 35203

Dear Messrs. Proctor and Perkins:

Thank you for your letters concerning the Court's case assignment procedures.

The Court has carefully considered the suggestion of Mr. Proctor. After such consideration, and consultation with the Administrative Office of the United States Courts, the Court has decided not to implement the suggestion.

We are grateful for your efforts to assist us.

Very truly yours,


U. W. Clemon

SUBMISSIONS FOR THE RECORD



July 22, 2003

News Release
JUDICIARY COMMITTEE

United States Senate • Senator Orrin Hatch, Chairman

Contact: Margarita Tapia, 202/224-5225

**Statement of Chairman Orrin G. Hatch
Before the Committee on the Judiciary
Hearing on the Nominations of:**

**STEVEN M. COLLOTON TO BE UNITED STATES CIRCUIT JUDGE
FOR THE EIGHTH CIRCUIT;**

**P. KEVIN CASTEL TO BE UNITED STATES DISTRICT JUDGE
FOR THE SOUTHERN DISTRICT OF NEW YORK;**

**SANDRA J. FEUERSTEIN TO BE UNITED STATES DISTRICT JUDGE
FOR THE EASTERN DISTRICT OF NEW YORK;**

**RICHARD J. HOLWELL TO BE UNITED STATES DISTRICT JUDGE
FOR THE SOUTHERN DISTRICT OF NEW YORK;**

**H. BRENT MCKNIGHT TO BE UNITED STATES DISTRICT JUDGE
FOR THE WESTERN DISTRICT OF NORTH CAROLINA;**

**R. DAVID PROCTOR TO BE UNITED STATES DISTRICT JUDGE
FOR THE NORTHERN DISTRICT OF ALABAMA; AND**

**STEPHEN C. ROBINSON TO BE UNITED STATES DISTRICT JUDGE
FOR THE SOUTHERN DISTRICT OF NEW YORK**

Today the Committee is considering seven outstanding nominees for the federal bench, and I am pleased to have all of them before the Committee this morning. I look forward to hearing from each of them.

Before we hear from our panel of distinguished Senators who have appeared today on behalf of these nominees, I would like to share a few words of introduction.

Our first nominee today is **Steven Colloton**, who has been nominated to the Eighth Circuit Court of Appeals. He has excellent academic and professional qualifications for the federal bench. A graduate of Yale Law School, Mr. Colloton clerked for D.C. Circuit Judge Laurence H. Silberman and for Supreme Court Justice William H. Rehnquist. Mr. Colloton worked as an attorney with the Office of Legal Counsel at the Department of Justice for a year and then, eager to return to his Midwestern roots, accepted a position as an Assistant U.S. Attorney in the Northern District of Iowa. After devoting eight years to fighting crime as a federal prosecutor, Mr. Colloton entered the private sector, where he concentrated his practice in

civil litigation. In 2001, he returned to the public sector as U.S. Attorney for the Southern District of Iowa. He will be an excellent federal judge.

Our group of district court nominees is equally impressive. Four of them hail from the great state of New York. **Kevin Castel** is one of our three nominees for the Southern District of New York. He is a highly regarded litigator who has focused much of his professional career on complex commercial litigation. A graduate of St. John's University School of Law, he has served as the Chair of the Commercial and Federal Litigation Section for the New York State Bar Association. We look forward to hearing from him.

Another Southern District nominee, **Richard Holwell**, has 30 years of experience as a practicing litigation attorney. He currently acts as the executive partner in charge of his firm's global litigation practice. He has extensive experience in both civil and criminal investigations conducted by the Department of Justice, the Securities and Exchange Commission, and other federal agencies.

Our final Southern District nominee, **Stephen Robinson**, brings a balance of civil and criminal litigation experience to the bench. In addition to experience in the private sector, Mr. Robinson worked as a line prosecutor for the U.S. Attorney's Office for the Southern District of New York before taking the helm as the United States Attorney for the District of Connecticut. Since 2002, he has worked as President and CEO of Empower New Haven, Inc., a nonprofit corporation.

Our other New York nominee, Judge **Sandra Feuerstein**, has been nominated for the Eastern District of New York. She has sixteen years of experience as a judge, having served on three different courts in the New York state judicial system. She has been named Judge of the Year twice since 1992. Judge Feuerstein is a noted humanitarian and will make an outstanding addition to the Eastern District bench.

In addition to our slate of New York nominees, we will consider two additional nominations for seats on the federal district courts. Judge **Brent McKnight**, who has been nominated for the Western District of North Carolina, spent six years litigating felony offenses as an Assistant District Attorney for the State of North Carolina. In 1989, he became a district judge for the North Carolina 26th Judicial District. Four years into his term, he received a 97% approval rating from attorneys polled by Court Watch of North Carolina. In 1993, he made the transition from state to federal court when he was appointed a federal magistrate judge for the Western District of North Carolina.

David Proctor, nominated to the Northern District of Alabama, has practiced law in the Birmingham area for more than 15 years, most recently at the firm Lehr, Middlebrooks, Price & Proctor, where he has been an effective litigator in labor, employment and civil rights law. His extensive legal experience will serve him well as on the federal bench.

I am pleased to welcome our nominees to the Committee today, and I commend the President on selecting them for the very important positions that they will assume upon confirmation.

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**Statement of Senator Patrick Leahy,
Senate Judiciary Committee
Judicial Nominations Hearing
July 22, 2003**

Today, the Committee will hear from seven judicial nominees, including another nominee to a Court of Appeals. This hearing is the 14th nomination hearing the Republican majority has held this year, including 50 of President Bush's judicial nominees, and the 14th hearing for a circuit court nominee this year.

This stands in sharp contrast to the way President Clinton's nominees were treated by the Republican majority. Fourteen hearings are more hearings for judicial nominees than Chairman Hatch allowed 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. Thus, in the first seven months of this year, we have already exceeded the number of hearings held in any of the six years the Republican majority controlled the pace of President Clinton's judicial 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. During 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. During the entire year of 2000, only eight judicial nominations hearings were held.

In 1999, this committee did not meet to consider a judicial nominee until June 16th, and during the rest of 1999, it held only seven hearings to consider judicial nominees. That was the third year of President Clinton's second term. Like 1999, 2003 is the third year of this President's term. By contrast, this year we had already held 11 hearings by the time Chairman Hatch held his first hearing in 1999.

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 had held five judicial nominations hearings, on average, by July 22. On this day, in 1995, only seven hearings had been held for judicial nominations; in 1996, only four hearings; in 1997, only four hearings; in 1998, eight hearings; in 1999, only two hearings; and in 2000, only seven judicial nominations hearings were held by July 22. Today, we participate in our 14th hearing this year. Republicans have moved much more quickly on President Bush's judicial nominees than for President Clinton's. The average number of circuit court nominees given hearings by July 22 during the years of

Republican control under President Clinton was five. The Republican majority, thus, is now moving almost three times faster for President Bush's circuit court nominees.

It was not so long ago, when another nominee to the Eighth Circuit, Bonnie Campbell, did not receive a vote by the Committee following the hearing on her nomination. Neither the nominee nor we were ever told why the Republican majority refused to accord her nomination a Committee vote despite the support of both of her home-state Senators, one a Democrat and the other a Republican. Bonnie Campbell, the former Attorney General of Iowa and former head of the Violence Against Women Office at the Department of Justice saw her nomination die without Senate action after more than a year. That nomination was eventually withdrawn by President Bush to make way for the nomination of Judge Melloy, who was confirmed last year by the Democratic-led Senate. For those always accusing Senate Democrats of tit-for-tat, the Iowa vacancy on the Eighth Circuit shows that Democrats have done no such thing. Indeed, we proceed today on Mr. Colloton's nomination despite the still unexplained and shabby treatment of Bonnie Campbell and Mr. Colloton's participation in the Republican's Whitewater investigation.

Today we will also hear from four nominees to the U.S. district courts in New York. These four nominees come to us with bipartisan support, including the support of their two home-state Senators. Justice Feuerstein, nominated to the Eastern District of New York, currently serves as a justice in the New York State Appellate Division and has served as a judge in the New York State court system for approximately 15 years. Mr. Castel, Mr. Holwell and Mr. Robinson, nominated to the U.S. District Court for the Southern District of New York, all have significant litigation experience as well as commendable records of providing legal services to disadvantaged persons. The New York nominees added to this hearing less than one week ago. The expedited inclusion of these four district court nominees at today's hearing is another example of how the Democratic members of this Committee have cooperated with the President and Republican majority.

We will also hear today from Judge Brent McKnight, nominated to the U.S. District Court for the Western District of North Carolina. Judge McKnight has served as a U.S. Magistrate Judge for the Western District of North Carolina for 10 years, received a unanimous "Well-Qualified" rating from the ABA, and has the support of both of his home-state Senators. Finally, we will hear from Mr. Proctor, a nominee to the U.S. District Court for the Northern District of Alabama. These two nominees are to fill new judgeships that became effective last week. This is another sign of how expeditiously the Senate is considering this President's nominees.

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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NOMINATIONS OF HENRY W. SAAD, OF MICHIGAN, NOMINEE TO BE CIRCUIT JUDGE FOR THE SIXTH CIRCUIT; LARRY ALAN BURNS, OF CALIFORNIA, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF CALIFORNIA; GLEN E. CONRAD, OF VIRGINIA, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF VIRGINIA; HENRY F. FLOYD, OF SOUTH CAROLINA, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF SOUTH CAROLINA; KIM R. GIBSON, OF PENNSYLVANIA, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF PENNSYLVANIA; MICHAEL W. MOSMAN, OF OREGON, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF OREGON; AND DANA MAKOTO SABRAW, OF CALIFORNIA, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF CALIFORNIA

WEDNESDAY, JULY 30, 2003

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

The Committee met, pursuant to notice, at 10:17 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch presiding.

Present: Senators Hatch, Specter, Sessions, Graham, Leahy, Feinstein, Feingold, Durbin, and Edwards.

Chairman HATCH. I apologize for being a little bit late. I have been in since 6:00 and I am still having trouble keeping up with it all, and I apologize to my colleagues who have had to wait. I apologize to my colleagues on this Committee.

Senator LEAHY. I can vouch for the fact that he was here at 6:00. I looked out the window and I saw him coming in.

[Laughter.]

Chairman HATCH. Leahy does not even get out of bed at 6:00, I have to tell you. I have been around him. I cannot blame him.

I am going to forego, or at least hold off on my statement. Should we hold off on our statements so that we can accommodate our fellow Senators? If you do not mind, we will start from your right and go to the left, and start with you, Fritz. Senator Hollings, we will call on you to speak first, then John Warner. Excuse me. We are going to have Senator Feinstein go first because she has an amendment on the floor and has asked to speak first.

Senators Levin and Stabenow have asked for 45 minutes to speak and have agreed to follow all of the other Senators. I will ask them and Congressman Rogers to come to the witness table. You are due on the floor too and you want to speak.

So we will go with Senator Feinstein, then with Senator Specter, and then we will go to Senator Hollings.

PRESENTATION OF LARRY ALAN BURNS AND DANA MAKOTO SABRAW, NOMINEES TO BE DISTRICT JUDGES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, BY HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Mr. Chairman, let me thank you very much for this courtesy. I really do appreciate it, and I will try to be very brief.

I am very pleased to introduce to the Committee two Southern District of California nominees, Larry Burns and Dana Sabraw. These nominees will fill two of the five new Southern District judgeships created by the Department of Justice reauthorization legislation enacted last year. The screening committee submitted their names to the President in March, who then nominated them in May. I think their presence here really represents a very successful conclusion to what was a multi-year effort to address a tremendous caseload crisis in the San Diego area.

I would very much like to thank the Chairman and the Ranking Member without whom these judgeships would not have been created, so thank you very, very much.

Until these judgeships were authorized, the Southern District of California had a weighted caseload average of approximately a thousand cases per judge. This is the highest in the country and more than twice the national average. I hope we can confirm Judge Sabraw and Judge Burns as quickly as possible because the District truly needs them. They have a very heavy caseload of complex and heavy cases including some large narcotics cases.

I am pleased to report that both judges come unanimously endorsed by the California Bipartisan Judicial Selection Committee. They are two more examples of how well this process can work if Democrats and Republicans approach the issue collaboratively.

Judge Burns is joined at today's hearing by his wife Kristi and his two sons, Andrew, 17 and Adam, 15. Could you all stand up so the Committee could acknowledge your presence? We are delighted to have you here. Thank you very much.

Judge Burns is a lifetime California resident, graduated from the University of San Diego Law School in 1979. The American Bar Association unanimously rated him well qualified, its highest rating.

Since 1997 he served as a magistrate in the Southern District where he has garnered rave reviews. Notably, he received the Judge of the Year award from the Consumer Trial Lawyers of San Diego.

Prior to his service on the bench, Judge Burns worked as an Assistant U.S. Attorney in the Southern District of California from 1985 to 1997 and as a Deputy District Attorney from 1979 to 1985. He has tried over 150 criminal cases to verdict.

During his time in the U.S. Attorney's Office, he enjoyed one of the most distinguished careers of any U.S. Attorney in the Southern District's history. His career reflects increasing levels of responsibility including positions as Chief of the Violent Crimes Sections and Deputy U.S. Attorney, the third-ranking position in the office. He had received superior performance awards from the Department of Justice in 1989, 1990, 1991 and 1992. He was only the second prosecutor from San Diego to be inducted into the American Academy of Trial Lawyers, which is an invitational organization limited to the best trial lawyers on both the criminal and civil defense side of the United States. A number of his professionals give him their highest marks, but in the interest of time I will just, if I may, enter those comments into the record.

Chairman HATCH. Without objection.

Senator FEINSTEIN. Thank you.

I am equally pleased to introduce Southern District of California nominee, Dana Sabraw, to the Judiciary Committee. He is joined by his wife, Summer Stephan, his son, Jack, age 12, and his twin daughters, Stephanie and Kimberly, age 10. I am very partial to girls, age 10. I would like to ask the family to stand so that we might see them as well. Thank you very much for being here. We really appreciate it.

I also understand that John Yang, the President of the National Asia-Pacific American Bar Association, is in attendance as well. Could you please rise, Mr. Yang, so that we could see you. Thank you very much.

Chairman HATCH. We are happy to welcome all of you here.

Senator FEINSTEIN. Judge Sabraw is another exemplary candidate. Like Judge Burns, he received a unanimous well-qualified rating from the ABA. He, again, similarly, earned his undergraduate degree from San Diego State University, and his law degree from the University of the Pacific in 1985. He was a member of the Law Review and the school honor society, graduating in the top 10 percent of his class.

After law school he worked for the oldest law firm in Santa Barbara called Price, Postel and Parma. He then became associate and partner in the firm of Baker and McKenzie, one of the largest law firms in the world.

Judge Sabraw was appointed by California Governor Pete Wilson to the Municipal Court in 1995 and then to the Superior Court in 1998. As a judge he has tried nearly 200 cases ranging from serious felonies to multi-party complex civil litigation.

He has remained active in the community despite his daunting workload. He is past president of the Oliver Wendell Holmes Inn of Court. He has also been on the Board of Directors of the Asian Business Association, the Falcons Youth Baseball, the San Diego

County Judges Association and the Pan-Asian Lawyers. Judge Sabraw founded the Positive Impact Program in 1998, and through this program, it is kind of interesting, judges, attorneys and community volunteers have educated over 6,000 fifth graders about the justice system. He has the endorsement of the Mayor of San Diego, Dick Murphy, who says that his skill, judgment and integrity would bring honor to the Federal bench.

I would like to end on that note. I think we have two very distinguished nominees. Again, an evenly-divided bipartisan screening panel found them eminently qualified, and unanimously presented them to the President of the United States.

Thank you for the courtesy, Mr. Chairman.

Chairman HATCH. Thank you, Senator. We will turn to Senator Specter.

Senator SPECTER. Well, thank you, Mr. Chairman. I too am about to offer an amendment on the Energy bill, but I think Senator Cantwell will be there for a little bit longer, and I know two of my senior colleagues here, so I would defer to Senator Hollings and Senator Warner, and then ask for recognition to introduce a Pennsylvania nominee.

Chairman HATCH. That would be fine, but I think what I am going to do is let both South Carolina Senators go if I can. Is that okay with you, because Senator Graham is here, so we can keep it consistent?

Senator SPECTER. That is acceptable, Mr. Chairman.

Chairman HATCH. Senator Hollings, we will turn to you now. Glad to have you here.

PRESENTATION OF HENRY F. FLOYD, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF SOUTH CAROLINA, BY HON. FRITZ HOLLINGS, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator HOLLINGS. Thank you very much, Mr. Chairman, and distinguished members of the Committee. In deference to all of us here who have business on the floor, let me ask that my full statement be included in the record as if delivered.

Chairman HATCH. Without objection.

Senator HOLLINGS. I would ask Judge Henry Floyd and his wife to stand. Also we are honored to have the Chief Justice of our State Supreme Court Jean Toal.

Chairman HATCH. Welcome. We are so happy to have you all here.

Senator HOLLINGS. We welcome you to the Committee.

Chief Justice Toal says Henry Floyd is the "go to guy." Any time they have a problem at the Supreme Court level, they have been going to him at the Circuit bench level for the past 12 years. Specifically, he has the unanimous well-qualified American Bar Association rating. He is a three-term State House Representative. I could go down on and on, on all the different experiences he has had in the 20 years at the bar.

Specifically he has balanced judicial temperament, Mr. Chairman. He does not go around harassing people about religion. He has a professional work ethic and a sharp legal mind. He does not go around publicly campaigning on controversial Supreme Court

decisions. This is the kind of judge that you have got to commend Senator Lindsey Graham for having. I can tell you right now, with all the rhubarb and the headlines and the controversy about judicial confirmations here in the U.S. Senate, this one will go through unanimously because he is just totally of a judicial temperament, and that sharp legal mind, and well-balanced judgment, and depth of experience and everything else like that, he has got glowing bipartisan support all over the State.

Chairman HATCH. Senator Hollings, do you think that we might even be able to avoid one of these time-consuming votes?

Senator HOLLINGS. You have got to give credit to Senator Lindsey Graham. I had a lot of letters recommending him, and I was sort of looking forward to it, but you know, the Supreme Court and that funny decision they made in Florida, so I never got the chance.

Chairman HATCH. The reason I raise that issue is because we are now voting on judgeship nominees we really never had to have roll call votes on, taking a lot of the time of the Senate, where we never did that before.

Senator HOLLINGS. I want to thank the Committee and you, Mr. Chairman, for your fine consideration.

Senator SPECTER. Senator Hollings, when you mention religion and campaigning on controversial decisions, when are you going to go for the jugular?

[Laughter.]

Senator HOLLINGS. When am I going to vote for who?

Senator SPECTER. The jugular. You are the master of the Senate at going for the jugular except possibly for Senator Warner.

Senator HOLLINGS. Let my lawyer, Warner, answer that.

[Laughter.]

Senator WARNER. I will stand by the old first captain. He still walks down the halls with the record he has had, World War II.

Chairman HATCH. Thank you. We are happy to have you here, Senator Hollings.

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

PRESENTATION OF GLEN E. CONRAD, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF VIRGINIA, BY HON. JOHN WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. I will be very brief, and like Senator Hollings, I will ask that my statement be included in the record.

We have one of these magnificent public servants, who has for 27 years been a Magistrate Judge in the Western District of Virginia in the Federal Court system, and the highlight of this hearing would be asking the Judge to introduce his lovely wife, Mary Ann. Would you stand, please, Mary Ann? That is the full reason why this wonderful man I think has received this nomination.

I say to my colleagues, Glen Conrad has been nominated by the President to serve as a judge on the United States District Court for the Western District of Virginia, nominated to fill the vacancy of James Turk, who began service in 1972 and recently took senior status, a remarkable jurist in the annals of Virginia history.

Senator Allen was to have joined me here today, and I will unanimous consent that his statement be placed in the record together with mine.

I just simply say to my colleagues, in putting this statement in, that the background of this nominee makes him highly qualified for this position. Both Senator Allen and I extensively interviewed a wide range of individuals, and this nominee came to the forefront.

His experience with the law is extensive. He has a record 27 years. That coupled with his temperament, his integrity and judicial demeanor is consistent with the high standards of the Federal bench and bar, and I urge his rapid confirmation by the United States Senate.

I thank my colleagues.

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

Chairman HATCH. Thank you, Senator. We appreciate having you here.

Let us turn to Senator Specter.

PRESENTATION OF KIM R. GIBSON, 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, Mr. Chairman.

I have the pleasure of introducing a very distinguished Pennsylvanian, Judge Kim Richard Gibson for nomination to the United States District Court for the Western District of Pennsylvania.

Judge Gibson is a State Court judge now, has been for the past 5 years, has an outstanding record, a graduate of West Point in 1970, magna cum laude on his JD degree from the Dickinson School of Law in 1975.

While in the military service, has extensive experience in the Judge Advocate General's Office, and returning to the practice of law in Somerset County, Pennsylvania, which in the past 2 years has become a very famous county where one of the 9/11 flights went down, and then the mine disaster last year. It is good to have something very positive for Somerset County and I think Judge Gibson's nomination to the Federal bench is just that. He had practiced law in Somerset County as a sole practitioner for 20 years, from 1978 to 1998, in a wide variety, and I think that kind of diversity is something which is very, very positive.

Judge Gibson has been recommended by the bipartisan nominating panel, which Senator Santorum and I have established, and with all of the big firm lawyers having come to the bench in so many parts of our State as well as the country, it is good to see a sole practitioner from a small county come to the Federal bench.

In the interest of brevity, Mr. Chairman, I would ask that a resume be included in the record with a detailed statement of Judge Gibson's legal background, and in conclusion the two most popular words of any statement, I would ask Judge Gibson to introduce his lovely wife, and as television had it, their three sons.

Judge GIBSON. Thank you, Senator Specter. With me today is my wife, Rebecca, my son, Connor, my son, Sean, my son, Matthew,

and also accompanying me today is my law clerk, John Egers, and my secretary, Kimberly Talarovich.

Chairman HATCH. We welcome all of you to the Committee.

Senator SPECTER. Thank you very much, Mr. Chairman. As I said, I would like to excuse myself. I am due on the floor shortly.

Chairman HATCH. Thanks, Senator.

We will turn to Senator Graham now, and then go across the table.

PRESENTATION OF HENRY F. FLOYD, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF SOUTH CAROLINA, BY HON. LINDSEY GRAHAM, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator GRAHAM. Thank you, Mr. Chairman.

I would like to associate myself with at least some of Senator Hollings' remarks, not all. That part about me being a good guy, I really want to associate myself with that.

But Senator Hollings and I do agree on this, that Judge Henry Floyd, Mr. Chairman, will be a great addition to the Federal bench. He has been serving, as Senator Hollings indicated, for over a decade at the State level. I can tell you firsthand, I have appeared before him as a judge, before I was elected to Congress. I think I lost. It probably had nothing to do with him, a lot to do with me. But Judge Floyd was rated in the top three judges of our entire state. Justice Toal is a big fan, and I certainly admire her, but we have Senator Larry Martin from Pickens County, Judge Floyd's home county, my home county. Larry has been in politics a long time, and anyone who has been around Judge Floyd would tell you that he is a quality person, he wears the robe well, and if you go into his court you are going to be treated fairly no matter where you come from, no matter what station in life you have, and I think he will be a great addition to the Federal bench. His colleagues and those who practice before him, rate him very highly in all the areas that matter to me.

We have a lot of politics in our judicial process. That is sort of the way it was meant to be. I think we have way too much. I do not associate myself with some of the things that Senator Hollings said, but we are here today trying to do some good, and South Carolina will be better off if we can get Judge Floyd nominated. I want to recommend to my colleagues on the Republican and Democratic side of the aisle, that if you vote for Judge Floyd you will have done a good thing for the State of South Carolina and the United States.

At this time, Judge Floyd, I think you would be honored to introduce your family, if you would do that.

Judge FLOYD. Thank you, Senator. This is my wife, Libba, and my daughter, Betts here. My good friend, Scott Dover is with us in addition to the two people that Senator Hollings mentioned.

Chairman HATCH. We are happy to welcome all of you here.

Senator GRAHAM. Welcome to Washington, and God bless in your new endeavors. I am very proud of you, Henry. You will make a great judge for us.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you.

We will turn to Senator Wyden and then Senator Smith.

PRESENTATION OF MICHAEL W. MOSMAN, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF OREGON, BY HON. RON WYDEN, A U.S. SENATOR FROM THE STATE OF OREGON

Senator WYDEN. Thank you, Mr. Chairman. Let me begin, Mr. Chairman, by thanking you for all of your courtesies. You have been so kind to me on so many matters, and we very much appreciate your handling this priority nomination for Oregon.

As you know, I feel very strongly about working in a bipartisan way. When I came to the Senate, Senator Hatfield was enormously helpful to me, and Senator Smith has just been so gracious and so thoughtful. We have done all of our judicial nominations together, and I am very proud to be here today, Mr. Chairman, and colleagues, to support the fine choice that Senator Smith has made for this particular nomination, Mike Mosman, to be of service on the United States District Court for the District of Oregon.

He has an outstanding record as a tough prosecutor. I believe his law enforcement background will be a significant asset to the Federal bench in Oregon.

He has such an interesting background, Mr. Chairman. Many may know, it has been reported in our newspapers, that at one time he wanted to be a marriage counselor. This strikes me as ideal training for the kind of position that he will be serving in.

But I support Mike Mosman for three major reasons. The first is I am convinced that he is committed to equal rights for all Americans, and I would also like to praise his listening skills. A number of organizations in Oregon raised questions, for example, with respect to Mr. Mosman's positions on a variety of social issues, and Mr. Mosman really reached out and listened, and showed his concern, and I credit him for that. His commitment to equal rights for all Americans and his willingness to listen has been especially important to me.

Second, I believe he is going to be fair, and that is a prerequisite for anyone serving in this position. He showed that as a prosecutor. He will show that as a U.S. District Judge.

Third, I think he understands the role of a judge in this position. He understands he is not a legislator. He is not out there writing bills and pushing legislation, but he is to serve as a judge on a whole host of concerns that come up throughout the west. He is a westerner. He understands our issues, and I am convinced that he would be an excellent nominee if confirmed.

I am glad once again to be able to join my good friend and colleague, Mr. Chairman, in sending to you another nominee that has the bipartisan support of both of Oregon's Senators, Michael Mosman.

Chairman HATCH. Thank you, Senator Wyden. We appreciate having you here, and we appreciate the good bipartisan way you and Senator Smith work on these judges.

Senator Smith, we will turn to you, and then we will go to Senator Allen, then Senator Santorum.

**PRESENTATION OF MICHAEL W. MOSMAN, NOMINEE TO BE
DISTRICT JUDGE FOR THE DISTRICT OF OREGON, BY HON.
GORDON SMITH, A U.S. SENATOR FROM THE STATE OF OR-
EGON**

Senator SMITH. Thank you, Chairman Hatch, Senator Leahy, Senator Durbin. I appreciate very much your consideration of Michael Mosman today, and it is also a privilege of mine to be here with my colleague, Ron Wyden, again in a bipartisan way in recommending a judge for the United States of America.

Recently the ABA rated Michael Mosman well-qualified. There is a reason for that. He is actually supremely qualified. He was the number one student at Utah State University, its valedictorian. He was the editor-in-chief of the Brigham Young University Law Review. He went on to clerkships with Malcolm Wilkey of the D.C. Circuit and Lewis Powell of the United States Supreme Court. He has had a distinguished career in private practice with the law firm of Miller and Nash. But he felt a calling, if you will, to public service and sought a position with the U.S. Attorney's Office.

I did not know Michael Mosman prior to our looking for a United States Attorney for Oregon. I believe I had met him, but could not say that I knew him. I knew of him. Senator Wyden and I established a bipartisan commission, and he surfaced as the number one recommendation of this bipartisan panel. He has been an outstanding United States Attorney for Oregon in the war on terrorism and in keeping the people of Oregon safe from those who would harm them.

In addition to that, in going forward for this position, again from a bipartisan panel the number one recommendation was for Michael Mosman to fill this vacancy.

I think it is a high tribute to him that in the audience today are two sitting judges of the United States District Court in Oregon, Judge Hogan and Judge Haggerty. Those gentlemen are here. If they could stand up, I would like to acknowledge them. They are here because they recognize, having seen him advocate before the bar of the Federal Courts in Oregon, his professionalism and would not be here as a Democrat and as a Republican if they did not think so highly of him.

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

Senator SMITH. Mr. Chairman, I could go on, but I think his record speaks for itself. I will conclude with an incident having nothing to do with the law.

Recently, my wife and I were having dinner at a nice place in Oregon. We were attended by a lovely young woman who was our waitress. She was bright and very well-mannered. And, after the meal she introduced herself as Mike Mosman's daughter. I thought what man would not be proud to have a young woman like that as his daughter. I think it speaks well of her parents, but particularly of the man who will be judged by you today, Michael Mosman. I, without reservation, recommend him for confirmation to the United States District Court of Oregon.

Thank you, sir.

Chairman HATCH. Thank you. We appreciate both of you being here. We appreciate the good testimony, and we will put all statements in the record.

Senator Graham asked me to have articles in support of Judge Floyd be included in the record at the appropriate place following his remarks.

We will turn now to Senator Allen, then Senator Santorum.

PRESENTATION OF GLEN E. CONRAD, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF VIRGINIA, BY HON. GEORGE ALLEN, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator ALLEN. Thank you, Mr. Chairman, Senator Leahy, Senator Durbin. It is my pleasure to join with my colleague, Senator Warner, in strongly supporting the nomination of Glen Conrad, a fellow Virginian, to serve on the United States District Court for the Western District of Virginia.

I am glad that he is joined by his wonderful wife, Mary Ann Conrad, who I thought so much of in the days I was Governor that I appointed her to serve on the Community College Board for the State of Virginia. They are a wonderful team in service in a variety of ways to Virginia and to their communities.

It is a great pleasure to advocate strongly for Glen Conrad. I have known Glen Conrad since 1977. I consider the Western District of Virginia my home. When I graduated from law school at UVA, I went down and was a law clerk for then U.S. District Court Judge Glen Williams in Abingdon, Virginia, and there was a magistrate judge there, Glen Conrad. So as a pup coming out of law school, you are always learning as much as you can as far as how tough decisions are made, and how you handle a very voluminous docket. In fact, we had the highest caseload per district in the country, and it is still a high caseload. I got to know Glen Conrad then, and have watched him over the years. He ended up moving up to Roanoke. I have followed him over the years, and when this opportunity arose and you are thinking of who would best know this Western District of Virginia, which covers the Piedmont with courtrooms in Danville, Lynchburg and Charlottesville, and the Shenandoah Valley Harrisonburg, Roanoke, Abingdon, and Big Stone Gap in southwest Virginia. Glen Conrad's name certainly was on the top of the list.

Here is a person who knows the judges, knows the operation of the court, has been tested for decades, and been examined by lawyers who have had cases before him, and litigants before him. Judge Conrad was found to be not only experienced and knowledgeable in the law with a ripe judicial philosophy, but also understands how to mete out justice in a fair, equitable way, and in a way that does not deny the litigants proper recourse and quick, efficient justice, so that justice is not delayed because of unnecessary procedures. He is a person who is just outstandingly qualified.

He is a product of Virginia's education system. He received both his undergraduate and law degrees from the College of William and Mary. I think it is appropriate you are having this hearing on him today because today, in 1619 in Jamestown, was the first meeting of the first legislative body in the new world. For Mr.

Leahy, who is near Massachusetts, that is 1 year before the Pilgrims landed for history.

Senator LEAHY. We think of Massachusetts as a Southern State where I come from.

[Laughter.]

Senator ALLEN. If you read the Mayflower Compact, they thought they were landing in Northern Virginia.

[Laughter.]

Regardless, I think it is appropriate that a gentleman from William & Mary is being considered today. He does have the knowledge, the experience, and the qualifications.

The Virginia Bar Association, the Roanoke Bar Association, the Virginia Association of Defense Attorneys have endorsed him, and Judge Conrad received a highly recommended rating from the Virginia Women's Attorney's Association.

So, Mr. Chairman and members of the Committee, Judge Conrad is genuinely deserving of this honor. He has devoted his life to the law, to the bench, and I know he will do a tremendous job, and I recommend him with my highest recommendation and ask for your prompt consideration of Judge Conrad, so he can get to work as soon as possible because this judgeship has been declared a judicial emergency by the National Judicial Conference. I thank you, Mr. Chairman, and members of the Committee, and look forward to voting for Judge Conrad on the floor as soon as possible.

Chairman HATCH. Well, thank you, Senator Allen. We appreciate having you here, as all of our colleagues, and it was a great statement. You and Senator Warner are to be complimented, helping this good man to have this opportunity.

Senator ALLEN. Thank you, Mr. Chairman.

Chairman HATCH. Thank you.

Senator Santorum?

PRESENTATION OF KIM R. GIBSON, 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. Thank you, Mr. Chairman. I appreciate the opportunity to be here and testify. I want to thank all of the members of the Committee for their indulgence. I am here to testify on behalf of Judge Gibson for the U.S. District Court of the Western District of Pennsylvania. Judge Gibson is a Common Pleas Court Judge in Somerset County, which is a rural county that became somewhat, well, it became very famous as a result of the events of 9/11. That is where Flight 93 crashed, and actually Judge Gibson has been involved in some of the follow-up work that has been done on that, in his role as a judge and a leader in the community.

I did not know Judge Gibson prior to his name surfacing as a result of the Committee that Senator Specter and I have put together to go through the qualifications of applicants who would like to be judges in the Western District. We recommended Judge Gibson to the President because of his just outstanding credentials.

He stood head and shoulders above a very qualified field, and this is a man who not only is he a judge and served as a solicitor for Somerset County and was a solo practitioner and worked at the

Public Defender's Office, but he has a very distinguished career as a graduate of West Point, having served 8 years on active duty in the JAG Corps, 15 years as a reservist, a commander of a unit, was deployed during Desert Storm in 1991.

So he has served this country already in a very distinguished capacity, and very, very well, and has a tremendous record. He is just universally, from left to right, Democrat to Republican, admired in Somerset County, and came with the full and hearty recommendation of everybody that I have run into, and I have run into a lot as a result of this nomination. They have been contacting me in support of Judge Gibson.

So it is a real pleasure to be here today to recommend him to this Committee, and I want to thank the President for making the nomination, and I certainly hope that he is acted upon favorably by this Committee.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator Santorum. We appreciate you and Senator Specter appearing for the judge, and we are grateful to have you here.

Senator SANTORUM. Thank you very much.

Chairman HATCH. Thanks for your good testimony.

We are going to have the statements of the Chairman and the ranking member, and then we are going to turn to the two Senators from Michigan and Hon. Michael Rogers, who we will ask to take their chairs up here.

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

Chairman HATCH. Let me say, today, the Committee has the privilege of considering the nominations of seven outstanding lawyers to be Federal judges. I commend President Bush for nominating each of them, and I look forward to their testimony.

The first nominee from whom we will hear is Henry W. Saad, who has been nominated for a position on the United States Court of Appeals for the Sixth Circuit. This is an historic appointment.

Upon his confirmation, Judge Saad will become the first Arab American to sit on the Sixth Circuit, which covers the States of Kentucky, Ohio, Tennessee and Michigan. It is long past time for this Committee to consider Judge Saad's nomination.

He was first nominated to fill a Federal judgeship in 1992, when the first President Bush nominated him for a seat on the United States District Court for the Eastern District of Michigan. The fact that he did not get a hearing may have worked to his benefit, since he was appointed, in 1994, by Governor Engler to a seat on the Michigan Court of Appeals. He was elected to retain his seat in 1996 and again in 2002, receiving broad bipartisan support in each election.

On November 8th, 2001, President Bush nominated Judge Saad for a seat on the Sixth Circuit, the position for which we are considering him today. When no action was taken on his nomination during the 107th Congress, President Bush renominated him to the Sixth Circuit on January 7th, 2003. All told, Judge Saad has been nominated for a seat on the Federal bench three separate times. I think it is high time this Committee considered his nomination.

Judge Saad's credentials for this position are impeccable. He graduated with distinction from Wayne State University in 1971 and magna cum laude from Wayne State University Law School in 1974. He then spent 20 years in the private practice of law, with one of Michigan's leading firms, Dickinson, Wright, specializing in product liability, commercial litigation, employment law, labor law, school law and libel law.

In addition, he has served as adjunct professor at both the University of Detroit Mercy School of Law and at Wayne State University School of Law.

Judge Saad is active in legal and community affairs. Some of the organizations he has been involved with include educational television, where he serves as the trustee, the American Heart Association, Mothers Against Drunk Driving and other nonprofit organizations that serve the elderly and the impaired.

As a leader in the Arab American Community, Judge Saad has worked with a variety of organizations in promoting, understanding and good relations throughout all ethnic, racial and religious communities. He is an outstanding role model.

Judge Saad enjoys broad bipartisan support throughout his State, as evidenced by endorsements in his last election by the Michigan State AFL-CIO and the United Auto Workers of Michigan. He has received dozens of letters of support from leading political figures, fellow judges, law professors, private attorneys, the Michigan Chamber of Commerce and a variety of other groups.

Let me quote from just a few of the letters received in support of Judge Saad's nomination.

Maura D. Corrigan, chief justice of the Michigan Supreme Court wrote, "Henry Saad has distinguished himself as a fair-minded and independent jurist who respects the rule of law, the independence of the judiciary and the constitutional role of the judiciary in our tripartite form of Government. Judge Saad is a public servant of exceptional intelligence and integrity. He has the respect of the bench and the bar."

Other judges have written that he is "a hardworking and honorable individual" and that he is "an outstanding appellate jurist with a strong work ethic."

Roman Gribbs, a lifelong Democrat and retired judge wrote, "Henry Saad is a man of personal and professional integrity, is fair-minded, very conscientious and is, above all, an outstanding jurist."

Judge Saad has clearly earned the respect and admiration of his colleagues on the Michigan State court bench. His nomination does deserve consideration by this Committee. I hope that our consideration of Judge Saad's nomination is not overshadowed by collateral arguments about the propriety of holding this hearing.

Let me make this absolutely clear. Holding this hearing today is entirely consistent with the longstanding blue slip policy of this Committee. Since I first became Chairman of this Committee in 1995, I have followed the same blue slip policy crafted by two former Democratic chairmen of this Committee, Senator Kennedy and Senator Biden.

Here is the Committee's blue slip policy, as explained in a letter by former Chairman Joe Biden, to the first President Bush, dated

June 6th, 1989. “For many years, under both Democratic and Republican chairmanships, the return of a negative blue slip meant that the nomination simply would not be considered. That policy was modified under Senator Kennedy’s chairmanship so that the return of a negative blue slip would not preclude consideration of the nomination. A hearing and vote would be held, although the return of a negative blue slip would be given substantial weight.”

Chairman Biden continued to explain the blue slip policy that the Committee would follow under his chairmanship as follows:

“The return of a negative blue slip will be a significant factor to be weighed by the Committee in its evaluation of a judicial nominee, but it will not preclude consideration of that nominee unless the administration has not consulted with both home State Senators prior to submitting the nomination to the Senate. If such good-faith consultation has not taken place, the Judiciary Committee will treat the return of a negative blue slip by a home State Senator as dispositive, and the nominee will not be considered.”

I will submit a copy of his letter for the record.

In the case of Judge Saad, as with other Michigan nominees, there is a clear record of consultation by the Bush White House with the Michigan Senators. White House records indicate that beginning on April 10th, 2001, White House Counsel Alberto Gonzalez began discussions with the offices of the Michigan Senators regarding the vacancies on the Sixth Circuit and in the Eastern District of Michigan.

On May 17th, 2001, Judge Gonzalez provided the names of the individuals being considered for the Michigan vacancies and invited both Senators to provide feedback. The record is clear that over the next year, through subsequent telephone conversations, as well as written correspondence, there was extensive consultation and repeated invitations to the Michigan Senators to provide their input into the nomination process.

In fact, I understand the White House offered to consider nominating both of the individuals championed by the Michigan Senators to Federal judgeships, although I believe they were District Court judgeships. Although President Bush ultimately did not nominate those individuals, the consultation requirement was undeniably fulfilled in the case of Judge Saad and the other Michigan nominees.

I will continue to work with my friends and colleagues from Michigan, Senators Levin and Stabenow, the White House, Senator Leahy, and others on the Committee to reach an acceptable resolution in filling traditional vacancies in Michigan and the Sixth Circuit.

And while the Michigan Senator’s negative blue slips have been, and will continue to be accorded substantial weight, indeed, I delayed a hearing on any of the Michigan nominees because of the Michigan Senators’ views. Their negative blue slips are not dispositive under the Committee’s Kennedy–Biden–Hatch blue slip policy.

Again, I fervently hope that the debate that I anticipate will occur in my decision to schedule this hearing will neither distract, nor detract, from the historic significance of Judge Saad’s nomination, which was noted by Judge George Steeh, III, a distinguished Arab American appointed by President Clinton to the Eastern Dis-

trict of Michigan. He said, as quoted in the Detroit Free Press on November 9th, 2001, that President Bush's nomination of Judge Saad, in the wake of the September 11th attacks, "conveys an important message to all of the citizens and residents of this country and that we embrace and welcome diversity, and that we are extending the American dream to anyone who is prepared to work hard."

I could not agree more. Judge Saad is a fine jurist who will make an outstanding addition to the Sixth Circuit, and I look forward to hearing from him this morning or afternoon, whichever the case may be.

With that, I will turn to the ranking member.

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

Senator LEAHY. Thank you, Mr. Chairman.

Chairman HATCH. Is Mr. Rogers here? Take your seat.

Senator LEAHY. It is unfortunate when one wants to recite history, every so often those troubling little irrefutable facts come in the way in the recitation. So I thought maybe I would go over some of the irrefutable facts, which may give a different view than my friend, the distinguished Chairman, has just given.

Today, is the first time Chairman Hatch will ever have convened a hearing for a judicial nominee with two negative blue slips returned to the Committee—the first time ever. I believe it also may be the first time any chairman, Democratic or Republican, in any Senate Judiciary Committee, whether with a majority of Democrats or a majority of Republicans, proceeded with a hearing on a judicial nominee over the objection of both home-State Senators. It is certainly the only time in the last 50 years. I know it is the only time in the 29 years I have been in the Senate.

So, today, actually should be noted in the annals of the Senate and of our Committee for the precedent set by this hearing, for the hubris behind it, and for the brazenness of the double standard it sets. In collusion with a White House of the same party, the Senate's majority this year has launched a lengthening series of changed practices and broken rules on this Committee. And the White House, which seems to be calling more and more, determining how the independent Senate will act and more and more whittling away the independence of the Senate, the White House, and some in the Senate, have even suggested change in the Senate's rule to consolidate the White House's control over the judicial nomination process.

Over the last 3 years, time and again the good-faith efforts of Senate Democrats to repair the damage done to the judicial confirmation process over the previous 6 years has been met with nothing but hubris. The kind of hubris is now also having a corrosive effect on the other body, the House of Representatives, that we have seen very dramatically in the past few weeks.

Now, when Chairman Hatch chaired this Committee, but not with a Republican President, but with a Democratic President, Bill Clinton, one negative blue slip from a Senator was enough to doom a nomination and prevent a hearing on that nomination; indeed, among the more than 60 Clinton judicial nominees for this Com-

mittee did not even consider. There were several who were blocked even though they had positive blue slips from both their States.

It appeared so long as any Republican Senator had an objection to the nomination of a Democratic President, that was honored. The nomination did not go forward. For example, when Senator Helms of North Carolina objected to an African-American nominee from Virginia, not only from his own State, but from Virginia, it was never allowed to go forward.

When Senator Slade Gorton, my good friend from the State of Washington objected to nominees from California, they were held up. Earlier this year, the Committee, under the Chairman, took the unprecedented action of proceeding to a hearing on the nomination of Carolyn Kuhl to the Ninth Circuit over the objection of Senator Boxer from California.

Now, when the senior Senator from California, Senator Feinstein, announced her opposition to the nomination as well, I suggested to the Chairman that further proceedings on the nomination ought to be carefully considered and we not proceed on the nomination, especially as it was opposed by the Senators from both that State and that was well known.

In fact, Senator Feinstein, the senior Senator from California, has reminded the Chairman of his statements in connection with the nomination of Ronnie White, of Missouri. That was a nominee that got through our Committee, with both Democratic and Republican votes, but was defeated by Republicans in a party-line on the Senate floor.

The Chairman said had he known that both home State Senators were opposed, he never would have proceeded, but, in a continuing series of changes of practices and positions this year, the Committee has proceeded to proceed with the Kuhl nomination, and of course the party-line vote was resolved.

Now, we are making a further profound change in practices. When the Democratic President was doing the nominating and Republican Senators were objecting, a single objection from a single home State Senator stalled the nomination. In fact, I do not believe the Chairman can cite a single example of a single time that he went forward with a hearing over the objection of a negative blue slip of a single Republican home State Senator. There is none.

But now the Republican President is doing the nomination, and all of a sudden the rules just change. No amount of objection by Democratic Senators is sufficient. It only took one Republican to object to a nomination of President Clinton, and now no matter if both home State Senators or Democrats object to a nomination of President Bush, the rules are entirely different.

Chairman overrode the objection of one home State Senator with the Kuhl nomination, and he overrides the objections of both home State Senators for the Michigan nomination.

I doubt we will hear from the other side of the aisle. It is the truth of the two policies that has been followed. While it is true various chairmen, and I admit various chairmen of the Judiciary Committee have used the blue slip in different ways, some actually unfairly and others toward attempting to remedy the unfairness, it is also true that each of those chairmen was consistent in his application of his own policy; that is, until now.

The double standard the Republican majority has adopted obviously depend upon the occupant of the White House, and I suspect the White House has ignored the independence of the Senate and is pulling the strings. But this change in practice marks another example of the double standard.

Last week, the Republican majority chose to abandon our historic practice of bipartisan investigation. This is something that has always been done in the nearly 30 years I have been here. There is an investigation, and you have both Republican and Democrats who work closely together, so both the Chairman and the Ranking Member get the same result, but that has been abandoned and abandoned the meaning of consistent practice of protecting minority rights. They did that by changing and overruling the long-standing Committee rule that required a member of the minority to cut off debate in order to bring the matter to a vote.

Incidentally, a rule that was put in place at the insistence of then ranking minority member, Strom Thurmond, who wanted to make sure the Republican minority was protected. The Republican minority, as long as they were in the minority, they were protected. The second the Democrats go into the minority, we are not going to follow the rules any more. They do not have to be protected.

Now, this week, the Committee takes another giant step in the direction of partisanship through this hearing. Apparently, Republican Senators will stop at nothing in their efforts to aid and abet the White House with a Republican President in an effort to politicize the Federal judiciary.

The Federal judiciary should not be an arm of either the Democratic or Republican Parties. He should be independent. We can elect Republicans, and Democrats, and Independents, and that is fine. That is an area where they should be partisan in the Congress or the presidency, but not in the Federal judiciary. That should be independent.

Now, both, and what makes it more difficult is that both of the Senators from Michigan are among the most respected members of the Senate, both are fair-minded, both have formed bipartisan coalitions time and time again, and both of them have attempted to work with the White House to offer their advice, but their input was rejected.

They have now suggested another way to end the impasse on judicial nominations for Michigan. Their suggestion was a bipartisan commission along the lines of a similar one in Wisconsin. I see the distinguished Senator from Wisconsin here. I think that is a good one.

I am familiar with these kind of bipartisan screening commissions. Vermont, which has had, since I have been here, Republican Senators, Democratic Senators, and now an Independent Senator, they have used such a commission for more than 25 years with great success. When I came here, I was the first, and actually still the only Democrat elected in Vermont's history to the U.S. Senate, but the then-senior Senator, Republican Senator, worked with me to set up such a commission.

Now, I commend the Senators representing Michigan for their constructive suggestions and for their good-faith effort to continue

to work with the administration, even though they do not seem to want to.

So now we are faced with a nomination from Michigan to the United States Court of Appeals for the Sixth Circuit, opposed by both Michigan Senators, and it appears that again we will ignore our practices and our rules to pick a judicial fight.

Of course, if we also have time, we will probably get to review the nominations of Michael Mosman, Judge Kim Gibson, Glen Conrad, Judge Henry Floyd, Magistrate Judge Larry Burns, and Judge Dana Sabraw, both nominated for the Southern District of California, and all of whom have received very, very glowing testimonies from their Senators of both parties. All of them have the support of both of their home State Senators. Two of these District Court nominations were the product of a bipartisan Selection Commission, which has worked extremely well for the citizens of California.

In fact, I congratulate the Senators from the State of California and the people from the State of California for working out that kind of a commission. I think what it guarantees is that these are going to be consensus nominees, and they will probably get a vote on the floor of the Senate that will reflect the fact that they are consensus nominees.

In fact, had such a bipartisan commission been allowed to include California's Circuit Court nominees, we might not be faced with the divisive nomination of Carolyn Kuhl. President Bush promised, and I was heartened by his promise on the campaign trail, that he would be a uniter and not a divider. Unfortunately, that was before the election, and the practice in office with respect to judicial nominees has been most divisive. In fact, citing the remarks of the White House, the Lansing State Journal recently reported, for example, that the President is simply not interested in compromise on the existing vacancies in the State of Michigan.

Under our Constitution, the Senate has an important role in the selection of our judiciary. It was the brilliant design of our Founders to establish that the first two branches of Government would work together to equip the third branch to serve as an independent arbiter of justice, not an arm of the Senate, not an arm of the White House, not an arm of either of the political parties, but as an independent arbiter, and that they relied on the checks and balances of the Senate and the White House to make sure they would be independent.

As conservative columnist George Will wrote this past weekend, "A proper Constitution distributes power among Legislative, Executive and Judicial institutions so that the will of the majority can be measured and expressed in policy and for the protection of minorities, somewhat limited."

Well, the structure of our Constitution and our own Senate rules of self-governance are designed to protect minority rights and to encourage consensus. And despite the razor-thin margin of recent elections, the majority party is not acting in a measured way, but in complete disregard for the traditions of bipartisanship that have always been the hallmark of the Senate.

When there was a Democratic President in the White House, as I said, Circuit Court nominees were delayed and deferred, and va-

cancies in the Court of Appeals more than doubled under Republican leadership of the Senate, from 16 in January, 1995, to 33 when the Democratic majority took over in July of 2001. And we then went and whittled back, but now with a Republican President, very substantially on those.

In fact, under Democratic leadership, in spite of the abuses by Republicans and in spite of the 6 years of them blocking President Clinton's nominations, we proceeded to consider and confirm two nominees to the Sixth Circuit, notwithstanding that all of President Clinton's nominees to that have been blocked for years.

We proceeded to confirm two more this year. The vacancies that once plagued the Sixth Circuit have been cut in half. The eight vacancies have been caused by the refusal of the Republicans to consider President Clinton's nominees. The Democrats have allowed four of them to be filled in the last few months. The Sixth Circuit currently has more judges and fewer vacancies than it has had in years.

Those of us who were involved in this process in the years 1995 to 2000 know that the Clinton White House bent over backwards to work with the Republican Senators and seek their advice. In fact, my distinguished colleague, in his brilliant history of his own career, here in the Senate, refers to his working with President Clinton on that.

There were many times when the White House made nominations at the direct suggestion of Republican Senators. In fact, I was there on some of those occasions. And there are judges sitting today on the Ninth Circuit, and the Fourth Circuit, the District Courts in Arizona, Utah, and Mississippi and many other places only because of recommendations of Republican Senators were honored by a Democratic President.

In contrast, since the beginning of his time in the White House, the Bush administration sought to overturn traditions of bipartisan nominating commissions that run roughshod over the advice of Democratic Senators. They tried to change the exemplary systems in Wisconsin, the State of Washington, and Florida that worked so well.

So, today, despite the best efforts of two extremely well-respected Senators from Michigan who proposed a bipartisan commission, similar to their sister State of Wisconsin, the administration has rejected compromise.

I object to this reversal of position for obvious partisan gain and the unprecedented hearing, unprecedented hearing, going as far back as we can find in 50 years, that is being held today. I will participate in the questioning of Judge Saad because his nomination has raised some concerns. His judicial opinions against whistleblowers—those people who really do protect the Government—and his opinions against victims of discrimination, as well as his opinions on cases involving workers' rights give me great concern about his willingness to follow the law, but he will have a chance to answer those questions. So I look forward to his testimony.

Senator FEINGOLD. Mr. Chairman?

Chairman HATCH. Senator?

Senator FEINGOLD. Mr. Chairman, I just want to make a brief statement. I feel truly privileged to serve on this Committee.

Senator LEAHY. I would ask to put my whole statement in the record.

Chairman HATCH. Without objection, we will put the whole statement in the record.

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

Chairman HATCH. Senator, I would like to turn to the Senator from Michigan.

Senator FEINGOLD. I would like to just make a brief statement if I could.

Chairman HATCH. All right.

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

Senator FEINGOLD. Obviously, I think this is one of the most distinguished bodies in the Senate. We have jurisdiction over issues that have a huge impact on the daily lives of our constituents, civil rights, the prevention and punishment of crime, the civil justice system and the Federal judiciary to just name a few.

These are some of the most complicated and contentious issues the Senate faces, but because of that it is in this room that I have also been part of some of the most vigorously intense and challenging debates of my entire career. I have enjoyed these debates, and I have enjoyed working with my colleagues on this Committee.

As I noted at our meeting last week, one of the things that makes it possible for us to work together, even on these very contentious issues is the respect for our rules and for practices of the Committee that have developed over time. Since the beginning of this year, I have watched with dismay as the rules and practices that have guided this Committee's actions and nominations for many years have been tossed aside in order to push through the most nominees possible in the shortest period of time.

An agreement between Senators Thurmond, Biden, Dole and Byrd, honored since the mid-1980's, on the number of controversial nominees to be considered in a single hearing, the minimum time for the minority to prepare for a hearing after a nominee's file is complete, and the timing of Committee votes after a hearing is held has now, for all intents and purposes, been eliminated.

Nominees are now routinely scheduled for a Committee vote before questions have even been asked, much less answered. The rule that allows any matter to be held over for a week has been essentially eliminated. And, of course, Committee Rule IV, which had been in effect as a protection for the minority since 1979, has been violated twice, even after an agreement was reached to reinstate it after the first violation.

With this hearing today, Mr. Chairman, we are overthrowing another longstanding practice of the Committee. This one, as the Ranking Member discussed, dates back more than a century. Both Michigan Senators who are with us today have expressed their opposition to this nominee by returning negative blue slips. Yet we are having a hearing in this Committee.

For years, Mr. Chairman, you refused to have hearings on nominees put forward by President Clinton, and you often cited objections from only one home State Senator. Once again, the rules have

changed based on the politics of the moment rather than based on any recognizable principle. I think that is very unfortunate.

We all know the history of the vacancies on the Sixth Circuit. One Clinton nominee for that circuit, Judge Helene White, holds the dubious distinction of being the nominee who waited the longest for the courtesy of a hearing, in vain. She was pending in this Committee for over 4 years. She never got a hearing. And, remember, both blue slips were returned on her nomination.

So this is the circuit where consultation and compromise is most needed, but the White House has steadfastly refused. Even with four vacancies, this White House could not find a way to reach out to Senators Stabenow and Levin and try to make amends for the shabby treatment of Helene White and Kathleen McCree Lewis.

This White House has made all four nominations without working with the two Senators from Michigan. It has refused all overtures by the Senators to try to work together and come up with a compromise that would have led to the four seats being filled long ago.

Now, I want to see these vacancies on the Sixth Circuit filled. I want there to be judges working hard to bring fair and equal justice to the people of Michigan, Ohio, Kentucky, and Tennessee. What is happening here today is not helping to break this deadlock. I have little doubt that the vast majority of our caucus will support the two Senators from Michigan in their fight to be adequately consulted on judges who will sit in their State.

Mr. Chairman, this is another sad day among many that we have had on judicial nominations. I do welcome the nominees and their families, and I am sorry that what should be a day of celebration and pride is instead another day of controversy. But I felt I had to comment on the continued uprooting of the Committee's rules and practices.

Thank you for letting me speak, Mr. Chairman.

Chairman HATCH. Well, thank you, Senator. As you know, there is a real dispute over whether the rules have been violated or not, with our side taking a different position from yours. I have to say in the case of Ronnie White, at least he got a vote. He may have been defeated, but he at least got a vote. That is something that a lot of our nominees are not getting. And every one of the cases cited by my friend from Vermont has an argument and an answer to it. I will not take time to do that now.

I would just mention that Mr. Saad has been blocked through three nominations for 11 solid years, so—well, maybe not solid years, but he was first nominated in 1992 and has been nominated three times, and, unfortunately, he is caught in this controversy, which I am trying to solve. I believe Presidents, their nominees, their executive nominees, especially judges, deserve votes. They deserve up-and-down votes. If you don't like them, vote against them. If you like them, vote for them. But we are finding that we are not doing that.

Having said that, let me just turn to our two distinguished Senators from Michigan. I have a high regard for both of them. It is unfortunate that we have to be at this crossroads. I don't always feel good about these conflicts and these problems. I certainly don't feel good about the politics involved. But as long as I have known

Senator Levin, which is a long time, he has always been straightforward, has always been fair, and I know that he differs with the administration and perhaps with me on this, and I respect him. Senator Stabenow, who has been a hard-working Senator ever since she has been here, and we are grateful to have both of you here, and then we will turn to Michael Rogers at the end. But we have agreed to give an extraordinary amount of time to the three of you, which is right, I think, under these circumstances. And I intend to listen to your comments.

I might have to get up and go out a couple of times. If I do, it is not out of disrespect. Please understand that. But we will start with you, Senator Levin, and then we will go to Senator Stabenow, and then we are honored to have Hon. Michael Rogers from the House of Representatives here, and we look forward to hearing your testimony as well.

Senator Levin?

STATEMENT HON. CARL LEVIN, A U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator LEVIN. Thank you, Mr. Chairman. We appreciate the opportunity to appear before this Committee today. We obviously would have preferred that our appearance be under different circumstances.

We oppose the decision to proceed with this nomination and the other nominations for Michigan vacancies without addressing serious concerns that we have raised regarding fundamentally unfair treatment of Michigan judicial nominees during the previous administration.

This Committee last held a hearing on a nominee for a Michigan vacancy on the Sixth Circuit on May 7, 1997, more than 6 years ago and more than 3½ year before President Clinton's term expired.

The fact that the last 3½ years of the Clinton Presidency passed without a hearing on Michigan's Sixth Circuit nominees was not because there were no Michigan vacancies on that court. It was not because President Clinton failed to submit nominees for those vacancies. And it was not the result of questions about the character or the qualifications of the President's nominees to those vacancies. Rather, it resulted from Senator Abraham's decision to refuse to return his blue slips on the nomination of Michigan Court of Appeals Judge Helene White and Kathleen McCree Lewis.

The record shows that this Committee honored Senator Abraham's refusal to return those blue slips. But even after Senator Abraham finally returned his blue slips on the two nominations in the spring of 2000, the two women were not given hearings. That distortion of the judicial nominating process was grossly unfair to the two nominees and deprived the previous administration of the consideration by the Senate of those two nominees.

We seek a just resolution, and Senator Stabenow and I have returned the blue slips with objections to proceeding to the current nominees until that resolution is achieved.

As we have expressed to you personally, we believe that moving forward without resolving the impasse in a bipartisan manner could deepen partisan differences and make future efforts to re-

solve this matter more difficult. The number of Michigan vacancies on the Federal courts provide an unusual opportunity for a bipartisan compromise. Efforts to forge compromise so far have not been successful, but we hope those efforts will continue.

In order to fully understand our concerns, a brief history of the Michigan vacancies on the Sixth Circuit is in order. Judge Helene White was nominated to a vacancy on the Sixth Circuit on January 7, 1997, after Judge Damon Keith assumed senior status. I returned my blue slip on Judge White's nomination. Senator Abraham did not.

More than 10 months later, on October 22nd, Senator Leahy, as Ranking Member of this Committee, delivered what would be the first of at least 16 statements on the Senate floor, made over a 4-year period, regarding the Sixth Circuit nominations. He called for the Committee to act on Judge White's nomination. His appeal, like the others that were to follow, was unsuccessful.

For instance, on October 21, 1998, more than a year and a half after Judge White was nominated, Senator Leahy returned to the floor, where he warned that, "At each step of the process, judicial nominations are being delayed and stalled." His plea was ignored. Senator Abraham's blue slip remained unreturned, and the 105th Congress ended without a hearing for Judge White.

In January 1999, President Clinton again submitted Judge White's nomination. That day, I sent one of many notes to both Senator Abraham and Chairman Hatch. In that letter, I said that the 105th Congress had ended without Judge White being granted a Judiciary Committee hearing and suggested that fundamental fairness dictated that she receive an early hearing in the 106th Congress. Still no blue slip from Senator Abraham. His decision was honored and, again, no hearing.

On March 1, 1999, Judge Cornelia Kennedy took senior status, opening a second Michigan vacancy on the Sixth Circuit. The next day, Senator Leahy returned to the floor, repeated his previous statements that nominations were being stalled, and raised Judge White's nomination as an example.

The exercise of the blue slip power by Senator Abraham was clearly motivated during this period by his repeated efforts to obtain the nomination by President Clinton of Jerry Rosen, a district court judge in the Eastern District of Michigan, for Judge Kennedy's seat. However, in September of 1999, President Clinton decided to nominate Kathleen McCree Lewis to that seat.

Soon thereafter, I spoke with Senator Abraham about the Lewis and White nominations. It had been more than 2-1/2 years since Judge White was first nominated. Twice in the next 6 weeks, Senator Leahy urged the Committee to act, calling the treatment of judicial nominees "unconscionable."

On November 18, 1999, I again wrote Senator Abraham and Chairman Hatch, urging hearings in January of 2000 for the two Michigan nominees. At that time, I noted that Judge White had been waiting for nearly 3 years for a hearing. I stated that the confirmation of the two women was "essential for fundamental fairness." My appeals were for naught and 1999 ended without Senator Abraham's blue slips and, therefore, without Judiciary Committee hearings.

In February of 2000, Senator Leahy again spoke on the Senate floor about the multiple vacancies on the Sixth Circuit. Less than 2 weeks later, I made a personal plea to Senator Abraham and Chairman Hatch to act on the Michigan nominees. Again, I was unsuccessful. Senator Abraham's blue slips remained unreturned, and no hearing was scheduled.

On March 20th of the year 2000, the chief judge of the Sixth Circuit sent a letter to Chairman Hatch expressing concerns about an alleged statement from a member of this Committee that, "due to partisan considerations," there would be no more hearings or votes on vacancies for the Sixth Circuit Court of Appeals during the Clinton administration. The judge's concern would turn out to be well founded.

Finally, on April 13, 2000, Senator Abraham returned his blue slips for Judge White and Ms. Lewis, without indicating approval or disapproval. I had previously understood that Senator Abraham's decision not to return blue slips on the two nominees had prevented them from being granted a Judiciary Committee hearing. So the day that Senator Abraham returned his blue slips, I not only spoke to Chairman Hatch, but I also sent him a letter reminding him that blue slips had now been returned on the two nominations, expressing my concern about the unconscionable length of time the nominations had been pending, and urging that they be placed on the agenda of the next Judiciary Committee confirmation hearing. Again, my efforts were unsuccessful. That hearing passed without the Michigan nominees being on the agenda.

On May 2, 2000, I tried again and sent another note to Chairman Hatch, but neither Judge White's nor Ms. Lewis's nominations were placed on the Committee's hearing agenda then, or ever. Over the next several months, Senator Leahy went to the floor ten more times to urge action on the Michigan nominees, and more than once I also raised the issue on the Senate floor.

In the fall of 2000, in a final attempt to move the nominations of the two Michigan nominees, I met with Majority Leader Lott to discuss the situation. And on the 12th of September, I sent him a letter saying that, "The nominees from Michigan are women of integrity and fairness. They have been stalled in the Senate for an unconscionable amount of time without any stated reason." Neither the meeting with Senator Lott nor the letter prompted this Committee to act on the nominations, and the 106th Congress ended without hearings for either woman.

Judge White's nomination was pending for more than 4 years, the longest period of time any circuit court nominee has waited for a hearing in the history of the United States Senate. Ms. Lewis's nomination was pending for more than a year and a half.

Senator Abraham's refusal to return blue slips on the White and Lewis nominations did not relate to either woman's qualifications; rather, his refusal stemmed from his effort to persuade the White House to nominate Jerry Rosen, his preferred nominee to the Cornelia Kennedy seat on the Sixth Circuit. That unreturned blue slips of one Republican Senator precluded Judiciary Committee consideration of two nominees of a Democratic President, but two negative Democratic blue slips do not prevent the Committee from

now proceeding with hearings for a nominee of a Republican President is simply not acceptable.

At least one version of Judge White's and Ms. Lewis's blue slips read the following: "No further proceedings on this nominee will be scheduled until both blue slips have been returned by the nominee's home State Senators."

In 1997, when asked by a reporter about a Texas nominee opposed by that State's Republican Senators, Chairman Hatch said, "The policy is that if a Senator returns a negative blue slip, that person's going to be dead."

And on October 7, 1999, Chairman Hatch said, with respect to the nomination of Judge Ronnie White, "I might add, had both home State Senators been opposed to Judge Ronnie White in Committee, Judge White would never have come to the floor under our rules. I have to say that that would be true whether they are Democrat Senators or Republican Senators. That has just been the way the Judiciary Committee has operated."

During the entire Clinton Presidency, it is my understanding that not a single judicial nominee—not one—got a Judiciary Committee hearing if there was opposition by one home State Senator, let alone two. Both home State Senators now oppose proceeding with President Bush's Michigan judicial nominees absent a bipartisan approach.

Inconsistencies in the Committee's blue slip policy are troubling. But equally troubling is that even after their blue slips were returned by Senator Abraham, Judge White and Ms. Lewis were still denied hearings. Senator Abraham returned his blue slips in April 2000, providing more than enough time for the Committee to hold a hearing. What happened? Please listen to what Kent Markus of Ohio said about President Clinton's Sixth Circuit nominees.

Professor Markus was nominated by President Clinton in February of 2000, also to fill a vacancy on the Sixth Circuit. Both home State Senators indicated their approval of his nomination. Nevertheless, he was not granted a Judiciary Committee hearing. His troubling account of that experience sheds added light on the Michigan situation. In his testimony before this Committee last May, this is what Professor Markus said:

"To their credit, Senator DeWine and his staff and Senator Hatch's staff and others close to him were straight with me. Over and over again, they told me two things: one, there will be no more confirmations to the Sixth Circuit during the Clinton administration; and, two, this has nothing to do with you, don't take it personally, it doesn't matter who the nominee is, what credentials they may have, or what support they may have. See item number one."

And Professor Markus continued: "On one occasion, Senator DeWine told me, 'This is bigger than you and it's bigger than me.' Senator Kohl, who had kindly agreed to champion my nomination within the Judiciary Committee, encountered a similar brick wall. The fact was a decision had been made to hold the vacancies and see who won the Presidential election. With a Bush win, all those seats could go to Bush rather than Clinton nominees."

Senator Stabenow and I are not alone in the view that we hold that what occurred with respect to these nominees was fundamentally unfair. On more than one occasion, Judge Gonzales, the cur-

rent White House counsel, has acknowledged that it was wrong for the Republican-led Senate to delay action on judicial nominees for partisan reasons, at one point even calling the treatment of some nominees during the Clinton administration “inexcusable.”

Mr. Chairman, I doubt that any member of this Committee or of the Senate from either party would simply acquiesce if confronted with this set of facts. Senator Stabenow and I are determined to do what we can to see to it that the tactic used against the two Michigan nominees does not succeed. But we are equally determined to see a bipartisan solution. In order to achieve a fair resolution of this past injustice, Senator Stabenow and I have proposed a bipartisan commission to recommend nominees to the President. Similar commissions have been used in other States. That commission would not guarantee a recommendation for any particular individual, much less the nomination of any particular individual, since that is obviously up to the President. Yet that proposal has been rejected.

Mr. Chairman, all of us have an opportunity to seek a bipartisan solution to the problem, avoiding a highly divisive and acrimonious debate. With this number of vacancies, we have an unusual opportunity to find a better path for consideration of judicial nominees. Finding that path would be of great benefit, not just as a solution to this problem but to set a positive tone for the resolution of other disputes perhaps as well.

As to the qualifications of the nominee before you today, we would ask that the Committee hold the record open so that we can complete our vetting process. Our process began just a week and a half ago when we were suddenly—and, I may say, surprisingly—confronted with the decision that our blue slip objections, which we based on the procedural history just outlined, would be ignored.

Each of us who was here over the past several years knows what occurred with respect to the two Michigan nominees to the Sixth Circuit. And I believe that every one of us here at that time knows that what occurred was unfair to those nominees. All of us can contribute to the resolution of this situation. Notwithstanding that today’s hearing is being held over our objection, we still have time to reach a bipartisan compromise and to move forward together, and I hope that we can do just that.

Thank you.

Chairman HATCH. Thank you, Senator. We appreciate having your viewpoint.

Senator LEVIN. And I would ask unanimous consent that the letters that I referred to be made part of the record.

Chairman HATCH. Without objection, we will make them part of the record.

Senator Stabenow, we will turn to you?

**STATEMENT OF HON. DEBBIE STABENOW, A U.S. SENATOR
FROM THE STATE OF MICHIGAN**

Senator STABENOW. Well, thank you, Mr. Chairman.

First, I would thank you and members of the Committee for allowing me and allowing Senator Levin to have the opportunity to address you today on this important issue. I completely agree with Senator Levin’s testimony, and I thank him for his leadership in

trying to bring fairness to the nomination process in the Sixth Circuit Court of Appeals. I also welcome Judge Saad to the hearing.

Since I did not come to the Senate until 2001, I want to focus on the future, having supported Senator Levin's testimony. Senator Levin has clearly outlined the history of how two highly qualified women failed to get a hearing before this Committee for more than 4 years and 1½ years, respectively.

Mr. Chairman, it seems to me that the best way to end this impasse is to forge a bipartisan compromise. If the administration and Senator Levin and I do not do so, I am concerned that this struggle between the two branches of Government will continue for some time. Senator Levin and I have proposed to settle this conflict, as has been indicated, by appointing a bipartisan commission to make recommendations to the White House on judicial nominations. Our proposal would be based on a commission that is up and working just across Lake Michigan in Wisconsin.

The State of Wisconsin commission has produced bipartisan nominees for both the district and the circuit courts since its inception under the Carter administration. In fact, just recently, the Republican Chairman of the House Judiciary Committee, Representative James Sensenbrenner, joined Wisconsin's two Democratic Senators, Senators Kohl and Feingold, in announcing the renewal of their commission to recommend to the President nominees for Wisconsin vacancies on the Seventh Circuit Court of Appeals.

Mr. Chairman, since he is your counterpart on the House Judiciary Committee, I am sure you know Congressman Sensenbrenner well, and you know that Chairman Sensenbrenner probably has a great deal of political and policy differences with Senators Kohl and Feingold. But for the sake of balance and fairness, he agreed to help form the bipartisan Wisconsin commission, and I commend all of those involved in that process.

And according to press reports, Chairman Sensenbrenner has said that the White House is "willing to go through the commission process" for an appeals court nominee from Wisconsin.

The Wisconsin commission includes representatives from the Wisconsin Bar Association, the deans of the State's law schools, as well as members appointed by both Republicans and Democrats, and they only recommend qualified candidates that have the support of the majority of the commission. The President then looks to the recommendations of the commission when making his nominations. The Wisconsin commission's recommendations have always been followed by the President, Democrat or Republican. Regardless of their political party, they have always been followed.

This type of commission preserves the constitutional prerogatives of both the President and the Senate. It allows the President to pick one of the recommended nominees and protects the Senate's advise and consent role.

Mr. Chairman, Wisconsin is not the only State, as we all know, where this type of bipartisan commission works. In a similar form, it has worked in several other States, including Washington State, California, and, as the esteemed Ranking Member indicated, in Vermont.

I strongly believe that this is the best way to correct this current situation, and I would ask that the members of this Committee

support such a bipartisan solution. If this process is good enough for Wisconsin, if this process is good enough for Congressman Sensenbrenner, why is it not good enough for us in Michigan? It would take almost no time to set up a similar commission in Michigan, and we are prepared to do so to move this process along.

Senator Levin and I are interested in finding a bipartisan solution to this problem. If we can agree on a commission, we are willing to accept recommended nominees even if they are not Helene White or Kathleen Lewis or any other person we would choose if it were up to us.

Let's let a bipartisan commission work, and we all will let the chips fall where they may. Mr. Chairman, let's look to the future and restore civility to this process. This has gone on too long.

I urge all the members of this Committee to support this bipartisan solution, and I would like to thank you again for allowing us to testify. I would be happy to answer questions, and I am hopeful that we can join together in resolving this issue.

Chairman HATCH. Thank you, Senator Stabenow. We appreciate your remarks.

Congressman—

Senator LEVIN. Mr. Chairman, I am wondering if I could be excused at this time.

Chairman HATCH. You sure can.

Senator LEVIN. Thank you.

Chairman HATCH. We know how busy you are, and we are happy to do so.

Congressman Rogers, we will take your testimony now.

PRESENTATION OF HENRY W. SAAD, NOMINEE TO BE CIRCUIT JUDGE FOR THE SIXTH CIRCUIT, BY HON. MICHAEL ROGERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Representative ROGERS. Thank you, Mr. Chairman. Good morning, and Senator Leahy as well. Thank you for allowing me to testify today along with the members of the Committee, Senator Levin, and Senator Stabenow. I certainly appreciate the opportunity to be here today.

I have the very great privilege to be here today to introduce a great jurist who is not only a personal friend, but someone who has distinguished himself in the practice of law. But, first, Mr. Chairman, I would like to say I appreciate all that you have gone through to come to the conclusion to hold this hearing today. In talking with you personally, your staff, and the administration, the anguish in which you reached this conclusion should be noted for the public. This has not been a political decision for you. This has been a decision about justice and fairness and balance.

There are some extenuating circumstances that have brought us all here today. I have heard the word "unprecedented" several times, and I certainly won't get into the intricacies of Senate rules. But we do have something that is unprecedented. The Administrative Office of the U.S. Courts has deemed the circumstances in the Sixth Circuit Court a "judicial emergency"—unprecedented. Nearly 40 Assistant United States Attorneys wrote letters speaking to the

dangers of the vacancies of this court to bringing justice to the people for the Sixth Circuit—also unprecedented.

I am not here today, Mr. Chairman, to argue and debate the Senate rules, as my fellow colleagues from Michigan have done. But I do believe, today, that the victim is not the Senate rules, if this hearing does not go forward and certainly the nomination be confirmed for Henry Saad and the others on the Sixth Circuit. But the real victims will be those of terrorism, of organized crime, of white-collar criminals and drug cartels. Some 435-plus cases are now being held up in the Sixth Circuit because of the vacancies and the lack of the Circuit's ability to process these cases. That and those folks, Mr. Chairman, are the true victims.

But I do not want to forget why we are here. I am here for something pretty spectacular, a great moment in someone's life to have the opportunity to be here for a hearing to serve the people of the United States in the Federal courts. And I would ask not only a good friend of mine but, again, a great jurist, Mr. Saad, if he would please stand up and introduce his guests who are here with him today, with your indulgence, Mr. Chair.

Henry?

Judge SAAD. Thank you. Thank you, Mr. Chairman. With me today are my son, Andrew Saad, who is here from college. My oldest son, Edward, who is practicing law in New York, is, I believe, probably practicing law in New York.

Also with me today is Mara Letica; her son, Kyle Johnson; my law clerk, Melissa Taylor; my secretary of long standing, Margot Stallard; my other good friend, J.P. Mackley. I am sure I missed some other people. And I appreciate the introduction, and I appreciate the courtesy to appear before you.

Chairman HATCH. We are happy to have all of you here. Thanks for introducing them, Judge Saad.

Representative ROGERS. Thank you, Mr. Chairman. Thank you, Henry. And I just wanted to go over a little bit—you did a great job, Mr. Chairman, talking about his background. I just want to cover some different things, if I may.

Judge Henry Saad is a distinguished court of appeals judge with over a decade of experience on the bench. He has sat on the Michigan Court of Appeals since 1994, having been re-elected twice with bipartisan support. And I can speak personally to that, Mr. Chairman. I actually campaigned with Mr. Saad on the first time in some very, very Democrat areas of my district, and it was overwhelming, the support and admiration those communities had for Mr. Saad.

The American Bar Association rated Judge Saad as qualified to sit on the U.S. Court of Appeals for the Sixth Circuit. The nomination, and I hope confirmation, of Judge Saad is a testament to the American dream and the ideals upon which our Nation is moored.

Born in Detroit to parents of Lebanese descent, Judge Saad is the first person in his family to attend college. Now the son of a welder for one of Detroit's automakers stands on the threshold of becoming the first Arab American appointee to the Sixth Circuit Court. The importance of Judge Saad's nomination to our Nation's Arab American communities and really all minority communities cannot be understated. Hailing from Michigan, which possesses

over 400,000 citizens of Arab descent, I am acutely aware of the positive message sent by Judge Saad's nomination to the Federal bench. At a time when many Arab American communities are suspect of their Government, the Arab American community needs Judge Saad as a role model.

In addition to being a leader in Michigan's Arab American community, Judge Saad has continually sought to bring together people of differing faiths. He was a board member of the National Council of Christians and Jews after founding the American Arabic and Jewish Friends, which is now a subsidiary of the National Conference of Community and Justice.

Distinguished attorney and former Labor Department Solicitor General George Salem said it best, and I quote, "Judge Saad has spent his career building good relations with all ethnic communities."

While diversity on the Federal bench, Mr. Chairman, is important, there is no doubt that Judge Saad also possesses the judicial temperament consistent with an independent Federal judiciary. However, do not just take my word for it. Here are what some of Judge Saad's colleagues, both Republicans and Democrats, have to say regarding his fitness for the Sixth Circuit Court of Appeals, and I quote:

"Judge Saad personifies the ideal judicial temperament we all seek and admire." Roman Gibbs, former Democrat Mayor of Detroit.

"Despite allegiances to different political parties, we almost always resulted in a consensus. Henry is known and respected as a scholar and great member of our court." Michigan Appellate Court Judge Mark Cavanaugh.

"Judge Saad has indeed sought common ground and often achieved it." Alan May, Vice Chair, National Conference for Community and Justice.

I quote: "Judge Saad is a person of the highest integrity and ability and a person deeply committed to the rule of law under the Constitution." Robert Sedler, professor of law and counselor to the American Civil Liberties Union.

Those testimonials, Mr. Chairman, are all from individuals affiliated directly or indirectly with the Democrat Party in the State of Michigan. And they reveal that Judge Saad is the embodiment of the independent Federal judiciary. Additionally, it is my understanding that Jim Zogby, the president of the Arab American Institute and a prominent Democrat activist, is also sending a letter of support to the Committee on behalf of Judge Saad.

Please allow me to share just a few more of these from two very, very respected jurists in Michigan's legal community.

"Judge Saad is one of the most thoughtful and fair-minded jurists on the court." Stephen Markman, Michigan Supreme Court Justice and former Senate Judiciary Committee staff member, and that ought to say it all for you, Mr. Chairman.

Chairman HATCH. That says a lot.

Representative ROGERS. And I quote again: "Henry Saad has distinguished himself as an independent jurist who respects the rule of law, the independent of the judiciary, and the constitutional role

of the judiciary.” Maura Corrigan, Michigan Supreme Court Chief Justice.

Now, in the courtroom, Judge Saad has served the citizens of Michigan with competence and integrity. He has significant appellate experience in both civil and criminal matters, authoring well over 75 published majority opinions. The respect afforded Judge Saad is best exemplified by the broad bipartisan support of his nomination to the Federal appellate bench. Groups as disparate as the United Auto Workers and the Michigan Chamber of Commerce have endorsed his nomination.

Furthermore, Judge Saad was asked to serve on the Iraqi Advisory Committee of the American Bar Association by former Detroit Mayor and incoming American Bar Association President Dennis Archer.

Like any public servant, Judge Saad is dedicated to improving the law and helping his State and local community through volunteer work. Judge Saad was the Chairman of the board of the Oakland Community College Foundation, president of the Wayne State University Law School Alumni Association, and he is currently a member of the Board of Visitors of the Ave Maria Law School.

Additionally, in 1997, Judge Saad received the Salute of Justice, John O’Brien Award for Outstanding Volunteer Service to the People of Oakland County. In 1995, he received the Arab-American and Chaldean Council Civic and Humanitarian Award for Outstanding Dedication to Serving the Community with Compassion and Understanding.

I think, Mr. Chairman, we have made quite clear his qualifications, and the good news in all of this is my two esteemed colleagues in the Senate, Senators Levin and Stabenow, don’t question the qualifications of Henry Saad to serve on the U.S. Circuit Court of Appeals. But while my primary mission today is to introduce my good friend and distinguished jurist, I would be remiss if I did not take the opportunity to address the emerging judicial crisis surrounding the Michigan nominees of President Bush to the Sixth Circuit.

The fact is today represents the first hearing for a Michigan judicial nominee for over 2½ years into the Bush administration. Just as there is no dispute over Judge Saad’s qualifications to serve on the Sixth Circuit, the same holds true for the remaining three Michigan nominees to the Federal appellate bench. The other judges—Honorable Richard Allen Griffin, Honorable David McKeague, and Susan Bieke Neilson—are all distinguished jurists who have served the citizens of Michigan with competence and integrity. All of Michigan’s four appellate nominees have received favorable ratings from the American Bar Association and have widespread bipartisan support and respect from the legal community.

Senator your decision today to initiate hearings on the Michigan Four, as they have become known back home, is commendable, but only a start. Fairness to these judges and to the American citizens who seek the timely administration of justice requires that these nominees be provided not only a hearing but also a vote in the full Senate. The continued wholesale blocking of Michigan nominees, despite their unquestioned merit, is inconsistent with the dignified traditions of the United States Senate.

Of course, it should also be noted that the wholesale blockade of Michigan nominees also extends to district court nominees Thomas Luddington and Dan Ryan as well.

Moreover, the Sixth Circuit is critically understaffed as these nominees have been nominated to fill vacancies that have been designated—and I repeat again because it is this important, Mr. Chairman—by the non-partisan National Judicial Conference as “judicial emergencies”—again, unprecedented.

Additionally, the United States Attorney’s Office for the Eastern District of Michigan issued a formal letter indicating that the severe understaffing in the Sixth Circuit hinders effective prosecution of criminal cases. Post-9/11, with all going on in the world today, Mr. Chairman, hardly do we find that acceptable circumstances. Again, unprecedented.

In fact, the partisanship currently surrounding the Michigan Four is a recent phenomenon because there is a strong record of bipartisanship relating to former President Clinton’s Federal judiciary nominees from Michigan, and I just want to go over these real quickly, Mr. Chairman, if I may.

Michigan Senator Spencer Abraham, a Republican, supported, even chaired the confirmation hearing for Hon. Eric Clay, who was President Clinton’s first nominee to the Sixth Circuit Federal Court of Appeals. With then-Senator Abraham’s strong support, Judge Clay was the first Clinton administration Federal appellate court nominee to get a hearing in the 105th Congress and the second to be confirmed by the Senate. Of 16 judgeships on the Sixth Circuit, Judge Clay continues to be the only Michigander.

The bipartisanship during the Clinton administration did not end with Judge Clay. Then-Senator Abraham also supported Clinton Federal district court nominees Arthur Tarnow, George Steeh, Victoria Roberts, Marianne Battani, and David Lawson. These five judges, all with Senator Abraham’s support, are now judges on our Federal court.

As you see, the partisanship surrounding Michigan judges is only of recent vintage. Unfortunately, Mr. Chairman, the citizens of Michigan are in grave jeopardy of losing Michigan’s voice on the Sixth Circuit. Four seats, one-quarter of the circuit’s membership, hang in the balance, and it would be an injustice for the people of Michigan to lose their representation in the judicial process.

Mr. Chairman, as elected officials, we should work together to promote the system of justice that is timely, fair, and ensures Michigan’s residents are represented by Michigan judges. Again, this hearing is a step in the right direction, and I applaud you for the courage to proceed with this hearing and steadfastly urge without delay the swift confirmation of Judge Henry William Saad to the U.S. Court of Appeals for the Sixth Circuit.

Mr. Chairman, I thank you, and I would ask that this place be the place where we seek justice and not seek retribution for at least perceived wrongs in the past. The fact that we do have a whole series of unprecedented events with the judicial emergency declaration and the Assistant United States Attorneys declaring the dangers of the vacancies of this court, I applaud again your courage for having this Committee hearing and nomination process, and I would hope that we could find that thoughtful debate

and end what unfortunately has become a very partisan temper tantrum and come to the conclusion that justice should be brought to the people of Michigan in the Sixth Circuit. And I thank you very much, Mr. Chairman and Ranking Member, for the opportunity to testify today.

Chairman HATCH. Thank you, Congressman Rogers. We appreciate your taking the time—

Senator LEAHY. Mr. Chairman, if I might, when you finish, I want to say something while he is still here.

Chairman HATCH. Sure. We appreciate your taking time to come over.

Senator LEAHY. I want to say it while he is still here.

Chairman HATCH. No, I understand. If you will wait so Senator Leahy can also make a comment. I know it is tough to give this kind of time over on this side of the Hill, but we are happy to have you here, and we appreciate your remarks.

Senator Leahy would like to say something.

Senator LEAHY. I also thank the Congressman for coming over here. He has been very patient. He has been here all morning, and I know with his workload that is also difficult, and his willingness to come here when he is not in session, when the other body is on recess, so I appreciate doubly your taking the time.

Representative ROGERS. Thank you, Senator.

Senator LEAHY. I was a little bit concerned hearing some of your statistics, and I know you did not intend this impression. But when you spoke of the vacancies, you understand that for 5 years there were nominees by President Clinton to fill some of those vacancies. They were never allowed to have a hearing or a vote. Had they been allowed that, had President Clinton's nominees been allowed to even be voted on, there wouldn't have been a vacancy.

When I became Chairman, I very quickly after I became Chairman, even though these vacancies were all—by sworn statement, were kept vacancies so that President Clinton couldn't nominate anybody. Notwithstanding that, shortly after I became Chairman, I held the first hearing on a Sixth Circuit nominee in, I think, 5 years. It was President Bush's nominee. And we have now confirmed four. We have actually had—since then we have had a 50-percent increase between the time I was Chairman and Senator Hatch again was Chairman, we have had a 50-percent increase in the number of active judges on the court, four judges confirmed—Rogers, Gibbons, Sutton, and Cook. I just didn't want to leave the impression that nothing has been done nor that vengeance was taken because people nominated by President Clinton for the Sixth Circuit were not allowed to have hearings.

In fact, as I said, the first such hearing in 5 years was one I held on one of President Bush's nominees, and we have put in four judges and confirmed four judges to that circuit since then.

Chairman HATCH. Well, maybe before you leave, Congressman, if you could give a few more minutes, we have a vote on, but I will just make some short comments, and then we will go to the vote and recess and come right back.

Let me first point out that the current controversy about Michigan nominees dates back more than a decade. At the end of President George Herbert Walker Bush's administration, Bush I, two

Michigan nominees to the Federal courts, John Smetanka and Henry Saad—who is before us today—never got hearings in the Democratic-controlled Senate and failed to attain confirmation. Judge Saad has been waiting for 11 years.

As President Clinton named his nominees to fill judicial vacancies, there was no expectation, let alone demand, that the two previous nominees be renominated by a new administration. Accordingly, President Clinton did nominate Michigan nominees to both the Sixth Circuit and the district courts. In fact, nine of those nominees were confirmed. A majority were confirmed during Republican control of the Senate; in other words, Clinton nominees.

Two nominees, Helene White and Kathleen McCree Lewis, failed to attain confirmation. Now, I feel badly about that. The primary criminal for their failed nomination was the lack of consultation with one of the home State Senators, which is an absolute must in this process. And there was none.

In his letter to the then-White House Counsel Beth Nolan, Senator Abraham wrote to express his astonishment and dismay that President Clinton forwarded the nomination for a Sixth Circuit seat without any advance notice or consultation. What was particularly troubling was that Senator Abraham had worked with the previous White House counsel, Mr. Ruff—a great man, by the way—to improve the consultation process.

In fact, despite previous difficulties, Senator Abraham had fully cooperated with the administration in advancing the nominations of a number of Michigan nominees. Unfortunately, the situation again deteriorated, and the White House reverted to its previous pattern of lack of consultation.

In fact, Senator Abraham was not consulted and, in fact, was told by the White House counsel that, despite earlier representations, the administration felt under no real obligation to do anything of the kind, which is unprecedented. And because of the White House's lack of consultation, the nominations of the two individuals did not move forward.

Now, this was consistent with both Democrat and Republican well-stated policy communicated to Mr. Ruff, that if good-faith consultation has not taken place, the Judiciary Committee will treat the return of a negative blue slip by a home State Senator as dispositive and the nominee will not be considered.

Now, I also want to note that today's hearing is not unprecedented. There have been nominations where negative blue slips were returned and a Senator's objection was certainly considered, but did not stop the process or necessarily defeat the nomination. For instance, Albert Moon was nominated in October 1985 to be United States District Judge for the District of Hawaii. Although both home State Senators returned negative blue slips, a confirmation hearing was held in late November 1985. Mr. Moon's confirmation was held over by the Committee in December 1985 in business meetings, and the 99th Congress adjourned before action on the nomination could be completed.

Other examples are the nomination of John C. Shabazz, nominated to be U.S. District Judge for the Western District of Wisconsin, and the nomination of Judge John L. Coffey, of Wisconsin, to be U.S. District Judge for the Seventh Circuit. In both cases,

Senator Proxmire returned blue slips prior to the Committee hearing, noting his objection to the nomination.

In the case of Judge Shabazz, Senator Proxmire also appeared and testified at the Committee's business meeting regarding his opposition to the nomination. Both confirmations were favorably reported by the Committee, and both were confirmed by the Senate.

While Senator Biden was Chairman, the Committee considered the nomination of Vaughn R. Walker to be U.S. District Judge for the Northern District of California. Senator Cranston opposed, the Democrat Senator at that time opposed this nomination, sending letters to President Bush and Senator Biden expressing his opposition. In November 1989, the Committee favorably reported the nomination and the full Senate confirmed Mr. Walker by unanimous consent.

Now, just to make the case a little more clear, I don't feel good about Helene White and Kathleen McCree Lewis. But, of course, I had nothing to do with the problem, and the problems were created by the Clinton White House.

Now, I would like nothing better than to work this out in a bipartisan way, and I have already talked to both Senators from Michigan and expressed that to them, and I will work to do that. This has been an embarrassing thing.

But let me just make the record clear with this chart. The record is clear that previous Presidents were treated fairly by the Senate. It is time to give President Bush the same courtesy and move forward with his Michigan judges to the Sixth Circuit and to the district courts.

And, by the way, my comments about if two negative blue slips are returned that person is basically dead referred to district court nominees. We are talking about circuit court nominees. And I don't know of any cases where circuit court nominees have not been given at least a hearing and a vote. There may be some, but I cannot think of any off—

Senator SESSIONS. Mr. Chairman, could I comment on that?

Chairman HATCH. Could I just finish this?

Senator SESSIONS. All right.

Chairman HATCH. Then I would be glad to have you comment.

Senator LEAHY. I will go first.

Chairman HATCH. I have to go to the Ranking Member first, and then I will come to you.

The record is clear that previous Presidents were treated fairly by the Senate, and I think President Bush deserves the same type of courtesy that the previous Presidents had, including President Clinton. And I think we should move forward with these Michigan judges to the Sixth Circuit and the district courts.

Now, on this chart, during the current Bush Presidency, the Senate has confirmed no Michigan judges in almost 2 years. Six nominations are pending and have been for quite a while.

During the Clinton Presidency, if you will notice there, the Senate confirmed nine Michigan judges, and I was Chairman for six of those years.

Although two Michigan nominees were left unconfirmed at the end of the Clinton Presidency—Helene White and McCree Lewis—

two nominees were also left without hearings at the end of President Bush I when he ended his term in 1992.

Now, during the first Bush Presidency, the Senate confirmed six Michigan judges, and two nominations were returned to the President.

So for those who like to keep score and who think that is the way to do this, the Michigan judge tally would be as followed: the current President Bush, zero for six. Zero. Can't even get a vote up or down in Committee. And up to now, lots of complaints about even holding hearings. But we have reached a point where the leadership has said these hearings have to go forward, and I think they are right. And we have given plenty of consideration to the negative blue slips, and I am going to give even more by trying to work out some bipartisan compromise if I can. But it is going to have to be a decent compromise.

Bush II, zero for six, the current President Bush. President Clinton got nine; two didn't make it. The prior President Bush, Bush I, got six but two didn't make it.

So when we talk about these things, we have got to get all the facts here, and, frankly, again, I will say that I don't feel good about this controversy. I happen to like both Michigan Senators. I like Spence Abraham, too, and he was not without honor here. He was right in what he did. And everybody knew it here. So to now try and paint that like President Clinton was not being treated fairly is just not quite accurate, especially under those circumstances, because I was here and they did not even deign to talk to Senator Abraham, which is something that has to be done, no matter who is in the Presidency. And I believe this administration has been doing a good job.

Now, some Democrats interpret it that unless they do what the Democrat wants them to, he is not consulting. Well, that is not what consultation is.

So I just wanted to make those points. I will turn to Senator Leahy, and then I am going to finish with—

Representative ROGERS. Well, I think the numbers are in your favor, Mr. Chairman, and I appreciate your effort for justice, not retribution.

Senator LEAHY. If I might, Mr. Chairman, now that you have recognized me—

Chairman HATCH. Sure.

Senator LEAHY. And I certainly don't want to cut off Congressman Rogers. I want him to have time, too. But for those who think we don't always agree on things, I happen to absolutely agree with Senator Hatch that it is important to have all the facts, and two of them were sort of overlooked in this.

One, we talked about Henry Saad being sent up here by former President Bush and not given a hearing. The little thing that was overlooked, it was 6 days before the end of the session. A number of nominees, quite a large number of nominees, were sent up by former President Bush just a few days before the end of the session. It was made very clear by folks at the Bush White House that they knew they would not get a hearing under the so-called Thurmond rule, Strom Thurmond's longstanding rule that within 6 months of an election you don't hold hearings on judges unless you

have both the Chairman and Ranking Member and both party Leaders agree. And I don't know anybody who has ever had a hearing 6 days before you are about to adjourn.

But they were sent up for two reasons: one, former President Bush fully expected to get re-elected; but, secondly, it was a nice political thing to lay out a number of these judges in different parts of the country and say now here is the kind of people I want for my next term. Nobody, Republican or Democrat, in my 29 years here has ever expected somebody to be confirmed 6 days before adjournment, nor did former President Bush. I think what he expected to do was be re-elected, and he was just going to put all these people in early on in the next year. That is just one fact that should be put out.

Another one, when we talk about procedures of past Chairmen, my Chairman is this man. He is my Chairman, and I want to talk about his procedure, which is this: Never once, never once, when it was a Democratic President did he violate the blue slip rule. And those negative blue slips were all from Republican Senators—

Chairman HATCH. Ronnie White.

Senator LEAHY. Never once.

Chairman HATCH. Ronnie White.

Senator LEAHY. Never once did he—you actually had favorable blue slips on Ronnie White, and then when—

Chairman HATCH. Negatives.

Senator LEAHY. No, you had two positives. He was voted out of Committee, and then Senator Ashcroft said, wait, I have changed my mind, I am not in favor of him. And Senator Bond—

Chairman HATCH. At the time of the vote there were two negative blue slips.

Senator LEAHY. Yes, well—

Chairman HATCH. And he got a vote. He got a vote. Our people aren't getting votes.

Senator LEAHY. He got sandbagged.

Chairman HATCH. We are being filibustered.

Senator LEAHY. He got sandbagged and you know it.

I am going to go vote, speaking of votes.

Chairman HATCH. All right. Senator Sessions?

Senator SESSIONS. I was going to recall, Mr. Chairman, your leadership in opposing a movement when President Clinton was President to expand the power of the blue slip to circuit judge nominees, and Republicans wanted to do that. You said that we should not do that, we should maintain the position that on a circuit nominee, a blue slip was not dispositive. And you stood firm on that, and we had a vote on it, and your position prevailed.

You have shown integrity and consistency in these issues.

Chairman HATCH. Can I interrupt you on that? You know, it was not unreturned blue slips that prevented hearings for Clinton nominees. It was the utter lack of consultation by the Clinton White House with home State Senators that prevented those nominees from going forward and getting votes. That is a rule that really we have always honored around here.

Now, look, there are some nominees I wish could have gotten through. I think I have expressed that. But I acted in good faith to move as many judicial nominees as I could, and I think my

record is pretty darn good. It was much better than the record when the Democrats controlled the Congress.

I don't want to go into all the statistics. We have been through them before, but the fact of the matter is it was much better. And I get a little tired of this partisanship that keeps coming up with selective recollections.

Sorry to interrupt you, Senator, but to be honest with you, this is the third nomination of Judge Saad, and he hasn't been given the time of day until now. I think it is time to start giving people at least the time of day. And, frankly, these nominees deserve up-and-down votes. Maybe they will be defeated. I don't know. But they deserve—the President deserves up-and-down votes, and especially when they get out of Committee and get to the floor, and especially when they are on the floor. We have never in the history of this country had a filibuster, a true filibuster against a judicial nominee until this President. And, frankly, it is not only unjustified, it is reprehensible what is going on.

I am sorry to keep you here, but I think it is important—

Representative ROGERS. Absolutely, Mr. Chairman.

Chairman HATCH. —that you report back to our friends in Michigan that this is not quite as clear-cut as our friends on the other side are trying to make it. In fact, it isn't the way they are trying to make it.

Senator I am sorry to interrupt you.

Senator SESSIONS. Well, John Smetanka was a United States Attorney with me. He was a brilliant guy, a decent person. Everybody liked him, moderate in demeanor and philosophy, studied at Catholic Seminary, just in every way a fine person. He sat over a year and never got a vote. And I remember that one distinctly. We were all just very concerned, his fellow United States Attorneys were, that he was denied that.

The first 9 nominees out of 11 that President Bush sent forward never got a hearing, I do not believe. Nine of the 11 never even got a hearing when the Democrats controlled this Committee for almost 2 years. That was an unprecedented blocking of nominees. I have never—I don't think we have ever seen that.

When we first started this new Congress and President Bush was elected, the Democrats demanded, after having complained about blue slip policies when President Clinton was President, they demanded enhanced power to block nominees with a blue slip. You remember that? It was very intense. They just demanded they have even more power to block nominees, and hopefully that didn't happen.

Another unprecedented thing happened. Two nominees for the circuit court were voted down in Committee, Priscilla Owen and Pickering. No Clinton nominees were ever voted down in Committee the entire time you were Chairman, Mr. Chairman.

Chairman HATCH. That is right.

Senator SESSIONS. We had filibusters in Committee. That has never been done before, and you finally invoked the power of the Chair to call a vote, which you have the power to do, to end the filibuster in Committee, and we have had filibusters on the floor of the United States Senate for Federal judges, which has never occurred in the history of this country.

So for the Democrats to suggest that they are somehow carrying on in the fashion that was carried on when President Clinton was nominating and Republicans had the majority here is just wrong. They have changed in a whole lots of ways and using a blue slip to block every nominee, four of them en bloc, without stating any objection for them, is such an abuse of that policy, I think we just simply have got to confront it, Mr. Chairman.

Chairman HATCH. Thank you, Senator.

We have got to get over. We are late for a vote. But let me just say this: There has been a rumor that somebody on the Democrat side might invoke the 2-hour rule. I hope that is not true, but that has been a rumor. But if they do—and they would have a right to, although I think it would not be good faith in my eyes. But if they do, then we will have to recess until the end of the session today, and we will continue to finish this hearing by the end of the day. So I just want to make everybody aware that that is not going to stop this hearing from going forward. It is just going to make it inconvenient and miserable for everybody if that happens to occur. I hope it will not, and I hope that is just a rumor. But I have heard it, and I just thought I would make that clear so everybody will understand.

I want to thank you for your patience, for being here, and for your kind remarks.

Representative ROGERS. Thank you, Mr. Chairman.

Chairman HATCH. And I want to thank the other two Senators as well. I appreciate their position. I appreciate their feelings. And I want to try and help them and help Michigan, if I can. But I sure as heck think we ought to get up-and-down votes for these people.

Representative ROGERS. Thank you for your passion, Mr. Chairman.

Chairman HATCH. With that, we will recess until I can get back. [Recess 12:20 p.m. to 12:44 p.m.]

Chairman HATCH. I am going to wait just a few more minutes, and then I am going to start. I hate to start without Senator Leahy, but I have been waiting for almost 15 minutes. I know there is not a follow-up vote. So I hope the Democrats will send somebody in here for this hearing, but if not, we will proceed.

I have been informed by my counsel that Senator Leahy said to go ahead and start. So, Judge Saad, we are going to ask you to come forward. Please raise your right hand. Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Judge SAAD. I certainly do. Thank you.

Chairman HATCH. Thank you.

**STATEMENT OF HENRY W. SAAD, NOMINEE TO BE CIRCUIT
JUDGE FOR THE SIXTH CIRCUIT**

Judge SAAD. Shall I be seated, Mr. Chairman?

Chairman HATCH. You surely can. We are very honored to have you before the Committee. You have an excellent reputation, as has been explained here by the Congressman, and I am well aware of it myself, having followed this saga now for the last 11 years. And I intend to see that you are treated fairly, and I intend to see that their nominations are treated fairly, if we can, when they achieve

the Presidency. But the point I have been making is I don't think President Bush has been treated very fairly, although I think we treated their nominees as fairly as I could under the circumstances.

Now, we are honored to have you here with members of your family and your friends, some of your friends. Would you care to make a statement before the Committee?

Judge SAAD. The only statement I would like to make, Mr. Chairman, is that I am absolutely pleased and honored to be here. I have had a great respect as a student of government for our Government in total, what our Founding Fathers did for this Senate, and its traditions, and I respect and honor what you are doing and what the Senate Committee is doing, and I am prepared to answer any questions that you may have.

[The biographical information follows:]

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

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

Henry William Saad;

Henry "Bill" Saad; (My middle name on my birth certificate and driver's license is "Bill".)

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

Judge, Sixth Circuit Court of Appeals.

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.

Michigan Court of Appeals
27777 Franklin Road, Suite 760
Southfield, MI 48034
(248) 358-3783

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

July 15, 1948 in Detroit, Michigan

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

Married, June 21, 1970

Maiden Name of Wife:

Maxine Elizabeth Martin
Teacher
Dearborn Public Schools
Dearborn, MI 48104

One (1) dependent child.

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

Sacred Heart Major Seminary, January – March, 1992

St. Mary's Orchard Lake, Sts. Cyril & Methodius Seminary, September 1991 – January 1992.

Wayne State University Law School; attended 1971-1974; J.D., 1974, magna cum laude.

Wayne State University, attended 1966-1971; BSBA with distinction.

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.

Judge, Michigan Court of Appeals (1994-Present)

27777 Franklin Road, Suite 760

Southfield, MI 48034

Paid Position

Adjunct Professor of Law

University of Detroit/Mercy School of Law (1976-Present)

651 E. Jefferson

Detroit, MI 48226

Paid Position

Adjunct Professor of Law

Wayne State University Law School (1977-Present)

Detroit, MI 48202

Paid Position

Partner (1981-1994)

Associate (1974-1981)

Summer Associate (1973)

Dickinson, Wright

525 N. Woodward Avenue

Suite 2000

Bloomfield Hills, MI 48034

Paid Position

Teaching Assistant (1972-1973)
Wayne State University Law School
Professor Marchant (now deceased)
Detroit, MI 48202
Paid Position

Teaching Assistant (1972)
Josephson's Bar Review Course
Address Unknown

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.

No.

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.

Cody High School, National Honor Society

Wayne State University, BSBA, with distinction

Wayne State University Law School Juris Doctorate, magna cum laude

Oakland County Republican Committee, Salute to Justice, John O'Brien Award for Outstanding Volunteer Service to the People of Oakland County (1997)

Arab-American and Chaldean Council (ACC) Civic and Humanitarian Award for Outstanding Dedication to Serving the Community with Compassion and Understanding (1995)

Wayne State University Law School, Order of the Coif (2000)

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

American Bar Association

- Labor, Litigation Section

- EEO Committee of Labor & Employment Law Section

State Bar of Michigan
- Legal Education Committee and Labor Section
- Labor Council, Labor Relations Law Section
- Special Committee on Law and the Media

Detroit Bar Association
- Public Advisory Committee
- Labor Law Committee
- Civil Rights Committee

Oakland County Bar Association
- Employment Law Committee

Arab-American Bar Association
- Treasurer (1990-1994)
- Secretary (1989-1990)
- Member (1994-Present)

Michigan Judges Association
- Member

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.

Michigan Courts – 1974

United States Court of Appeals for the Sixth Circuit – 1974

United States District Court for the Eastern (1974) and Western (1980) Districts of Michigan

United States District Court for the Eastern District of Ohio – 1975

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.

Michigan Employment Relations Commission (1990-1994)

- Arbitrator

Catholic Lawyers Society (1982-1998)

The Federalist Society – Detroit Chapter (1989-Present)

- Member

American Arbitration Association (AAA) (1985-1994)

- National Board of Arbitrators

Michigan Department of Civil Rights

- Hearing Referee (1979-1994)

National School Boards Association

- Council of School Attorneys (1986-1994)

Detroit Personnel Management Association

- Member (1985-1994)

Michigan Public Employer Labor Relations Association

- Member (1984-1994)

The Birmingham Community House (1989-1994)

Greater Detroit Chamber of Commerce (1988-1991)

- Health Care Committee

American Arabic and Jewish Friends (1978-1996)

- Co-Chair, Executive Committee

- Advisory Committee

Operation ABLE (1989-1994)

- Board of Directors

The Greater Detroit Inter-Faith Roundtable of the National Conference of Christians and Jews

- National Board of Trustees (1991-1997)

Arab American Chaldean Council (1987-1994)

- Advisory Board and General Counsel

Spectrum Human Services (1991-1994)

- Board of Trustees

Oakland Community College Foundation

- Chairman of the Board (1993-1994)

- Board Member (1992-1994)

Holy Name Church, Birmingham, Michigan

- Lay Reader (1990-2000)

- Choir (1992-Present)

Mothers Against Drunk Drivers (1995-1997)

American Heart Association (1999-Present)

- Board Member

Community Foundation of Southeastern Michigan (1998-2000)

- Board Member (1998-2000)

WTVS Channel 56 Educational Television Foundation (1999-Present)

- Trustee

I do not currently belong, nor have I ever belonged, to an organization which, to my knowledge, discriminates in membership 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.

Published Writings

"The Bildisco Decision – Balancing Political Interests," Employee Relations Law Journal, Vol. 10, No. 2, Autumn, 1984

"AIDS and the Law," Management Solutions, September, 1986

"AIDS – Legal Implications for the Employer," Michigan Journal, Vol 66, No. 2, February, 1987

"Chapters 37, 38, and 39," Schlei & Grossman's Employment Discrimination Law, Second Edition, 1983-85 Cumulative Supplement, 1987

"New State Libel Standard May Inhibit Press Freedom," Michigan Lawyers Weekly, February 1989, Henry W. Saad & Lisa Mikalonis

"The Making of a Litigation-Ready Story," Editor & Publisher, June 10, 1989 (same

article as immediately below)

“The Making of a “Litigation-Ready” Story – 20 Guidelines for Investigative Reporters,” Communicator (Radio-Television News Directors Association), February, 1991

“The Case for Prohibitions of Racial Epithets in the University Classroom,” The Wayne Law Review, Vol. 37, No. 3, Spring, 1991

“ADA Update: EEOC Issues Final Interpretive Relations,” The Oakland County Bar Association Laches, Number 312, January, 1992

“Resume Fraud and the After-Acquired Evidence Doctrine,” The Oakland County Bar Association Laches, Number 328, May, 1993

Michigan Public Employer Labor Relations Association Manual, contributed chapter on Constitutional law, 1994

“Ethics for the Matrimonial Lawyer,” Michigan Family Law & Practice, (3rd Text), West Publishing, 1998

“Practical Ways to Improve the Ethical Behavior of Lawyers,” Michigan Journal, Vol. 78, No. 9, September 1999.

I have given numerous speeches over the last ten years: however, the vast majority have been on specific legal subjects such as effective appellate advocacy, brief writing and judicial procedure. These speeches, by and large, have been given to high school classes, bar associations and other civic groups. I do not have copies of these speeches because I give my remarks extemporaneously. Moreover, I have searched for notes that I have prepared in preparation for speeches and have enclosed the only ones I have been able to find to date which involves a speech given under the auspices of the ABA CEELI project in Zagreb, Croatia on the importance of an independent judiciary to post-communist, eastern European countries. Furthermore, given the rather “academic” nature of my speeches, there has been no press coverage to my knowledge and my secretary, law clerk and I have searched the Internet and have been unable to find any press coverage of my remarks. The only coverage we have uncovered to date (and we will continue to search) are the attached comments regarding a speech I gave to first-year students at Ave Maria Law School as a member of the Board of Visitors.

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.

N/A

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

Good. Last physical examination was May 7, 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;

***Staple v Staple*, 241 Mich App 562; 616 NW2d 219 (2000) - Special seven-judge panel convened to decide conflict matter.**

Robert and Marcella Staple reached a settlement regarding all issues relating to their divorce, including that Robert would pay certain weekly amounts in alimony and child support, that the alimony payments would be reduced if Marcella Staple became employed and her gross income exceeded a certain monthly amount, and that Robert's support obligations would end in the event that Marcella either died or remarried. These terms were incorporated into the consent judgment. Several years later, Marcella Staple moved for an increase in the amount and term of the alimony award provided in the consent judgment. Citing *Bonfiglio v Pring*, 202 Mich App 61; 507 NW2d 759 (1993), the trial court ruled that the alimony provision in the consent judgment was not periodic alimony modifiable by MCL 552.28, but nonmodifiable alimony "in gross." On appeal, and pursuant to the binding precedent of *Bonfiglio*, the Court of Appeals affirmed under MCR 7.215(H). *Staple v Staple*, 237 Mich App 805, 812; 603 NW2d 278 (1999). However, the Court ordered that a special panel be convened to resolve the conflict between this case and *Bonfiglio*.

In *Staple v Staple*, 241 Mich App 562; 616 NW2d 219 (2000) (opinion by Saad, J.), in considering when an agreed-upon alimony provision in a divorce judgment entered pursuant to a settlement is subject to future modification under MCL 552.28, and when it is final and nonmodifiable, the Court examined two distinct approaches by Michigan courts, the "bright-line" approach and the "intent" approach. Regarding courts which adhere to the bright-line approach, the Court observed that the classification of "alimony in gross" and "periodic alimony" are "confusing misnomers" because alimony in gross is not really alimony intended for the maintenance of a spouse, but rather is in the nature of a division of property and is, therefore nonmodifiable under MCL 552.28, though the recipient spouse dies or remarries before all the payments are made. However, if the installment payments are subject to any contingency, such as death or remarriage of a spouse, courts adhering to the bright-line approach hold that the payments are more in the nature of maintenance payments, and therefore periodic alimony subject to modification.

Further, courts that decide the modifiability issue according to the periodic alimony or alimony in gross distinction have regarded the presence of a contingency as a bright-line indicator that the arrangement is for modifiable periodic alimony, though the parties have agreed or intended that the alimony not be subject to modification under MCL 552.28. On the other hand, courts, like the one in *Bonfiglio*, that follow the “intent” approach opt to resolve the “finality” versus “modifiability” dilemma in accordance with the parties’ intent, regardless whether contingencies are present.

After considering this issue in light of the statutory language of MCL 552.28 and the public policy behind Michigan laws on alimony and the finality of judgment, the Court adopted a modified approach that allows the parties to a divorce settlement to clearly express their intent to forgo their statutory right to petition for modification of an agreed-upon alimony provision, and to clearly express their intent that the alimony provision is final, binding, and thus nonmodifiable. If the parties to a divorce agree to waive the right to petition for modification of alimony, and agree that the alimony provision is binding and nonmodifiable, and this agreement is contained in the judgment of divorce, their agreement will constitute a binding waiver of rights under MCL 552.28. Accordingly, the Court opted to honor the parties’ clearly expressed intention to forgo the right to seek modification and to agree to finality and nonmodifiability, a holding consistent with the trend seen in both the courts and the legislatures of sister states. The holding applies only to judgments entered pursuant to the parties’ own negotiated settlement agreements, not to alimony provisions of a judgment entered after an adjudication on the merits.

***Rembert v Ryan’s Family Steak Houses, Inc*, 235 Mich App 118; 596 NW2d 208, lv den 461 Mich 927 (1999) - Special seven-judge panel convened to decide conflict matter.**

When hired by defendant, plaintiff signed an arbitration agreement with Employment Dispute Services, Inc. (EDS). The agreement states that plaintiff agrees to arbitrate, through EDS, all employment-related disputes between employees and defendant that could be filed in state or federal court. While employed, plaintiff sued defendants in circuit court for race discrimination under the Civil Rights Act (CRA) and for handicap discrimination under the Persons With Disabilities Civil Rights Act (PWDCA) (then known as the Michigan Handicappers’ Civil Rights Act). Defendants moved for summary disposition based on the signed arbitration agreement and the trial court granted the motion. On appeal, and pursuant to the binding precedent of *Rushton v Meijer, Inc (On Remand)*, 225 Mich App 156, 570 NW2d 271 (1997), the Court of Appeals affirmed in part and reversed in part under MCR 7.215(H). *Rembert v Ryan’s Family Steak House, Inc*, 226 Mich App 821, 825; 575 NW2d 287 (1998). However, the Court ordered that a special panel be convened to resolve the conflict between this case and *Rushton*.

In *Rembert v Ryan’s Family Steak Houses, Inc*, 235 Mich App 118; 596 NW2d 208 (1999) (opinion by Saad, J.), the Court held that an individual employment agreement to arbitrate statutory claims, including Civil Rights Act-based claims, are enforceable if “(1) the parties have agreed to arbitrate the claims (there must be a valid,

binding, contract covering the civil rights claims), (2) the statute itself does not prohibit such agreements, and (3) the arbitration agreement does not waive the substantive rights and remedies of the statute and the arbitration procedures are fair so that the employee may effectively vindicate his statutory rights.” *Id.* at 156.

The Court observed that the holding is consistent with Michigan’s public policy, and federal public policy, both of which increasingly and overwhelmingly favor arbitration as an inexpensive and expeditious alternative to litigation. Specifically, the holding furthers the objectives of the Michigan Arbitration Act (MAA), which is a strong and unequivocal legislative expression of Michigan’s proarbitration public policy. In accordance with the MAA’s endorsement of arbitration, and the CRA’s and the PWDCRA’s silence regarding the matter, the Court declined to interfere with traditional principles of freedom of contract and private parties’ contractual undertakings to arbitrate these claims. Moreover, federal legislation and case law also strongly favor arbitration, which is evident from the promulgation and interpretation of the Federal Arbitration Act.

***People v Holtzman*, 234 Mich App 166; 593 NW2d 617 (1999)**

Defendant was charged with two counts of first-degree criminal sexual conduct. The prosecution’s witness list included several persons who were to testify that defendant frequently invited teenage girls to his home, encouraged them to drink excessively, and touched them sexually while they were intoxicated. Defendant moved for mistrial after learning that prosecuting attorneys had prepared notes regarding pretrial interviews of witnesses, which witnesses had received before testifying. The circuit court declared a mistrial and dismissed the case with prejudice, finding that the notes were subject to Michigan’s reciprocal criminal discovery rule, MCR 6.201(A)(2).

People v Holtzman, 234 Mich App 166; 593 NW2d 617 (1999) (opinion by Saad, P.J.), raised an issue of first impression involving the interpretation of MCR 6.201(A)(2). The court rule provides that, in a criminal proceeding, a party must provide all other parties “any written or recorded *statement* by a lay witness whom the party intends to call at trial, except that a defendant is not obliged to provide the defendant’s own statement.” (Emphasis added.) Specifically, the Court considered whether the term “statement” as used in MCR 6.201(A)(2) includes the attorneys’ notes of interviews with witnesses whom the attorney intends to call at trial or whether the term “statement” carries its usual connotations, i.e., a narrative account that the witness either writes out and formally signs or adopts, or that the witness orally delivers for a verbatim transcription or recording.

The Court held that an attorney’s interview notes do not meet the definition of “statement” in the Michigan Court Rules because only written witness statements that have been signed or otherwise adopted or approved by the persons who made them and verbatim recorded statements qualify as “statements” under MCR 6.201(A)(2). The Court reasoned that, unless the “statements” sought to be discovered meet this narrow definition, mandatory disclosure of witness interview notes would run afoul of two deeply ingrained ethical and privilege rules by (1) subjecting that attorney to being called as a witness to explain any disparities between her notes of the witness statement and the witness’ trial testimony, and (2) compromising protected work product under MCR

2.302(B)(3) because the notes invariably reflect an attorney's mental impressions and strategies. The Court emphasized that, for a trial court to find that a prosecutor's notes from a witness interview have been adopted or otherwise approved by a witness, there must be a finding of unambiguous and specific approval by the witness. In support of its holding, the Court further observed that the goals of criminal discovery for both defense and prosecution are already well served by existing law and procedural rules, without taking an expansive reading of MCR 6.201(A)(2).

***Hyde v University of Michigan Regents*, 226 Mich App 511; 575 NW2d 36 (1997), *lv den* 459 Mich 909 (1998)**

Plaintiff, an employee of defendant who worked as an instructor in a university-sponsored program, brought a wrongful discharge action against the university, alleging racial discrimination. Plaintiff alleged non-economic damages for embarrassment, humiliation, outrage and indignation. Pursuant to MCR 2.314(A)(1), defendant sought discovery of plaintiff's mental history. Plaintiff refused the request and asserted the physician-patient privilege. The trial court denied defendant's motion in limine to preclude plaintiff from introducing any evidence of emotional distress at trial. The jury found that defendant discriminated against plaintiff by treating him differently than nonminorities, and awarded him noneconomic damages for outrage, indignation, humiliation, and embarrassment.

Defendant appealed and, in *Hyde v University of Michigan Regents*, 226 Mich App 511; 575 NW2d 36 (1997) (opinion by Saad, J.), the Court considered whether a plaintiff may seek more than economic damages yet shield from discovery his mental history in an employment discrimination, wrongful discharge case brought under the Civil Rights Act, MCL 37.2101 *et seq.* Under MCR 2.314(A)(1), "[w]hen a mental or physical condition of a party is in controversy, medical information about the condition is subject to discovery under these rules to the extent that "(a) the information is otherwise discoverable under MCR 2.302(B)," and "(b) the party does not assert that the information is subject to a valid privilege." The Court held that the trial court clearly erred in attempting to create two separate categories of psychic injuries: (1) 'serious' injuries such as 'emotional distress' and 'mental anguish,' and (2) 'garden variety' injuries, such as hurt feelings, outrage, embarrassment, and humiliation. Where, as here, a plaintiff in an employment discrimination case seeks recovery for anything beyond economic damages (such as pain and suffering, mental distress, hurt feelings, embarrassment, and so forth), he has thereby placed his mental condition in issue and consequently open to discovery under MCR 2.314(A).

The Court reasoned that, in order for a defendant to defend a claim for noneconomic damages, he must be permitted to determine, through discovery, whether factors other than the defendant's alleged misconduct may have influenced the plaintiff's emotional and mental condition. To preclude discovery of the plaintiff's mental or psychological history while permitting the plaintiff to testify regarding noneconomic damages, would deprive the defendant of a fair trial. Thus, if the plaintiff asserts the privilege to prevent discovery on this issue, the plaintiff must withdraw, or the court must dismiss, any claim for noneconomic damages.

***Harris v University of Michigan Bd of Regents*, 219 Mich App 679; 558 NW2d 225 (1996), application for leave to appeal held in abeyance 568 NW2d 672, app dis 570 NW2d 786 (1997)**

Plaintiff sustained injuries in a sledding accident while in Colorado with the University of Michigan's gymnastics team which was operated by the university's athletic department. Plaintiff filed suit against the coach, the university's board of regents, president and athletic director. Defendants moved for summary disposition on the basis of governmental immunity under MCL 691.1407 and argued that operating an athletic program was a governmental function for which it was entitled to immunity. Plaintiff claimed that, because the athletic department's activities were conducted primarily to produce a profit, they are proprietary and therefore not sheltered by governmental immunity. The trial court granted summary disposition to defendants pursuant to MCL 691.1407.

In *Harris v University of Michigan Bd of Regents*, 219 Mich App 679; 558 NW2d 225 (1996) (opinion by Saad, J.), the Court considered whether intercollegiate athletics is a governmental function of a public university so as to immunize the university from tort liability and, if so, whether the proprietary function exception to governmental immunity applies under these facts. Given the Legislature's broad definition of a governmental function, and in light of the history of intercollegiate athletics at Michigan universities and colleges that has historic support from the Michigan Legislature, the Court held that intercollegiate athletics is a governmental function for purposes of immunity. Further, the rationale for various state court decisions regarding high school athletics is equally applicable to intercollegiate athletics: (1) team sports and competitions are properly a part of a school's overall physical education program, (2) the function of a physical education and related sports program is inherently educational, and (3) because such a program is educational, it is properly considered a governmental function. Moreover, Congress apparently considers collegiate athletics sufficiently related to higher education to embrace such activities within the exemption from federal income tax accorded to educational institutions under 501(c)(3) of the Internal Revenue Code, 26 USC 501(c)(3); income generated by university or college sports teams from admission tickets and broadcasting revenue is not considered "unrelated business income" subject to tax.

Plaintiff also failed to establish that the athletic program is a proprietary function as an exception to governmental immunity, MCL 691.1413. To be a proprietary function, an activity must be conducted primarily for the purpose of producing a pecuniary profit *and* not normally be supported by taxes or fees. According to Michigan case law, evidence that an activity is merely self-supporting indicates that is not proprietary. Further, after carefully reviewing the evidence properly before the trial court, the Court found it clear that many, if not most, of the sports programs at the university *lose* money. If the primary motive of the athletic department were to produce a profit, sports such as gymnastics that are not profitable would be dropped from the program. Moreover, the Court found it apparent, and indeed not seriously disputed by plaintiff, that public universities, including their athletic programs, are normally supported by taxes. Accordingly, the trial court correctly determined that the university's

operation of its athletic program was not a proprietary function under MCL 691.1413, and thus the university was entitled to governmental immunity from plaintiff's claims.

***Krohn v Sedgwick James of Michigan*, 244 Mich App 289; 624 NW2d 212 (2001)**

Plaintiff, who was fifty-seven years old at time of her termination, brought an action against her employer for age-based employment discrimination under the state Civil Rights Act (CRA). On appeal, plaintiff sought to overturn the jury's verdict, arguing that the trial court erroneously excluded direct evidence of discrimination by not allowing her to present evidence that her former supervisor uttered the phrase "out with the old and in with the new."

In *Krohn v Sedgwick James of Michigan*, 244 Mich App 289; 624 NW2d 212 (2001) (opinion by Saad, P.J.) the Court reviewed the narrow issue of what factors a court must consider in determining the relevance and admissibility of an allegedly discriminatory remark in a CRA claim. In analyzing this issue of first impression, the Court considered a line of authority from the federal courts known as "stray remarks" cases and set forth the following factors to determine the relevancy of such remarks: (1) Were the disputed remarks made by the decision maker or by an agent of the employer uninvolved in the challenged decision? (2) Were the disputed remarks isolated or part of a pattern of biased comments? (3) Were the disputed remarks made close in time or remote from the challenged decision? (4) Were the disputed remarks ambiguous or clearly reflective of discriminatory bias?

In concluding that the trial court did not abuse its discretion in excluding the comment "out with the old and in with the new," the Court found that the person who uttered the remark left his supervisory position one year before plaintiff's termination, no evidence suggested he had any decision making authority regarding plaintiff's discharge, he did not make the proffered remark in reference to plaintiff, he made it more than two years before plaintiff's termination, and the comment was clearly ambiguous and age neutral under the surrounding circumstances. Further, the Court ruled that, were it to find that the comment had some minimal relevance in light of the above factors, its probative value would have been substantially outweighed by the harm likely to result from its admission. MRE 403.

***Citizens for Common Sense in Govt v Atty General*, 243 Mich App 43; 620 NW2d 546 (2000)**

Plaintiff is a ballot question committee that opposed a certain ballot proposal sponsored by Let Local Votes Count. The ballot proposal was supported by the Michigan Municipal League (MML), a nonprofit corporation which funds its activities through fees assessed against its member cities and villages. In 1981, the Attorney General issued an opinion that the MML did not violate state law by spending funds to influence ballot proposals. In 1995, the Legislature amended the Michigan Campaign Finance Act (MCFA) to prohibit campaign contributions by a public body. Plaintiff claimed that MML's activities violated the Act. Because state agencies are bound to follow Attorney General opinions, plaintiff sought a declaratory judgment that the 1981 Attorney General opinion was invalid. The trial court granted summary disposition in favor of defendant,

in part, because it found that plaintiff had failed to exhaust its administrative remedies and there was no actual case or controversy to be addressed.

In *Citizens for Common Sense in Govt v Atty General*, 243 Mich App 43; 620 NW2d 546 (2000) (opinion by Saad, J.), the Court held that it lacked jurisdiction to decide whether the MML's expenditures violate MCL 169.257's prohibitions against municipalities expending public funds to influence ballot proposals because plaintiff failed to exhaust its administrative remedies. The Legislature has directed the Secretary of State to issue declaratory rulings regarding the MCFA, yet plaintiff never attempted to obtain a ruling as provided by the Administrative Procedures Act. The Court ruled that plaintiff, and the Court, must give the Secretary of State an opportunity to interpret and enforce § 57, and the Court of Appeals must decline plaintiff's invitation to presume how the Secretary of State or the Attorney General may opine or act in light of § 57. It would not have been futile for plaintiff to exhaust its administrative remedies because there was no indication that the Secretary of State would not seek guidance from the Attorney General or that the Attorney General would not have rendered an updated opinion in light of the amendments to the MCFA. Absent a declaratory ruling binding on the parties, the Court of Appeals lacks jurisdiction over the cause. Moreover, because plaintiff's injuries were merely hypothetical, there was no actual controversy over which the Court could exercise jurisdiction.

***Capital Region Airport Authority v DeWitt Charter Twp*, 236 Mich App 576, 601 NW2d 141 (1999), lv den 461 Mich 996 (2000)**

Capital Region Airport Authority (CRAA), a state agency charged with operating a city airport, brought suit against DeWitt Charter Township, claiming exemption from the township's zoning ordinance so that it could develop a business park on airport grounds. The case arose from CRAA's decision to subdivide a portion of Capital City Airport into a development to be known as the "Capital City Airport Business Park." At least some of the lots were slated for lease to nonaviation-related businesses, including the construction of a tortilla processing plant on airport grounds. The proposed developments were contrary to the zoning ordinance DeWitt promulgated pursuant to its authority under the Township Zoning Act, MCL 125.271 *et seq.* The CRAA denied that DeWitt had the authority to regulate the CRAA's land use: it argued that the aeronautical statutes conferred on the CRAA the exclusive jurisdiction over airport property and operations. The CRAA sued DeWitt for declaratory relief to establish the CRAA's right of exclusive jurisdiction over airport land use. The trial court granted summary disposition to the CRAA and held that the Airport Authorities Act, MCL 59.801 *et seq.* conferred on the CRAA exclusive jurisdiction over all airport operations, including land use, and therefore exempted the CRAA from both the zoning regulations and the Land Division Act.

In *Capital Region Airport Authority v DeWitt Charter Twp*, 236 Mich App 576, 601 NW2d 141 (1999) (opinion by Saad, P.J.), the Court held that the CRAA is not exempted by the Airport Authorities Act or the Township Zoning Act from local land use regulation with respect to the CRAA's proposed development of airport lands for non-aeronautical uses, though aeronautical uses are exempted. The Michigan Supreme Court, in *Dearden v Detroit*, 403 Mich 257; 269 NW2d 139 (1978), established that the question of state

agency authority versus local land control is decided according to the legislative intent for the particular situation, rather than a set rule favoring either the agency or the municipality. State case law conflicted regarding how to discern legislative intent for purpose of the *Dearden* analysis. However, ultimately, the Supreme Court clarified *Dearden* and called on courts to discern legislative intent through examination of the various statutory provisions rather than emphasis on “particular talismanic words.” *Burt Twp v Dep’t of Natural Resources*, 459 Mich 659, 669; 593 NW2d 534 (1999).

Using this analysis, the *Capital Region Airport Authority* Court ruled, on the basis of the Airport Authorities Act, MCL 259.807, there is no indication that the Legislature intended for the CRAA to exercise exclusive jurisdiction over the airport. While the Aeronautics Code, by virtue of § 9 of the Airport Authorities Act, confers on the CRAA exclusive authority over aeronautical operations at Capital City Airport, it makes no mention of the agency’s authority over nonaeronautical activities conducted on airport grounds. Indeed, neither of the provisions cited by CRAA expresses a legislative intent that the CRAA have exclusive authority over the acquisition, development, sale, or lease of airport land in conjunction with nonaeronautical uses.

The Court ruled that a review of the Township Zoning Act further supported its conclusion that the CRAA enjoys exclusive authority over aeronautical functions, but not over nonaeronautical functions. The Court further held that the CRAA was not exempt from the requirements of the Land Division Act regarding proposed non-aeronautical developments of airport lands; CRAA’s exclusive authority over the airport’s aeronautical activities did not endow it with exclusive authority over airport land used for non-aeronautical purposes, and there was no indication in the Land Division Act that the Legislature intended for airport lands to be exempt. MCL 125.271(1).

***In re Disclosure of Juror Names and Addresses*, 233 Mich App 604; 592 NW2d 798 (1999)**

During the highly-publicized jury trial of Ervin Dewain Mitchell on consolidated charges of felony murder and three counts of first-degree criminal sexual conduct, the trial court took measures to protect jurors’ identities by identifying them only by number, sequestering the jurors during trial, and prohibiting the media from showing the jurors’ faces. Before the jury reached a verdict, the Detroit Free Press petitioned the court to release the jurors’ names and addresses postverdict. The trial court informed the jurors of the request and asked their opinions. The jurors opposed the request and the trial court denied it.

In *In re Disclosure of Juror Names and Addresses*, 233 Mich App 604; 592 NW2d 798 (1999) (opinion by Saad, J.), the Court considered whether the trial court was required, under the media’s First Amendment right to news gathering, to provide the Free Press, postverdict, with the names and addresses of the jurors. Here, the juror identities were not concealed from the parties and the media was not barred from the courtroom, denied a transcript of the proceedings, or prohibited from interviewing jurors.

In balancing the strong public policy of openness against the policy of protecting the integrity of the jury system by safeguarding jurors' legitimate interests, the Court held that the press has a qualified right of access to names and addresses of jurors postverdict. The Court qualified this right of access by also holding that trial courts have discretion to impose appropriate restrictions on the manner and time of disclosure, and in some circumstances, perhaps, to refuse disclosure, in order to accommodate all the interests of justice, where safety concerns of jurors are found to be legitimate concerns. However, a trial court cannot deny media access to jurors' names and addresses without first making a determination that concerns for jurors' safety are legitimate and reasonable. Privacy concerns alone, unaccompanied by safety concerns, are not sufficient to justify total denial of media access to jurors' names; however, privacy concerns may justify a lesser restriction, such as a brief waiting period or an order prohibiting reporters from repeatedly attempting to question jurors who have already refused an interview.

***People v Stephan*, 241 Mich App 482; 616 NW2d 188 (2000)**

The prosecutor charged defendant with first-degree murder, assault with intent to murder, and two counts of felony firearm and defendant filed a notice of intent to assert an insanity defense. Before trial, the prosecutor requested the court to instruct the jury on the correct, current burden of proof for insanity and guilty but mentally ill (GBMI) verdicts. The standard jury instruction for insanity imposes the burden of proof on the defendant to prove insanity by a preponderance of the evidence. However, the standard jury instruction for GBMI, consistent with the non-amended GBMI statute, continues to place the burden of proof on the prosecutor to show beyond a reasonable doubt that the defendant was not insane. The trial court denied the prosecutor's request to infer that the GBMI statute was implicitly amended along with the insanity statute and indicated that it would read the jury instructions as drafted by the Michigan Supreme Court.

In *People v Stephan*, 241 Mich App 482; 616 NW2d 188 (2000) (opinion by Saad, J.), the Court was asked to decide whether the Legislature's 1994 amendment to the statute governing the criminal defense of insanity serve as an implicit amendment or partial repeal of the statute governing the GBMI verdict. The prosecutor contended that the trial court should not instruct the jury that the prosecutor carries the burden of proving that the defendant was not legally insane for purposes of a GBMI conviction. By making this request, the prosecutor asked the court to infer that the GBMI statute was implicitly amended along with the insanity statute, so that the two statutes are consistent in their allocation of proofs with respect to a defendant's alleged insanity and mental illness. Pointing out that MCL 768.29a requires the court to read these instructions together, the prosecutor contended that the instructions contradict each other, and that the jury would be confused by the contradictory instructions on burden of proof.

The Court acknowledged the prosecutor's concern that the 1994 amendment created an inconsistency between the two statutes with respect to the allocation of the burdens of proof; however, it found the prosecutor's requested relief contrary to the doctrine of separation of powers because the Legislature alone holds the authority to correct the statutory discrepancy. Because the separation of powers doctrine is central to our jurisprudence, the Court declined to encroach on legislative prerogative by rewriting

the GBMI verdict statute. If the Court were able to harmonize the GBMI verdict statute with the 1994 insanity defense statute amendments through the limited action of striking out particular words or phrases, it would do so. However, the Court concluded that it could not resolve the conflict through this limited action. Instead, the Court would have to significantly revise the entire structure of the GBMI verdict statute by imposing a specific new burden of proof for each of the three elements of a GBMI verdict, contrary to the manner in which the Legislature decided to draft the statute. The Court's aversion to judicial intrusion into the legislative province precludes this sort of rewriting de novo of the statute. Therefore, the Court deferred to the Legislature to make the necessary changes.

- (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

***Helder v North Pointe Ins Co*, 234 Mich App 500; 595 NW2d 157 (1999), rev'd sub nom *Helder v Sruba*, 462 Mich 92 (2000)**

In *Helder*, a dramshop action, a bar owner, over the course of a few years, hit his girlfriend after he drank at his own bar. His girlfriend sued the bar owner under the dramshop laws and the bar owner/boyfriend defaulted. Plaintiff thereafter sought \$100,000 from the dramshop insurance carrier, which refused to pay because it was never given notice or opportunity to defend the primary suit. The Michigan Court of Appeals held, in a 2 to 1 decision, that the insurer was not liable because it received no notice of the claim from its insured (the bar owner/boyfriend/defaulting defendant), and therefore, had no opportunity to defend. The Michigan Supreme Court reversed, holding that insured's failure to notify his carrier should not prejudice plaintiff.

***Horton v Verhelle*, 231 Mich App 667; 588 NW2d 144 (1997), overruled sub nom *Smith v Globe Life Ins Co*, 460 Mich 446 (1999)**

In *Horton*, defendant Homeowner Construction Lien Recovery Fund appealed the trial court's grant of summary disposition to plaintiff, a subcontractor who sought recovery from the fund after the general contractor failed to pay. The Court of Appeals held, among other things, that a genuine issue of material fact precluded summary disposition regarding whether the subcontractors' lien waivers were forged. Regarding the standard of review for a motion under MCR 2.116(C)(10), the Court of Appeals stated that summary disposition is appropriate only when the court is satisfied that "it is impossible for the nonmoving party to support his claim at trial because of a deficiency that cannot be overcome." *Horton* at 672. In *Globe, supra* at 455 n 2, an unrelated case, the Supreme Court overruled *Horton* (among several other cases) to the extent that it applied the standard of review stated in *Rizzo v Kretschmer*, 389 Mich 363; 207 NW2d 316 (1973). In *Globe*, the Supreme Court opined that "it is no longer sufficient for plaintiffs to promise to offer factual support for their claims at trial" but must "present evidentiary proofs creating a genuine issue of material fact for trial." *Globe, supra* at 455 n 2.

***Auto-Owners Ins Co v Perry*, 223 Mich App 1; 566 NW2d 10 (1997), rev'd sub nom *MEEMIC v Morris*, 460 Mich 180 (1999)**

In *Auto-Owners*, plaintiff insurer paid survivors loss benefits to defendant/decedent's children, without offsetting social security benefits received by the children. However, the insurer reserved the right to seek reimbursement of such offsets if the Michigan Supreme Court reversed a Court of Appeals decision denying that right. The Court of Appeals held, based on the children's knowledge of and acquiescence to the reservation of rights and based on prior case law that the insurer was entitled to reimbursement once the reversal occurred, from the date the payments began. The Supreme Court ruled that the children were not entitled to the overpaid amounts. However, the Court remanded the case to the trial court for an evidentiary hearing to determine whether the insurer was "equitably entitled to any reimbursement of the overpayments under a theory of unjust enrichment, and, if so, the amounts of reimbursement due." *MEEMIC* at 199-200.

***Bolt v City of Lansing*, 221 Mich App 79; 561 NW2d 423 (1997), rev'd 459 Mich 152 (1998)**

The issue here was whether the charge levied by the City of Lansing for a new sewer system was a fee, which does not require taxpayer approval, or, a new tax which requires taxpayer approval. The Michigan Court of Appeals, in a 2 to 1 decision, held the charge was a fee. The Michigan Supreme Court reversed and held that the charge was a tax requiring voter approval under the Headlee Amendment to the Michigan Constitution.

***Lagalo v Allied Corp*, 218 Mich App 490; 554 NW2d 352 (1996), rev'd 457 Mich 278 (1998)**

In *Lagalo*, plaintiff suffered injuries when his brakes failed following the installation of a master brake cylinder manufactured by defendant. On appeal, the Court of Appeals set aside the jury's verdict after the jury made an inconsistent and irreconcilable finding that the manufacturer of a master brake cylinder was negligent and also that the manufacturer did not breach its implied warranty. This Court reasoned that if the manufacturer breached its duty with respect to the manufacture of the cylinder, the cylinder necessarily was not fit for its intended and anticipated use, making the manufacturer liable for breach of implied warranty. The Michigan Supreme Court reversed, finding that the jury could have concluded that, while the cylinder's failure showed negligent manufacture, there was no breach of implied warranty in light of the period during which plaintiff "could have obtained a second repair in safety."

***Kent County Deputy Sheriffs' Ass'n v Kent Cty Sheriff*, 238 Mich App 310; 605 NW2d 363 (1999), aff'd 463 Mich 353 (2000).**

The Michigan Employment Relations Commission (MERC) held that, under the Public Employment Relations Act (PERA), the employer, Kent County Sheriff, was not required to disclose internal affairs files to the union prior to arbitration of

the disciplined deputy sheriff's grievance. MERC ruled that the employer had no duty to disclose because it believed that co-workers might coerce witnesses to modify their testimony. In a subsequent but identical factual case, the union again tried to obtain internal affairs files. The employer, sheriff, refused, citing MERC's earlier holding. The union then made a FOIA request for the internal affairs files which the circuit court granted. The Michigan Court of Appeals, in a 3 to 0 decision, held that PERA preempts FOIA and reasoned that Michigan's comprehensive public sector labor laws would be undermined by case-by-case state court rulings which contradict MERC. The Michigan Supreme Court upheld the non-disclosure holding of the Court of Appeals, but disagreed with the preemption rationale.

People v Darrell Simpson, unpublished opinion per curiam of the Court of Appeals, issued November 18, 1997 (Docket No. 185484).

The Michigan Court of Appeals originally reversed part of a Criminal Sexual Conduct conviction because the trial court impermissibly admitted propensity evidence under MRE 404(b). The Michigan Supreme Court remanded and asked our Court to re-evaluate our decision in light of two recent Michigan Supreme Court decisions involving a substantial re-articulation of the standards for propensity or other acts evidence. After the first remand, our Court again reversed part of the conviction based on the trial court's erroneous admission of propensity or bad acts evidence which should have been excluded under 404(b). Our Michigan Supreme Court again remanded the case following another re-articulation of 404(b) and another Michigan Supreme Court decision. Thereafter, our Court upheld the conviction under 404(b) as re-articulated by our Michigan Supreme Court.

People v Mark Thomas, unpublished opinion per curiam of the Court of Appeals, issued May 22, 2001 (Docket No. 216063).

The Michigan Supreme Court asked our Court to remand this case to the trial court to determine whether the court reporter had, in fact, properly transcribed a certain word used by the trial court judge in his instructions to the jury.

People v Scott Farrow, unpublished opinion per curiam of the Court of Appeals, issued February 19, 1999 (Docket No. 211127).

The Michigan Court of Appeals held that defendant had consented to a search, contrary to the trial court's finding that the consent was not volitional. On appeal, the Michigan Supreme Court held that the Court of Appeals "overstepped its review function" and in effect made independent findings substituting its judgment for that of the trial court judge. Therefore, the Court reinstated the circuit court's order suppressing the evidence seized during the search.

Sewell v Jeffrey Cruse, unpublished opinion per curiam of the Court of Appeals, issued December 3, 1999 (Docket No. 208148).

The Michigan Court of Appeals affirmed a jury award to a tenant against a landlord for personal injuries caused by an alleged wrongful termination of tenancy and subsequent eviction. The Michigan Supreme Court reversed and held that an earlier summary eviction proceeding precluded plaintiff's suit under the doctrine of *res judicata*.

Coleman v State of Michigan, unpublished opinion per curiam of the Court of Appeals, issued August 27, 1999 (Docket No. 202847).

The Michigan Court of Appeals affirmed the trial court's grant of summary disposition to the State of Michigan in an employment discrimination case brought by a corrections officer. The Michigan Supreme Court reversed and held that the trial court erroneously granted summary disposition because there was sufficient evidence for the matter to go to trial.

Russell v Whirlpool Financial Corp, unpublished opinion per curiam of the Court of Appeals, issued December 19, 1997 (Docket No. 191892).

In this worker's compensation case, the Michigan Court of Appeals affirmed the Worker's Compensation Appellate Commission's decision to reverse a magistrate's open award of disability benefits. The Michigan Supreme Court reversed the Court of Appeals and thus affirmed the magistrate's award under an interpretation of a rather complicated worker's compensation statute involving favored work.

People v Herbert Dunning, unpublished opinion per curiam of the Court of Appeals, issued October 14, 1997 (Docket No. 189107).

The Michigan Court of Appeals affirmed defendant's first-degree felony murder conviction and denied defendant's claim of appeal based on ineffective assistance of counsel. This Court denied defendant's request based, in part, on the law of the case doctrine because a previous panel of the Court denied defendant's requested relief. The Michigan Supreme Court reversed the order and remanded the matter to the circuit court for a hearing on defendant's ineffective assistance of counsel claim.

Brian Evens v Shiawassee Cty Road Commission, unpublished opinion per curiam of the Court of Appeals, issued March 7, 1997 (Docket No. 186253).

This traffic accident case involved the doctrine of governmental immunity. The Michigan Court of Appeals agreed with plaintiff that the trial court incorrectly held that the county did not owe a duty to plaintiff to erect a stop sign. Accordingly, we reversed the trial court's grant of summary disposition in favor of defendant. At issue was the application of the "highway exception" to

governmental immunity and whether the government had a duty to install, maintain, repair or improve traffic control devices, including traffic signs. The Michigan Supreme Court observed that the case law interpreting and applying the highway exception “has precipitated an exhausting line of confusing and contradictory decisions.” The Michigan Supreme Court went on to note that “these decisions have created a rule of law that is virtually impenetrable, even to the most experienced judges and legal practitioners. Further, these conflicting decisions have provided precedent that both parties in highway liability cases may cite as authority for their opposing positions. This area of law cries out for clarification which we attempt to provide today.”

The Michigan Supreme Court noted that because its prior decisions “have improperly broadened the scope of the highway exception, provided a variety of contradictory and conflicting interpretations of this exception’s statutory language, we believe it is impossible to avoid overruling some precedent, if we are to set forth a clear rule of law.” After a lengthy decision reviewing the history of the highway exception to governmental immunity, the Michigan Supreme Court held that counties and road commissions have no duty under the highway exception to install, maintain, repair or improve traffic control devices, including traffic signs. Therefore, the Michigan Supreme Court reversed the decision of the Court of Appeals and reinstated the circuit court’s grant of summary disposition in favor of defendant Road Commission.

- (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.

***People v Kim*, 245 Mich App 609; 630 NW2d 627 (2001)**

Defendants, charged with committing the crime of riot, challenged the riot statute, MCL 752.541, as unconstitutionally vague and overbroad. The statute provides that “[i]t is unlawful and constitutes the crime of riot for 5 or more persons, acting in concert, to wrongfully engage in violent conduct and thereby intentionally or recklessly cause or create a serious risk of causing public terror or alarm.”

The Court (opinion by Saad, J.), observed that, in *People v Garcia*, 31 Mich App 447; 187 NW2d 711 (1971), the Court of Appeals upheld the constitutionality of the riot statute and specifically ruled that the phrase “public terror or alarm” is “sufficiently clear that men of average intelligence would not have to guess as to its meaning nor differ as to its application.” *Id.* at 456. However, defendants argued that *Garcia* was superseded by *NAACP v Claiborne Hardware Co*, 458 US 886; 102 S Ct 3409; 73 L Ed 2d 1215 (1982), in which a group of white merchants sustained damages during a civil rights boycott and brought a claim against participants and certain civil rights organizations, seeking injunctive relief and money damages. The United States Supreme Court held in *Claiborne* that the nonviolent elements of the boycott activities were entitled to protection under the First Amendment. Thus, to the extent that the petitioners sought to bring about political, social, and economic change through the exercise of their First

Amendment rights of speech, assembly, association, and petition, rather than through riot or revolution, their activities were constitutionally protected.

In *Kim*, the Court held that *Claiborne* clearly did not supersede *Garcia*. The Court stated that both *Garcia* and *Kim* involved violent conduct rising to the level of riot. The Court further reasoned that neither the First Amendment nor *Claiborne* offers protection to the defendants under these facts, citing *Grayned v Rockford*, 408 US 104; 92 S Ct 2294; 33 L Ed 2d 222 (1972) (peaceful demonstrations in public places are protected by the First Amendment, although when they turn violent, demonstrations lose their protected quality as expression under the First Amendment).

***People v Stephan*, 241 Mich App 482; 616 NW2d 188 (2000)**

Defendant, charged with first-degree murder, assault with intent to murder, and two counts of felony firearm, filed a notice of intent to assert an insanity defense. Before trial, the prosecutor requested the court to instruct the jury on the correct, current burden of proof for insanity and guilty but mentally ill (GBMI) verdicts. The standard jury instruction for insanity imposes the burden of proof on the defendant to prove insanity by a preponderance of the evidence. However, the standard jury instruction for GBMI, consistent with the non-amended GBMI statute, continues to place the burden of proof on the prosecutor to show beyond a reasonable doubt that the defendant was not insane. The trial court denied the prosecutor's request to infer that the GBMI statute was implicitly amended along with the insanity statute and indicated that it would read the jury instructions as drafted by the Michigan Supreme Court.

In *People v Stephan*, 241 Mich App 482; 616 NW2d 188 (2000) (opinion by Saad, J.), the Court was asked to decide whether the Legislature's 1994 amendment to the statute governing the criminal defense of insanity serve as an implicit amendment or partial repeal of the statute governing the GBMI verdict. The prosecutor contended that the trial court should not instruct the jury that the prosecutor carries the burden of proving that the defendant was not legally insane for purposes of a GBMI conviction. By making this request, the prosecutor asked the court to infer that the GBMI statute was implicitly amended along with the insanity statute, so that the two statutes are consistent in their allocation of proofs with respect to a defendant's alleged insanity and mental illness. Pointing out that MCL 768.29a requires the court to read these instructions together, the prosecutor contended that the instructions contradict each other, and that the jury would be confused by the contradictory instructions on burden of proof. leave to appeal.

The Court acknowledged the prosecutor's concern that the 1994 amendment created an inconsistency between the two statutes with respect to the allocation of the burdens of proof; however, it found the prosecutor's requested relief contrary to the doctrine of separation of powers because the Legislature alone holds the authority to correct the statutory discrepancy. Because the separation of powers doctrine is central to our jurisprudence, the Court declined to encroach on legislative prerogative by rewriting the GBMI verdict statute. If the Court were able to harmonize the GBMI verdict statute with the 1994 insanity defense statute amendments through the limited action of striking out particular words or phrases, it would do so. However, the Court concluded that it could

not resolve the conflict through this limited action. Instead, the Court would have to significantly revise the entire structure of the GBMI verdict statute by imposing a specific new burden of proof for each of the three elements of a GBMI verdict, contrary to the manner in which the Legislature decided to draft the statute. The Court's aversion to judicial intrusion into the legislative province precludes this sort of rewriting de novo of the statute. Therefore, the Court deferred to the Legislature to make the necessary changes.

***People v Martin*, unpublished opinion per curiam of the Court of Appeals, issued December 26, 2000 (Docket No. 217195), vacated ___ Mich ___ (2001)**

This case arose out of a fatal shooting at defendant's trailer home following a violent argument between defendant and his wife, Dawn. During the altercation, defendant was shot once in the chest with a rifle and Dawn was shot three times by the same gun. One of the bullets passed through Dawn's brain, killing her within minutes of the shooting. At approximately 1:10 p.m., the county sheriff arrived at the scene in response to an emergency call. After the sheriff announced his presence, defendant crawled out of the trailer and told him, "She just fired again." The sheriff entered the home and saw Dawn lying on the living room floor along with a nearby rifle, six spent shell casings, various bullet holes and a large quantity of blood. After paramedics took defendant and Dawn to the hospital, the sheriff secured the scene by instructing two deputies to stand guard outside the trailer while he left to interview a neighbor. At approximately 4:00 p.m. that afternoon, a detective and two forensic specialists arrived at the trailer and, after talking to the deputies, entered the home to process the crime scene. No warrant was obtained to search defendant's home until the next day, and accordingly, a generalized search of the premises did not occur until then.

The prosecutor alleged that defendant shot and killed Dawn while defendant maintained that Dawn committed suicide. Defendant moved to suppress all evidence the crime lab investigators processed and seized after their warrantless "reentry" of his home by the crime lab technicians and the trial court denied the motion. The parties agreed that the sheriff validly entered defendant's trailer home without a warrant pursuant to the exigent circumstances exception. Based on *Michigan v Tyler*, 436 US 499, 98 S Ct 1942; 56 L Ed 2d 486 (1978), and its progeny, the Court of Appeals held that the continuation of the investigation by way of processing only those items the sheriff saw in plain view did not violate the Fourth Amendment.

The Court first acknowledged that, under *Mincey v Arizona*, 437 US 385; 98 S Ct 2408; 57 L Ed 2d 290 (1978), *Thompson v Louisiana*, 469 US 17; 105 S Ct 409; 83 L Ed 2d 246 (1984), *Flippo v West Virginia*, 528 US 11; 120 S Ct 7; 145 L Ed 2d 16 (1999), there is no categorical "murder scene" exception to the search warrant requirement. However, the Court ruled that those cases do not prohibit the scientific processing of plain view evidence at a secured murder scene within a reasonable time after the original entry. Further, the Supreme Court in *Tyler* held that a warrantless reentry by investigators some four hours after they

extinguished a fire did not violate the Fourth Amendment because it constituted one continuing investigation.

The Court of Appeals also observed that, because the events leading up to Dawn's death remained unclear, the sheriff prudently refrained from compromising the plain view evidence and instead secured the scene in order to leave to the crime lab specialists the job of scientifically processing the scene. The Court ruled that the processing of plain view evidence by forensic specialists simply does not constitute the kind of intrusive, exploratory or generalized search condemned by the United States Supreme Court in *Mincey*, *Thompson* and *Flippo*. Here, the very limited scientific processing of only those items already viewed by police takes it outside the province of *Mincey* and *Thompson* both of which involved exhaustive searches of the defendants' entire home.

Accordingly, the Court affirmed in part the trial court's denial of defendant's motion to suppress certain evidence obtained during the search. The Court also remanded the case to the trial court to determine what portion of the evidence seized may have been in plain view and thus susceptible to search and what evidence was not in plain view. Thereafter, defendant and the prosecutor filed a stipulation in the trial court not to hold the evidentiary hearing after defendant conceded "that all material evidence examined and seized by members of the Michigan State Police Crime Lab had been seen in plain view" by the sheriff during his lawful entry of the residence. The prosecutor also filed a motion in the Michigan Supreme Court to hold defendant's application for leave to appeal in abeyance and to remand for an evidentiary hearing pursuant to new information establishing that no evidence was processed or seized before a valid search warrant was issued. The prosecutor argued that, if the trial court determined that the evidence was seized pursuant to a valid search warrant, it would render defendant's application for leave to appeal moot. Pursuant to the prosecutor's motion, the Michigan Supreme Court vacated the decision of the Court of Appeals and remanded the case to the trial court for an evidentiary hearing to resolve factual issues raised by the prosecutor and any additional matters raised by defendant concerning the search.

***In re Disclosure of Juror Names and Addresses*, 233 Mich App 604; 592 NW2d 798 (1999)**

During the highly-publicized jury trial of Ervin Dewain Mitchell on consolidated charges of felony murder and three counts of first-degree criminal sexual conduct, the trial court took measures to protect jurors' identities by identifying them only by number, sequestering the jurors during trial, and prohibiting the media from showing the jurors' faces. Before the jury reached a verdict, the Detroit Free Press petitioned the court to release the jurors' names and addresses postverdict. The trial court informed the jurors of the request and asked their opinions. The jurors opposed the request and the trial court denied it.

In *In re Disclosure of Juror Names and Addresses*, 233 Mich App 604; 592 NW2d 798 (1999) (opinion by Saad, J.), the Court considered whether the trial court was required, under the media's First Amendment right to news gathering, to provide the Free Press, postverdict, with the names and addresses of the jurors. Here, the juror identities were not concealed from the parties and the media was not barred from the courtroom, denied a transcript of the proceedings, or prohibited from interviewing jurors.

In balancing the strong public policy of openness against the policy of protecting the integrity of the jury system by safeguarding jurors' legitimate interests, the Court held that the press has a qualified right of access to names and addresses of jurors postverdict. The Court qualified this right of access by also holding that trial courts have discretion to impose appropriate restrictions on the manner and time of disclosure, and in some circumstances, perhaps, to refuse disclosure, in order to accommodate all the interests of justice, where safety concerns of jurors are found to be legitimate concerns. However, a trial court cannot deny media access to jurors' names and addresses without first making a determination that concerns for jurors' safety are legitimate and reasonable. Privacy concerns alone, unaccompanied by safety concerns, are not sufficient to justify total denial of media access to jurors' names; however, privacy concerns may justify a lesser restriction, such as a brief waiting period or an order prohibiting reporters from repeatedly attempting to question jurors who have already refused an interview.

***Commissioner of Ins v Albino*, 225 Mich App 547; 572 NW2d 21, application for leave to appeal held in abeyance 572 NW2d, lv den 456 Mich 908 (1997), cert den sub nom *Ernst & Young v Commissioner of Ins of Michigan*, 523 US 1137; 118 S Ct 1841; 140 L Ed 2d 1091 (1998)**

Commissioner of Insurance (IC), as rehabilitator of insolvent mutual insurance company organized in Canada, sued a Canadian accounting firm which had audited the insurer, for breach of contract, professional malpractice, and fraud in submitting deceptive and misleading audits to Insurance Commission, which allegedly concealed insurer's wrongful removal of \$600 million from trust required by Michigan law to be held for benefit of, among others, Michigan policyholders. The trial court denied the Canadian firm's motion to dismiss for lack of personal jurisdiction. On appeal, the Canadian firm contended that allowing Michigan courts to adjudicate the IC's claims against it would violate the Due Process Clause of the United States Constitution as interpreted by the United States Supreme Court in *World-Wide Volkswagen Corp v Woodson*, 444 US 286; 100 S Ct 559; 62 L Ed 2d 490 (1980); *Burger King Corp v Rudzewicz*, 471 US 462; 105 S Ct 2174; 85 L Ed 2d 528 (1985), and *Asahi Metal Industry Co, Ltd v Superior Court of California, Solano, Co*, 480 US 102; 107 S Ct 1026; 94 L Ed 2d 92 (1987).

To determine whether jurisdiction existed to litigate the dispute in Michigan, the Court (opinion by Saad, J.) first ruled that the case fell within the scope of the Michigan long-arm statute, because the Canadian firm caused acts to be done and consequences to occur in Michigan in every meaningful sense contemplated by MCL 600.725(2). Next, in determining whether sufficient minimum contacts exist between a defendant and Michigan to support Michigan's exercise of limited personal jurisdiction, the court applied the three-pronged test in *Starbrite Distributing, Inc v Excelda Mfg Co*, 454 Mich

302; 562 NW2d 640 (1997). The Court found that the Canadian firm's contacts with Michigan were not random, fortuitous, or attenuated, that the firm purposefully directed its audits at Michigan and its citizens, and that the firm dealt, year after year, with a statutory corporate citizen (the insurance company), knowing that such a contractual relationship was necessary for the corporation to do business in Michigan and, in turn, made possible handsome fees for the firm. Further, pursuant to *Starbrite*, although the Canadian firm did not solicit business in Michigan, it certainly chose to do business in Michigan and purposefully directed its audit at the IC and Michigan policyholders.

Under the second prong of the minimum-contacts test (cause of action arose from the defendant's activities in the state), the Court ruled that the IC's claim arose out of the very conduct that the IC claimed caused the financial harm to Michigan citizens and that is inextricably intertwined with the Canadian firm's audits. Therefore, the firm's knowing and intentional contacts with Michigan were so substantial as to render the exercise of jurisdiction over the firm fair and just.

Under the third prong of the *Starbrite* analysis (activities must be so substantially connected with Michigan to make the exercise of jurisdiction over the defendant reasonable), the Court found that the Canadian firm purposefully availed itself of the benefits and privileges of doing business in Michigan and knew that the corporation was domiciled in Michigan for the purpose of selling insurance; accordingly, in auditing the corporation, the firm knew that it was providing services to a Michigan resident. The firm also provided the corporation with an "awareness letter" knowing that its audit reports would be forwarded to the Michigan Insurance Bureau. Furthermore, the Canadian firm addressed its audit reports "To the Policyholders," many of whom are Michigan residents. These actions suggest that the Canadian firm could reasonably foresee being haled into court in Michigan and that the burden of doing so does not render jurisdiction unreasonable.

Moreover, the Court held that, here, unlike *Asahi*, exercising jurisdiction over the Canadian firm does not offend traditional notions of fair play and substantial justice. The distance that the firm must travel was not burdensome, and the firm was an integral part of an international organization of accounting firms that aggressively markets and promotes the services of its members throughout the world. The Court also found that the interests of Michigan, the IC and the shared interests of the several states justified any burdens placed on the alien defendant. Accordingly, the Court affirmed the trial court's judgment that its exercise of jurisdiction over the Canadian firm satisfies Michigan's long-arm statute and the Due Process Clause of the United States Constitution.

***Bolt v City of Lansing*, 221 Mich App 79; 561 NW2d 423 (1997), rev'd 459 Mich 152 (1998)**

In this original action under Const 1963, art 9, § 32, plaintiff, a taxpayer by virtue of his ownership of real estate located in the City of Lansing, challenged the city's storm water service charges as being a disguised tax. In its effort to comply with the Clean Water Act, in 1995, the City of Lansing adopted Ordinance No. 925, which added a new Chapter 1043 to the Ordinances of the City of Lansing, which provides for the creation of

a storm water enterprise fund to defray the cost of improvements to the city's storm water disposal system. Ordinance 925 would effectuate complete separation of the storm water and sewage systems, and provide for treatment of storm water to remove pollutants before the water is discharged into navigable waterways, at an estimated cost of \$176,000,000 over thirty years. The ordinance was adopted by the Lansing City Council and was not submitted for approval to the electors of the city. The question presented was whether Lansing may charge landowners for the cost of separating the storm water and sewage systems, and treating the storm water runoff, without submitting the question to the taxpayers for a vote under the Headlee Amendment, Const 1963, art 9, §§ 25-34.

The Court based its analysis on whether the charge to landowners for the cost of separating the storm water and sewage systems and treating the storm water runoff was a "tax" or a "user fee." The Court ruled that, if a tax, it would unquestionably be a tax increase as well as a tax that was not in effect on December 23, 1978, the effective date of the Headlee Amendment, and thus would be a tax that requires voter approval pursuant to Const 1963, art 9, § 31. In other words, Ordinance 925 would run afoul of the Headlee Amendment. If, however, the charge was a user fee, as the city contended, then it would be unaffected by Article 9.

The Court observed that the Headlee Amendment does not define a tax or a fee, and that historically, there is no bright-line test that distinguishes the two. However, citing *Ripperger v Grand Rapids*, 338 Mich 682, 686; 62 NW2d 585 (1954), the Court found that the Michigan Supreme Court has already ruled that sewage disposal charges to landowners constitute a user fee, not a tax. Pursuant to the analysis in *Ripperger*, the Court ruled that, in *Bolt*, charges for storm water collection, detention, and treatment do not lose their character as a fee by virtue of being separated from sewage collection and disposal. The Court further held that the result does not change by separating the systems - the charge in *Bolt* was a user fee, not a tax. Accordingly, the Court ruled that plaintiff's complaint was without merit and entered a judgment of no cause of action. In *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998), the Michigan Supreme Court reversed and held that the charge was a tax requiring voter approval under the Headlee Amendment to the Michigan Constitution.

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

17. Public Office, Political Activities and Affiliations:

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

I was appointed to the Michigan Court of Appeals in November of 1994 by Governor Engler and in 1996 ran in the general election to retain my seat on the bench. My term expires on December 31, 2002. Our jurisdiction is statewide.

I have not had any unsuccessful candidacies for elective office

In 1992, President Bush appointed me to the Federal District Court for the Eastern District of Michigan. My nomination, along with 55 other nominees throughout the United States, were delayed pending the upcoming November 1992 election. After the November 1992 election, my nomination, along with the 55 others throughout the United States, was not scheduled for a Senate hearing. Accordingly, that nomination never came to fruition. It should be noted that during that process, I was reviewed by the American Bar Association and received its highest ranking on unanimous vote.

- (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.

Since a youth, I have been a volunteer worker in a number of political campaigns. I cannot recall all campaigns, but here are some: (1) Re-election campaign for Gerald Ford in 1976; (2) Volunteer for Reagan-Bush in 1980 and Co-Chair of Michigan Lawyers for Reagan-Bush in 1984; (3) Co-Chair of Michigan Lawyers for Bush-Quayle in 1988; (4) Co-Chair of Michigan Lawyers for Engler for Governor in 1990; (5) Volunteer in other U.S. Senate and House races. I have also volunteered time in local judicial campaigns and for campaigns for boards of universities such as Regents for University of Michigan and Board of Governors for Wayne State University.

Since taking the bench in 1994, I have worked on numerous campaigns for candidates for our appellate and trial courts in Michigan.

For example, I worked on campaigns for:
 Justice Robert Young, Michigan Supreme Court
 Justice Stephen Markman, Michigan Supreme Court
 Justice Clifford Taylor, Michigan Supreme Court
 Justice Maura D. Corrigan, Michigan Supreme Court
 Judge Kurt Wilder, Michigan Court of Appeals
 Judge Hilda Gage, Michigan Court of Appeals
 Judge Joan Young (Oakland Circuit Court Judge who ran unsuccessfully for the Michigan Court of Appeals).

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;
- N/A
- (2) 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 affiliated, and the nature of your affiliation with each.

Dickinson, Wright
525 North Woodward Avenue, Suite 2000
Bloomfield Hills, MI 48034
Summer Associate (1973)
Associate (1974-1981)
Partner (1981-1994)

Michigan Court of Appeals
2777 Franklin Road, Suite 760
Southfield, MI 48304
Judge (1994-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.

1974-1977: Product liability and insurance defense and commercial litigation
1977-1994: Employment law, labor law (including collective bargaining negotiations, arbitrations and consulting on development of human resource policies), school law and libel law.

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

Gillett Communications of Detroit, Inc. (WJBK TV-2) – Employment Law; Libel Law

Carboloy, Inc. – Employment Law

Oakland Community College – Labor Law (Collective bargaining)

negotiations/arbitration)

Henry Ford Community College – Labor Law (Collective bargaining, negotiations/arbitration)

Dearborn Public Schools – Labor Law (Collective bargaining negotiations arbitration)

Hamtramck Public Schools – Labor Law (Collective bargaining, negotiations/arbitration)

GMFanuc Robotics – Employment Law

ACO Hardware – Employment Law

Federal Mogul – Employment Law

FTD – Employment Law

City of Taylor – Employment Law litigation

RCA – Labor Law

Ford Motor Company – Labor Law

Chrysler Corporation – Labor Law

Eli Lilly & Company – Products Liability

National Bank of Detroit – Commercial

General Electric Company – Labor Law

Michigan Bell Telephone Company – Labor Law

Sears, Roebuck & Company – Products Liability

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

Occasionally.

- (2) Indicate the percentage of these appearances in:

(A) federal courts;
50%

(B) state courts of record;
50%

(C) other courts.
N/A

(3) Indicate the percentage of these appearances in:

(A) civil proceedings;
100%

(B) criminal proceedings.
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.

For the first ten (10) years, I tried many relatively minor matters and tried approximately 75-100 cases, 80% of which I was lead counsel.

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

50%

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

None.

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

Board Member, Wayne County Neighborhood Legal Services (1976-1978)
Devoted many hours on Board meetings and related activities.

Common Ground (1991-1994) Provided free legal services for 2-3 hours per

month for the indigent in Oakland County through Common Ground (a non-profit volunteer organization).

Operation Able (1989-1993) Volunteer free legal advice and board service to this non-profit organization which assists older citizens in finding employment.

Spectrum Human Services (1989-1994) I served on Board for this agency which helps the disadvantaged (homeless, mentally and physically disabled, physically and mentally abused) and I provided free legal advice over several years.

Greater Detroit Interfaith Roundtable of Christians and Jews (1989-1997) I have served on the Board and provided legal advice and seminars to this non-profit organization which is designed to foster goodwill between various ethnic, racial and religious groups.

New Detroit, Inc. (1976-1984)
 - Public Safety and Justice Committee
 - Racial and Religious Subcommittee

United Foundation (1986-1990)
 - Allocations Committee

Community Foundation of Southeastern Michigan (1996-1999)
 - Board Member
 - Program and Distribution Committee (allotted monies to needy organizations).

19. **Litigation:** Describe the ten (10) most significant litigated matters which you personally handled, and for each provide the date of representation, the name of the court, the name of the judge or judges before whom the case was litigated and the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties. In addition, please provide the following:
- (a) the citations, if the cases were reported, and the docket number and date if unreported;
 - (b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;
 - (c) the party or parties whom you represented; and
 - (d) describe in detail the nature of your participation in the litigation and the final disposition of the case.

Case:

Doe v University, 721 F Supp 852 (E.D. Mich 1989)

Court:

United States Federal District Court, Eastern District of Michigan; Judge Avern Cohn

Substance:

ACLU challenged University of Michigan policy prohibiting verbal racial harassment.

Significance:

First test case in the United States regarding a university's attempt to fashion a policy within first amendment law to deal with racial hate speech in classrooms and other learning areas.

Party Represented:

University of Michigan

Nature of Representation:

Acted as lead counsel in preparing defense and conducting preliminary injunctive hearing.

Final Disposition:

Federal District Court ruled the policy to be unconstitutionally broad and vague. We assisted the University of Michigan in drafting a replacement policy.

Dates:

Complaint filed June 1989, argued August 25, 1989

Counsel for Plaintiff:

Professor Robert Sedler
369 Wayne State University Law School
Detroit, MI 48202
(313) 577-3968

Other Counsel for University of Michigan:

Hon. Elizabeth M. Pezzetti (former partner, Dickinson Wright)
(248) 858-0240
Robert Powell, Esq. (former partner, Dickinson Wright)
(313) 621-6402

Case:

Vincent J. Shepherd and Ina Dee Shepherd v Bethlehem Steel Company

Court:

United States Federal District Court, Eastern District of Michigan; Judge Cornelia G. Kennedy (currently Judge, Sixth Circuit Court of Appeals)
Civil Action No. 571662

Substance:

Products liability action.

Significance:

Had plaintiff prevailed, the damages would have been significant. Plaintiff, a young man, claimed total permanent disability.

Party Represented:

Defendant Bethlehem Steel Company

Nature of Representation:

Lead counsel for defendant.

Final Disposition:

Defendant received a verdict of no cause of action at trial.

Dates:

Complaint filed 1975
Removal to federal court August 29, 1975
Judgment entered March 2, 1979

Counsel for Plaintiff:

Richard W. Bohan (now retired)
8442 Idlewood Court
Bradenton, FL 34202
(941) 907-1213

Roger Ettlinger
Block & Ettlinger
929 N. Pontiac Trail
Walled Lake, MI 48390
(248) 624-4120

Case:

Kenneth Wade v Broadcasting Partners of Detroit, Inc.

Court:

United States Federal District Court, Eastern District of Michigan; Judge Lawrence Zatkoff
Case No. 89 CV 73007 DT

Substance:

Plaintiff claimed age discrimination, breach of contract and defamation with connection with his termination of employment.

Significance:

Wrongful discharge claim with tort claim of defamation included. Questions of employer's qualified immunity for alleged defamatory statements.

Party Represented:

Broadcasting Partners of Detroit, Inc.

Nature of Representation:

Acted as lead counsel in preparing defense and conducting discovery.

Final Disposition:

Settled.

Dates:

Complaint filed June 1, 1989; settled April 3, 1990

Counsel for Plaintiff:

John R. Foley, Esq.
18560 Outer Drive
Dearborn, MI 48128
(313) 274-7377

Other Counsel for Defendant:

Hon. Elizabeth M. Pezzetti (former partner, Dickinson, Wright)
(248) 858-0240

Case:

Jamison v Storer Broadcasting Company
511 F. Supp 1286 (ED Mich 1981)

Court:

United States Federal District Court, Eastern District of Michigan; Judge Patricia Boyle
(now retired Michigan Supreme Court Justice)
Case No. 77-72111

Substance:

Plaintiff, former sportscaster for defendant television station, brought suit for wrongful termination and reverse race discrimination. After plaintiff committed suicide, suit was pursued by Administratrix of his estate.

Significance:

Case raised issues of first impression as to whether (1) discharged employee stated a cause of action for wrongful death and (2) a television station which was required to have an affirmative action policy by the FCC could be subject to having that affirmative action policy used against it at trial in a "reverse-race" discrimination case.

Party Represented:

Defendant Storer Broadcasting Company

Nature of Representation:

Acted as "second chair" during discovery and bifurcated trial (second damages trial after removal by the Sixth Circuit Court of Appeals was tried by other attorneys in my former firm). Other counsel at Dickinson, Wright who represented defendant is (now Federal District Judge) Hon. John Corbett O'Meara (313) 234-5140.

Final Disposition:

Defendant prevailed on appeal to the Sixth Circuit Court of Appeals in an unpublished decision, *Jamison v Storer Broadcasting Co*, 830 F 2d 194 (CA 6, 1987).

Dates:

1977 - 1983

Counsel for Plaintiff:

Michael Materna, Esq.
28051 Dequindre Road
Madison Heights, MI 48071
(248) 543-8300

Case:

Charla Rusche v Florist's Transworld Delivery Association

Court:

Wayne County Circuit Court, Judge Claudia House Morcom
Civil Action No. 84-419640-NO

Substance:

Sex discrimination, retaliation and breach of contract with regard to plaintiff's discharge from employment.

Significance:

Case raised questions of first impression in Michigan as to whether (1) a plaintiff's damages are cut off when plaintiff voluntarily removes herself from the job market by enrolling full time in college and (2) an employee's secret, unilateral recording of a telephone conversation constituted a violation of Michigan's eavesdropping statute.

Party Represented:

Florist's Transworld Delivery Association

Nature of Representation:

Lead counsel for defendant.

Final Disposition:

Case settled.

Dates:

Complaint filed 1984.

Case settled November 13, 1987.

Counsel for Plaintiff:

Kathleen L. Bogas
1000 Farmer Street
Detroit, MI 48226
(313) 496-9400

Case:

Mays v Gillett Communications of Detroit, Inc.

Court:

Wayne County Circuit Court, Judge Michael L. Stacey, Case No. 89-921140 NO

Michigan Court of Appeals, Case No. 126785

Judges: Donald L. Holbrook, Jr., Joseph B. Sullivan and Clifford W. Taylor

Substance:

Wrongful death action by plaintiff claiming that defendant television station was negligent in refusing to comply with a subpoena to produce videotapes regarding teen gangs.

Significance:

This case was the result of legal proceedings by a television station to quash a subpoena to produce a videotape; *In re Contempt of Stone*, 154 Mich App 121; 397 NW2d 244 (1986), *lv den*, 426 Mich 854 (1986). The case presents the issue whether a defendant can be held liable in tort for pursuing its legal rights to quash a subpoena.

Party Represented:

Defendants Gillett Communications of Detroit, Inc. and Bradley M. Stone

Nature of Representation:

Lead counsel in trial and appellate courts.

Final Disposition:

Summary judgment granted in trial court on February 16, 1990; affirmed in *Mays v Gillett Communications of Detroit, Inc.*, 198 Mich App 223; 497 NW2d 218, *lv den* 444 Mich 880 (1993).

Dates:

Complaint filed August 23, 1989; Summary Disposition granted February 16, 1990; Claim of Appeal filed March 8, 1990, argued May 14, 1992.

Counsel for Plaintiff:

Jeanne Mirer, Esq.
306 S. Washington Avenue, 6th Floor
Royal Oak, MI 48067
(248) 398-9800

Other Counsel for Defendants:

Noel D. Massie (former partner, Dickinson, Wright)
(248) 645-0000

Case:

Richard D. Raught v Ross Roy, Inc.

Court:

Oakland County Circuit Court, Judge Alice L. Gilbert and Judge Deborah Tyner
Case No. 89-318306 CK

Substance:

Plaintiff claimed breach of contract and age discrimination due to his termination of employment in a workforce reduction.

Significance:

Issue as to whether summary disposition is appropriate where plaintiff has a "satisfaction" contract and has received satisfactory performance evaluations, but employer has determined he was least satisfactory employee and therefore must terminate him in workforce reduction.

Party Represented:

Defendant, Ross Roy, Inc.

Nature of Representation:

Argued mediation, summary judgment motion, advised counsel on strategy.

Final Disposition:

Case settled prior to trial.

Dates:

Case settled September 1991.

Counsel for Plaintiff:

James G. McMahon (present location unknown)
(former location) McMahon and McMahon
23100 Jefferson
St. Clair Shores, MI 48080
(313) 777-2400

Other Counsel for Defendant:

Hon. Elizabeth M. Pezzetti (former partner, Dickinson Wright)
(248) 858-0240

Case:

Arnold Mollett v City of Taylor and Robert Diel

Court:

Wayne County Circuit Court, Judge Helene N. White
Case No. 89-921442 CZ

Michigan Court of Appeals, Case No. 136281
Judges: Janet T. Neff, Raymond S. Gribbs and John H. Shepherd

Substance:

Plaintiff claimed he was harassed and constructively discharged from the City of Taylor Fire Department because he had been tried and acquitted for cheating on a civil service examination.

Significance:

The case presents novel questions concerning the interplay of exhaustion of remedies under the Firemen and Policemen Civil Service Act and a collective bargaining agreement, and the doctrine of constructive discharge.

Party Represented:

Defendants City of Taylor and Robert Diel

Nature of Representation:

Acted as lead counsel for defendants.

Final Disposition:

Trial court granted summary disposition to defendants; Michigan Court of Appeals affirmed trial court in *Mollett v City of Taylor*, 197 Mich App 328, 494 NW2d 832 (1992).

Dates:

Complaint filed August 30, 1989; summary disposition granted December 3, 1990, Michigan Court of Appeals decision released December 7, 1992.

Counsel for Plaintiff:

Dean Koulouras, Esq. (trial court)
13407 Farmington Road, #102
Livonia, MI 48150
(734) 458-2200

John Lydick, Esq. (appellate court)
577 E. Larned, Suite 210
Detroit, MI 48226-4323
(313) 961-1525

Other Counsel for Defendants:

Hon. Elizabeth M. Pezzetti (former partner, Dickinson Wright)
(248) 858-0240
Noel D. Massie, Esq. (former partner, Dickinson, Wright)
(248) 645-0000

Case:

Nathan Eugene Frank and Barbara Frank v Gillett Communications of Detroit, Inc.

Court:

Wayne County Circuit Court, Judge James Hathaway, Case. No. 91-100143 CZ

Substance:

Plaintiff, Nathan Eugene Frank, claimed that Gillett Communications of Detroit, Inc. defamed him when they reported that he had been arrested for threatening the life of President Bush. Barbara Frank claimed loss of consortium.

Significance:

Plaintiffs' damages would have been substantial, as he claimed total inability to work as Assistant Wayne County Sheriff. Also, legal question of defamation for a report of Secret Service questioning of plaintiffs could have established important precedent.

Party Represented:

Gillett Communications of Detroit, Inc.

Nature of Representation:

Lead counsel for defendant.

Final Disposition:

Case was settled prior to trial.

Dates:

Complaint filed 1991; settled 1991

Counsel for Plaintiff:

Dennis W. Bila, II, Esq.
300 Enterprise Court, #100
Bloomfield Hills, MI 48302
(248) 644-8801

Steven H. Boak, Esq.
711 West Ann Arbor Trail
Plymouth, MI 48170
(734) 455-4560

Other Counsel for Gillett Communications of Detroit, Inc.:

Robert E. Carr, Esq. (former associate, Dickinson Wright)
(313) 471-3226

Case:

In re Grand Jury Proceedings: Storer Communications, Inc. and Bradley M. Stone v Wayne County Circuit Court Judge William J. Giovan, et al.

Court:

Sixth Circuit Court of Appeals, 810 F2d 580 (6th Cir. 1987)
Judges: Norris, Wellford, Guy.

United States District Court for the Eastern District of Michigan, Judge Richard F. Suhrheinrich

Michigan Supreme Court

Michigan Court of Appeals
Judges: Gribbs, Walsh and Beasley

Wayne County Circuit Court, Judge William J. Giovan

Substance:

Defendants (reporter and television station) resisted a Grand Jury subpoena (by way of a motion to quash) for tapes which identified confidential sources on the grounds that the Grand Jury, through the prosecutor, failed to demonstrate that the tapes were necessary to the prosecution and that the prosecutor had failed to show that it made reasonable efforts to obtain the information. Defendants argued that absent such a showing, the subpoena violated their first amendment right to freedom of the press and also argued that the subpoena violated Michigan's Shield Statute.

Significance:

This case raised issues of first impression as to the constitutional interpretation of Michigan's Shield Statute and constitutional application of the United States Supreme Court's ruling in *Branzburg v Hayes*, 408 US 665 (1972).

Party Represented:

Storer Communications, Inc. and Bradley M. Stone

Nature of Representation:

Acted as lead counsel in Wayne County Circuit Court, Michigan Court of Appeals, Michigan Supreme Court; United States District Court for the Eastern District of Michigan and the Sixth Circuit for the Court of Appeals.

Final Disposition:

Sixth Circuit denied writ of habeas corpus thus upholding the district court's denial of defendant's petition for writ of habeas corpus. The Michigan Court of Appeals upheld the trial court's denial of defendants' motion to quash the subpoena and the Michigan Supreme Court denied leave to appeal.

Dates:

Argued in Sixth Circuit, October 1, 1986, decided February 6, 1987.

Counsel for Plaintiff:

Patrick J. Foley, Esq.
19588 Crystal Lake Drive
Northville, MI 48167
(248) 348-5174

Dan Watkins, Esq.
4981 Cascade Road SE
Grand Rapids, MI 49546-3763
(616) 956-1900

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.

N/A

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

None.

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

None. I will adhere strictly to the Code of Judicial Ethics regarding any potential conflicts.

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

I plan to continue in my current position as Adjunct Professor at Wayne State University Law School and the University of Detroit/Mercy School of Law.

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 sheet.

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?

(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.

Our State established two separate committees, both of which were composed of respected lawyers, to review candidates for the federal appellate and trial bench. The committees rated, but did not recommend, candidates. Rather, the ratings were provided to the Governor and the Congressional delegation. Candidates

were not made privy to the ratings or the internal workings of the relationship between the committees and the Governor's office and Congressional delegation. Nonetheless, I was advised that my name, along with several others, was being forwarded to Washington for an interview with the White House Counsel's office. Although my name was originally sent to Washington for the trial bench position, I was advised that I was in contention for the appellate position and, therefore, that I should simultaneously pursue both the federal appellate and trial bench.

- (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.

See amendment

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			
				Net Worth			
Total Assets				Total liabilities and net worth			
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)			
On leases or contracts				Are you defendant in any suits or legal actions?			
Legal Claims				Have you ever taken bankruptcy?			
Provision for Federal Income Tax							
Other special debt							

ADDENDUM
QUESTIONNAIRE FOR NOMINEES REFERRED
TO THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

Hon. Henry William Saad

5. **Marital Status:**

Separated, October 2001
Filed Complaint for Divorce July 2002

15. **Health:**

Good. Last physical examination was July 22, 2002.

16. **Citations:**

[For purposes of clarification, in this addendum I am sending:

1. For purposes of Question 16(b): Additional published case citations and summaries. I previously sent summaries of only those criticized or reversed opinions for which I was the author. Since I sent the last Questionnaire, I have learned that the Committee may also want summaries of those published cases for which I was on the panel, but did not have authorship responsibilities.

2. For purposes of Question 16(b): Additional unpublished case citations and summaries. I previously sent summaries of only those criticized or reversed opinions for which I had writing responsibility. Here, I include additional summaries of those unpublished cases for which I was on the panel, but did not have writing responsibilities. Also, I have very recently received an updated list from our Court Clerk's office (probably as a result of new computer software) with one additional unpublished reversed or criticized case for which I had writing responsibility. I have analyzed and summarized that opinion and also include it here.

3. For purposes of Question 16(c): One additional published case addressing federal or state constitutional issues.]

(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;

Published cases for which I was on the panel, but did not have authorship responsibilities:

***Gora v City of Ferndale*, 210 Mich App 622; 533 NW2d 840 (1995); See also *Gora v City of Ferndale (On Remand)*, 217 Mich App 295; 551 NW2d 454 (1996):**

Plaintiffs, owners and operators of the Loving Touch, Inc., filed suit against the City of Ferndale and alleged that a city ordinance relating to the operation of massage parlors violated their constitutional rights under 42 USC 1983 and 42 USC 1988. The trial court held that the State of Michigan Occupational Code, MCL 339.101 *et seq.*, "was

not pervasive enough to evidence a legislative intent to preempt the Ferndale ordinance,” but also held certain sections of the Ferndale ordinances unconstitutional. *Gora, supra* 210 Mich App at 625. The Court of Appeals (Kelly, Michael J.) vacated the trial court’s order and held that the state Occupational Code preempted the ordinance by occupying the field of regulation of myomassology. Because it held that Ferndale’s ordinance was preempted, the Court of Appeals declined address plaintiffs’ other issues on appeal regarding the constitutionality of portions of the Ferndale ordinance. Plaintiffs appealed the decision to the Michigan Supreme Court and, in lieu of granting leave to appeal, the Supreme Court vacated this Court’s judgment and remanded the case for reconsideration in light of 1995 PA 104 and to consider the constitutional issues not addressed in the prior opinion. *Gora v City of Ferndale*, 451 Mich 875; 549 NW2d 567 (1996).

On remand, the Court of Appeals, in a per curiam opinion, ruled that the Occupational Code no longer preempted the Ferndale ordinance because, after the panel issued its prior opinion, the Legislature repealed the sections of the Code addressing massage. *Gora v City of Ferndale (On Remand)*, 217 Mich App 295, 297 n 1; 551 NW2d 454 (1996). Regarding the constitutionality of the Ferndale ordinance, the Court reversed the trial court’s holding that the educational and licensing requirements violate constitutional due process rights. *Id.* at 301-302. The Court also reversed the trial court’s holding that the ordinance’s prohibition of mixed-gender massage does not violate constitutional equal protection guarantees. *Id.* at 302-303. Further, the Court affirmed the trial court’s holding that the ordinance provision allowing warrantless searches is unconstitutional. *Id.* at 305. Finally, the Court of Appeals reversed that trial court’s ruling that sections of the ordinance prohibiting the exposure or touching of certain body parts are unconstitutionally vague. *Id.* at 306.

On appeal, the Michigan Supreme Court reversed the decision of the Court of Appeals and ruled that the entire City of Ferndale ordinance is constitutional. *Gora v City of Ferndale*, 456 Mich 704, 723-724; 576 NW2d 141 (1998). Specifically, the Supreme Court held that, because federal courts have held that the prohibition of opposite sex massages does not implicate or violate federal equal protection guarantees and because the federal equal protection clause is substantially similar to the state equal protection guarantees, the provision does not violate the state constitution. *Id.* at 713-714. Further, the Supreme Court held that “the United States Supreme Court has determined that the massage parlor industry is a pervasively regulated business and that inspections of massage parlors conducted without warrants pursuant to a comprehensive licensing and regulation ordinance are permissible under the administrative search exception to the warrant requirement of the Fourth Amendment.” *Id.* at 717. The Court further ruled that the scope of the inspection provisions were sufficiently restricted to allow reasonable inspections to determine compliance with the ordinance. *Id.* at 720-721.

***Frankenmuth Mut Ins Co v Masters*, 225 Mich App 51; 570 NW2d 134 (1997):**

Plaintiff insurance company filed a declaratory judgment action seeking a determination of its obligation to indemnify defendant insured for collateral fire damage to adjoining buildings caused by the insured and his employee setting fire to their store. *Id.* at 54-55. The trial court granted the insurance company’s motion for summary disposition because (1) the fire was not an “occurrence” under the policy because the insured and his employee intentionally set the fire and (2) from the standpoint of the

insured, he and his employee intended to burn property and recovery was barred under the policy's intentional act exclusion. The Court of Appeals (Jansen, J.) affirmed in part and reversed in part and held, relying on *Arco Industries v American Motorists Ins Co*, 448 Mich 395; 531 NW2d 168 (1995), while the intentional acts exclusion of the homeowners' policy barred coverage, there was an issue of fact whether the insured and his employee expected or intended to burn the adjoining buildings. *Id.* at 59-60. On appeal, the Michigan Supreme Court abrogated the reasoning of *Arco* and reinstated the trial court's order granting summary disposition to the insurance company. *Frankenmuth Mutual Ins Co v Masters*, 460 Mich 105, 116-117; 595 NW2d 832 (1997). The Supreme Court reasoned that the defendant insured acted intentionally in setting the fire, he intended to damage property and it is irrelevant that the damage to surrounding businesses "was different from or exceeded the harm intended . . ." *Id.* at 116.

***McJunkin v Cellasto Plastic Corp*, 226 Mich App 234; 573 NW2d 72 (1997):**

Plaintiff sustained a back injury at work and, during litigation, his doctor testified that he was able to perform a modified, light-duty job offered by defendant company. *Id.* at 238. Plaintiff initially declined the position, but later offered to return to work. *Id.* However, though defendant held the job open for several months, it had since restructured the job and the light-duty position was no longer available to plaintiff. *Id.* at 238-239. The magistrate permanently terminated plaintiff's workers' compensation benefits because he unreasonably refused an offer of work. *Id.* at 239. The Worker's Compensation Appellate Commission (WCAC) affirmed the magistrate's decision and plaintiff appealed. *Id.* The Court of Appeals (Neff, J.) affirmed the WCAC's finding that defendant unreasonably refused a *bona fide* offer of reasonable employment under MCL 418.301(5)(a). However, relying on *Derr v Murphy Motors Freight Lines*, 452 Mich 375; 550 NW2d 759 (1996), the majority held that plaintiff's workers' compensation benefits should have been reinstated after defendant withdrew its offer of favored work, though the company held the position open for a reasonable time. *Id.* at 243-244. Judge Saad concurred with the majority's holding that plaintiff unreasonably refused an offer of work, but expressed dissatisfaction with the holding in *Derr, supra* that "benefits are to be restored any time the 'offer is withdrawn' by whatever artificial circumstance, no matter how unrelated to plaintiff's willingness or availability to work." *Id.* at 244.

On appeal, the Michigan Supreme Court affirmed the decision of the Court of Appeals, but modified its reasoning. *McJunkin v Cellasto Plastic Corp*, 461 Mich 590, 592; 608 NW2d 57 (2000). The Supreme Court found that plaintiff unreasonably refused reasonable employment but held that his benefits should be reinstated not from the date the employer withdrew its offer of work, but from the date the employee "ended his period of unreasonable refusal" and agreed to return to work. *Id.* at 599.

***Smith v Cliffs on the Bay Condo Ass'n*, 226 Mich App 245; 573 NW2d 296 (1997):**

Defendant owned two adjacent parcels of property but did not receive tax notices for one of the parcels and, therefore, failed to pay taxes on it. Plaintiffs bought the property at a tax sale and, four years later, defendant filed an affidavit of interest in the property. Plaintiffs filed suit to quiet title and defendant counterclaimed to quiet title. The trial court granted summary disposition to plaintiffs, the tax purchasers. The Court

of Appeals (O'Connell, J.) reversed in part, vacated in part, and held that defendant did not receive constitutionally sufficient notice of the Department of Treasury hearing regarding the disposition of the parcel, which was sent to the defendant's last known, but outdated address.

The Michigan Supreme Court initially vacated the Court of Appeals decision and remanded the case to the trial court for reconsideration. *Smith v Cliffs on the Bay Condo Ass'n*, 459 Mich 925; 589 NW2d 779 (1998). However, in response to a motion for reconsideration, the Supreme Court remanded the case to the trial court and directed the parties to submit a chronological list of actual and constructive notices of the taxation and tax sale of the property. *Smith v Cliffs on the Bay Condo Ass'n*, 460 Mich 867; 599 NW2d 101 (1999). After remand, the Supreme Court ruled that, under Michigan's General Property Tax Act, MCL 211.2 *et seq.* the "mailing of tax delinquency and redemption notices to a corporation at its tax address of record in the manner required by the General Property Tax Act . . . is sufficient to provide constitutionally adequate notice." *Smith v Cliffs on the Bay Condo Ass'n*, 463 Mich 420, 421-422; 617 NW2d 536 (2000) (citation omitted). Accordingly, the Supreme Court reversed the Court of Appeals' decision and remanded for consideration of the other claims raised by defendant. *Id.* at 431.

***American Axle & Mfg, Inc v City of Hamtramck*, 227 Mich App 135; 575 NW2d 296 (1997):**

Petitioner challenged a City of Hamtramck tax assessment which the city imposed following a civil judgment under the Revised Judicature Act, MCL 600.6093. Petitioner paid the tax and petitioned for a refund in the Michigan Tax Tribunal. The Tax Tribunal granted summary disposition to petitioner and held that the tax violated the Headlee Amendment, Const 1963, art 9, §§ 6, 25-34 and that the tax exceeded the maximum rate authorized by the Michigan Constitution, the home rule cities act, and the Hamtramck city charter. On appeal, the Michigan Supreme Court reversed and held that, on this issue of first impression, the Headlee Amendment permits a city to levy a "previously authorized" tax regardless whether the taxes were levied when the Headlee Amendment was ratified or whether the circumstances giving rise to the tax or rate existed prior to the ratification. *American Axle & Mfg, Inc v City of Hamtramck*, 461 Mich 352, 357-365; 604 NW2d 330 (2000). The Supreme Court further held that the city's levy did not violate the home rule cities act of the City of Hamtramck charter. *Id.* at 365-367.

***Republic Bank v Modular One LLC*, 232 Mich App 444; 591 NW2d 335 (1998):**

Plaintiff sued to quiet title to eight residential parcels it purchased in a foreclosure sale. Defendant had placed construction liens on the properties after it installed modular homes on the properties before plaintiff purchased the lots. The trial court granted summary disposition to plaintiff and ruled that the defendant's liens were unenforceable because defendant did not have a residential builder's license. The Court of Appeals reversed the trial court's grant of summary disposition and held that, while an unlicensed contractor may not maintain an action to enforce a lien under MCL 339.2412, equity requires that plaintiff, in order to receive the equity of an unclouded title, must

compensate an unlicensed contractor for work performed to improve the property. *Id.* at 450-455.

The Michigan Supreme Court overruled the Court of Appeals' opinion in *Stokes v Millen Roofing Co*, 466 Mich 660; 649 NW2d 371 (2002). In *Stokes*, the Court ruled that the "failure to obtain a residential builder's license constitutes a bar to its seeking compensation" for work performed and any construction liens placed by an unlicensed contractor are invalid. *Id.* at 673-674.

***Bingham Township v RLTD RR Corp*, 228 Mich App 154; 576 NW2d 731 (1998):**

Defendant RLTD Railroad Corporation owned a railroad corridor running through plaintiff, Bingham Township. The Federal Surface Transportation Board granted permission to RLTD to abandon the corridor so that co-defendant, Leelanau Trails Association (LTA) could convert it into a bicycle and commuter trail. *Id.* at 731-732. Plaintiff brought an action for injunction and a declaration of the parties rights because the trail would attract tens of thousands of visitors each year, the LTA planned to construct numerous additional structures, the LTA refused to submit plans for approval by the Bingham Township planning commission and refused to comply with the township zoning ordinance by applying for a land-use permit. *Id.* at 732. The trial court granted defendants' motion for summary disposition and held that the local zoning powers were preempted by both state and federal law. *Id.* On appeal, the Court of Appeals (Neff, J.) affirmed the trial court's ruling and held that the township's zoning powers are preempted by state law because the state Legislature expressed an intent to occupy the field of regulating old railway lines and "giving local authorities the power to impose their individual zoning schemes over these interjurisdictional transportation corridors would frustrate the Legislature's intent to preserve essential rail corridors and allow for rail-trail transformations." *Id.* at 733.

In lieu of granting leave to appeal, the Michigan Supreme Court remanded the case to the Court of Appeals to determine if the Michigan Trailways Act (MTA), MCL 324.72101 et seq., and the State Transportation Preservation Act (STPA), MCL 474.51 et seq., apply to the railroad corridor at issue. *Bingham Township v RLTD RR Corp*, 460 Mich 868; 598 NW2d 349 (1999). On remand, the Court of Appeals (Neff, J.) again affirmed the trial court's decision. *Id.* at 533. The Court of Appeals specifically held that the STPA authorizes the state transportation department to acquire and preserve an abandoned railway as a commuter trail but, because RLTD sold its interest to LTA, the department did not "acquire" or own the corridor and, therefore, the STPA does not apply to the land development. *Id.* at 542-543. Regarding the application of the MTA, the Court of Appeals held that, regardless whether the state owns the railway land and notwithstanding that the railway was not yet designated as a "Michigan railway," the regulatory provisions of the MTA apply to the land and the MTA preempts the local zoning ordinance. *Id.* at 543-553. The Court reasoned that the Legislature intended the MTA to apply if the railway meets or *will meet* the "Michigan railway" requirements in the statute. *Id.*

On appeal, the Michigan Supreme Court reversed the Court of Appeals' ruling regarding the applicability of the MTA. *Bingham Township v RLTD RR Corp*, 463 Mich 634, 645; 624 NW2d 725 (2001). Specifically, the Supreme Court clarified that, while the MTA anticipates that all the requirements needed to establish the "Michigan railway"

designation may not be met at once, the Legislature did not intend for the MTA to apply to those railways that had not yet achieved the "Michigan railway" designation. *Id.* at 644. Accordingly, because the MTA did not apply, the Court ruled that it was not necessary to determine whether the MTA preempts the Bingham Township ordinance. *Id.* at 645. In so holding, the Court also reversed the decision of the trial court and remanded for further proceedings. *Id.*

***Shields v Shell Oil Co*, 237 Mich App 682; 604 NW2d 719 (1999):**

In 1987, plaintiff's son, Daniel Shields, bought a gasoline station from defendant, Shell Oil Company and, before the sale, Shell removed its underground gasoline storage tanks. *Id.* at 684. In 1991, Daniel Shields discovered gasoline contamination at the site, caused by Shell's storage tanks. *Id.* at 684-685. Notwithstanding this finding, Daniel Shields sold the property to Harbhajan Singh in 1992 and Daniel Shields thereafter transferred his interest in the land contract to his father, the plaintiff. *Id.* at 685. Singh sued plaintiff and Daniel Shields and, in December 1994, obtained a \$38,500 consent judgment for remediation costs of the contamination. *Id.* Plaintiff then filed an action against Shell to recover the \$38,500 under the Natural Resources and Environmental Protection Act (NREPA), because Shell owned the property at the time the contamination occurred. *Id.* Shell moved for summary disposition and argued that, because the site was contaminated when Daniel Shields bought it in 1987, under NREPA MCL 324.20140, the claim accrued before July 1, 1991, and was barred by the statute of limitations date of July 1, 1994. *Id.* Shields argued that the limitations period was not triggered until the 1994, when he incurred response activities costs through the consent judgment. *Id.* The trial court granted summary disposition to Shell. *Id.* at 686. On appeal, the Court of Appeals, in a per curiam opinion, ruled that, as a statute of repose, MCL 324.20140(2), imposed a strict time limit after the claim accrued, when Daniel Shields acquired the property in 1987. *Id.* at 694. Accordingly, plaintiff had to file his complaint before July 1, 1994, and, because he failed to do so, his claim was time-barred. *Id.* at 695.

On appeal, the Michigan Supreme Court peremptorily reversed the decision of the Court of Appeals and vacated the trial court's order granting summary disposition to Shell and remanded the case to the trial court for further proceedings. *Shields v Shell Oil Co*, 463 Mich 940; 621 NW2d 215 (2000). In a brief statement, the Court ruled that, under MCL 324.20140, "it is clear that only actions for recovery of response activity costs incurred before July 1, 1991, were subject to the July 1, 1994, limitation period." *Id.*

***People v Vasquez*, 240 Mich App 239; 612 NW2d 162 (2000):**

The prosecutor charged defendant with resisting and obstructing an officer, MCL 750.479, after defendant lied to a police officer about his name and age. *Id.* at 241. The trial court quashed the criminal information and ruled that while, in some circumstances, misrepresentations might constitute "obstruction," under these facts, defendant's lie "neither impeded the investigation into whether he had been drinking alcoholic beverages nor prevented the officers from booking him on the underlying charge . . ." *Id.* at 242. The Court of Appeals, in a per curiam opinion, reversed the trial court's ruling. *Id.* at 249. The Court of Appeals reasoned that, while passive, defendant's lie served to

“prevent the State Police from instituting any legal action against him as an individual and would actually hinder law enforcement agents from taking action against him, which fits under the broad definition of resisting, obstructing, or opposing.” *Id.* at 245. The Court further held that the statute is not impermissibly vague. *Id.* at 247.

On appeal, the Supreme Court reversed the decision of the Court of Appeals and held that MCL 750.479 does not proscribe *any* interference with a police officer, only “threatened, either expressly or impliedly, physical interference and actual physical interference with a police officer.” *People v Vasquez*, 465 Mich 83, 85-86; 631 NW2d 711 (2001). Accordingly, the Court ruled that defendant did not “obstruct” the police officer and affirmed the trial court’s order dismissing the charges against defendant. *Id.* at 100.

***Greathouse v Rhodes*, 242 Mich App 221; 618 NW2d 106 (2000):**

In this medical malpractice case, plaintiff appealed a jury verdict in favor of the defendant doctor. *Id.* at 226-227. On appeal, plaintiff argued that the trial court abused its discretion by denying her motion to strike defendant’s expert witnesses because they were not qualified to testify to the appropriate standard of care under MCL 600.2169(1)(a). *Id.* at 227. The Court of Appeals held that plaintiff forfeited her right to challenge defendant’s experts by failing to challenge the expert’s qualifications under MCL § 2169(1)(a) within a reasonable time after learning the expert’s identity. *Id.* at 231. Because plaintiff waited until 28 days before trial and two years after learning about one expert to challenge his qualifications, the Court ruled that plaintiff forfeited his challenge. *Id.* at 236.

On appeal, the Michigan Supreme Court reversed in part the decision of the Court of Appeals and held that it was not necessary for plaintiff to challenge the defendant’s expert within a “reasonable time” of learning the identities of the experts. *Greathouse v Rhodes*, ___ Mich ___, 636 NW2d 138 (2001).

***Taggart v Tiska*, 242 Mich App 688; 619 NW2d 731 (2000):**

Plaintiffs brought an action against an adjacent landowner and claimed ownership of a strip of land between the properties by adverse possession. *Id.* at 689. Plaintiffs were ousted from the strip in November 1996, but did not file their complaint to recover the disputed strip until December 1997. *Id.* at 689-690. Accordingly, the trial court ruled that, under MCL 600.5868, plaintiffs’ action was time-barred by the one year statute of limitations in MCL 600.5868. *Id.* at 689. The Court of Appeals, in a per curiam opinion, affirmed the trial court’s ruling. *Id.* at 689-691. On appeal, the Michigan Supreme Court reversed the decisions of the trial court and the Court of Appeals and held that, though “less than perfectly clear,” MCL 600.5868 does not constitute a one-year statute of limitation. *Id.* at 673. Rather, the Supreme Court held that the statute applies only to the determination of whether an adverse possessor continuously possessed the land, not the time within which an owner by adverse possession must sue to enforce his rights. *Id.* at 673-674.

***Molloy v Molloy*, 247 Mich App 348; 637 NW2d 803 (2001):**

In this child custody case, the Court of Appeals ordered a conflict panel to resolve whether an in camera interview of the child could extend beyond the best interest factors of the child's parental preference. *Id.* at 349. The Court (Cooper, J.) ruled "that a child's in camera interview during custody proceedings must be limited to a reasonable inquiry of the child's parental preference." *Id.* at 351. The Court further held that, "[g]iven the important individual rights and state interests present, coupled with the potential for error under the current procedures, we find that the requirement of a record in every in camera interview with a child during a custody dispute is necessary for purposes of meaningful appellate review and to ensure the integrity of the custody decisions." *Id.* at 362.

On appeal, the Michigan Supreme Court affirmed the Court of Appeals' decision, except for the ruling requiring that the interviews be recorded. *Molloy v Molloy*, ___ Mich ___; 643 NW2d 574 (2002). Specifically, the Supreme Court opened "an administrative file to examine the extent to which, and the procedures by which in camera testimony may be taken in custody cases." *Id.* The Court invited interested persons to address the issue and remanded the case "to the trial court for further proceedings, consistent with the decision of the Court of Appeals." *Id.*

Additional unpublished reversed or criticized case for which I had writing responsibility:

***Cain v Waste Management*, unpublished opinion per curiam of the Court of Appeals, issued May 2, 2000 (Docket No. 214445).**

Plaintiff employee appealed the decision of the Worker's Compensation Appellate Commission (WCAC) which denied him benefits for the loss of use of his left leg in a work-related accident. The Court of Appeals affirmed in part and reversed in part and held that, while plaintiff failed to properly plead a claim for specific loss benefits for his left leg, the WCAC erred by applying the "corrected test" to assess the function of plaintiff's leg while wearing his leg brace. The Court of Appeals held that the trial court should have applied the "uncorrected test," which measures the use of the leg without any corrective device. On appeal, the Michigan Supreme Court reversed and held that the "corrected test" should be used to evaluate an injured limb. *Cain v Waste Management, Inc.*, 465 Mich 509; 638 NW2d 98 (2002). The Court ruled that "total and permanent disability is not demonstrated where the proofs indicate that a braced limb is functional and can support 'industrial use.'"

Unpublished cases for which I was on the panel, but did not have writing responsibilities:

***Porter ex rel Estate of Smith v Northeast Guidance Center, Inc.*, unpublished opinion per curiam of the Court of Appeals, issued October 5, 2001 (Docket Nos. 213190, 217974, 223647, 223648):**

Plaintiff sued defendant and her employer when defendant struck and killed plaintiff's decedent while driving her employer's vehicle. The jury returned a verdict for plaintiff and defendants appealed. This Court affirmed the jury's finding of liability, but reversed its damage award because plaintiff's counsel introduced irrelevant evidence and

argument regarding the decedent's organ donation to invoke the sympathies of the jury. On appeal, the Michigan Supreme Court modified the judgment of the Court of Appeals and remanded for a new trial on both the issue of liability and damages. *Porter ex rel Estate of Smith v Northeast Guidance Center, Inc.*, ___ Mich ___; 653 NW2d 183 (2002). The Supreme Court reasoned that, because defendants' liability for the accident was not clear, and because the decedent's lack of negligence was not clear, a new trial on only the issue of damages would be disfavored under Michigan case law from the 1960s.

***Pioneer State Mut Ins Co v Splan*, unpublished opinion per curiam of the Court of Appeals, issued August 24, 2001 (Docket No. 220477):**

Defendants insured their modular home through plaintiff, Pioneer State Mutual Insurance Company since 1982. In subsequent years, plaintiffs made numerous structural improvements to the home, including adding several rooms and installing a galvanized roof. Cracks began to develop in the ceiling of the home and expanded into "gaping" separations, caused by severe sagging of the roof. Plaintiffs obtained a repair estimate for \$74,638.51. Defendants submitted a proof of loss claim and stated that the sagging was caused by the buildup of ice and snow. Plaintiff concluded, however, that the damage was caused by structural defects existing before defendants purchased the home. The trial court granted plaintiff's motion for summary disposition because the policy excludes a loss caused by faulty or defective construction. The trial court also held that, while the policy covers "collapse," the policy explicitly provides that "collapse" does not include loss caused by "settling, cracking, shrinking, building to expansion" This Court reversed the trial court's grant of summary disposition and held that the term "collapse" in the policy is ambiguous. The Court further held that there was a genuine issue of material fact regarding whether the home collapsed and was covered by the collapse provision.

On appeal, the Michigan Supreme Court vacated the judgment of the Court of Appeals in an order issued on November 27, 2002. *Pioneer State Mut Ins Co v Splan*, ___ Mich ___; ___ NW2d ___ (2002). Specifically, the Court ruled that the Court of Appeals erroneously concluded that the policy term "collapse" is ambiguous. The Court, therefore, remanded the case to the Court of Appeals for reconsideration.

***Rabedeau v General Motors Corp*, unpublished opinion per curiam of the Court of Appeals, issued September 18, 1998 (Docket No. 189347):**

In this discrimination and retaliation case, the Court of Appeals affirmed a jury verdict in favor of plaintiff, but remanded for an evidentiary hearing regarding the amount of attorney fees and costs to which plaintiff was entitled under the Michigan Civil Rights Act. The Court also ruled that the trial court must consider the award of attorney fees as part of the verdict for purposes of determining the defendant's liability for mediation sanctions. On appeal, the Michigan Supreme Court denied leave to appeal on all issues, but reversed in part the decision of the Court of Appeals to remand for a determination of mediation sanctions because it ruled that plaintiff is not entitled to mediation sanctions in addition to the attorney fees awarded under the Civil Rights Act. *Rabedeau v General Motors Corp*, 461 Mich 957; 607 NW2d 728 (2000).

***Winter v Fitness USA Health Spas Corp*, unpublished opinion per curiam of the Court of Appeals, issued July 22, 1997 (Docket No. 188648):**

In this age discrimination case, the Court of Appeals vacated a jury verdict and remanded for a new trial because the trial court abused its discretion by denying defendant's motion for a new trial. Specifically, the Court ruled that defendant was denied a fair trial by plaintiff's counsel's repeated "comments concerning defendant's alleged wealth, greed, and brutal corporate nature" On appeal, the Michigan Supreme Court reversed the judgment of the Court of Appeals and stated merely that "[t]he trial court did not commit a clear abuse of discretion in denying defendant's motion for new trial." *Winter v Fitness USA Health Spas Corp*, 459 Mich 895; 589 NW2d 278 (1998). The Court then remanded the case for the Court of Appeals to consider the other issues raised on appeal.

***Budde v Michigan Dept of Consumer & Industry Services*, unpublished opinion per curiam of the Court of Appeals, issued September 14, 2001 (Docket No. 221251):**

Defendant filed a complaint against plaintiff, a state certified social worker, for violating the Occupational Code by engaging in a sexual relationship with a female patient. The Board of Examiners of Social Workers (Board) revoked plaintiff's state certification and imposed a fine. Plaintiff appealed the decision to the trial court, which reversed the decision and found that plaintiff's conduct did not cause the patient any harm. On appeal, the Court of Appeals reversed the trial court's decision and, among other rulings, held that the Board did not abuse its discretion by revoking plaintiff's certification and imposing a fine. On appeal, the Supreme Court reversed in part the Court of Appeals' decision regarding whether the penalty imposed constituted an abuse of discretion. *Budde v Michigan Dept of Consumer & Industry Services*, ___ Mich ___; 643 NW2d 573 (2002). The Court remanded the case to the trial court to decide whether the sanction imposed constituted an abuse of the Board's discretion. *Id.*

(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.

***Burns v City of Detroit*, ___ Mich ___; ___ NW2d ___ (Docket No. 213029, issued November 1, 2002):**

Plaintiff, an employee of the Detroit Police Department, filed a lawsuit against the City of Detroit and three individual police officers for sexual harassment, retaliation, defamation and tortious interference with a business relationship. The jury returned a verdict for plaintiff on all four claims and defendants appealed. In *Burns v City of Detroit*, unpublished opinion per curiam of the Court of Appeals, issued October 31, 2000 (Docket No. 213029), the Court of Appeals (Meter, P.J., and Gribbs and Griffin, JJ.) affirmed the jury's verdict on plaintiff's retaliation and hostile work environment sexual harassment claims, but reversed the jury's verdict on plaintiff's defamation and tortious interference with a business relationship claims. Because the jury rendered a

single damage award, this Court remanded the case to the trial court for a new trial on damages.

In lieu of granting leave to appeal, the Michigan Supreme Court *sua sponte* remanded the case to the Court of Appeals “for consideration of the question whether the remarks that supported the ‘hostile environment’ sexual harassment claims cannot form the basis for liability because they are protected speech under US Const, Am I, and Const 1963, art 1, § 5, and because basing a finding of liability on such remarks would raise vagueness and overbreadth concerns under the same constitutional provisions.” *Burns v City of Detroit*, 465 Mich 946; 637 NW2d 503 (2002).

On remand, the Court of Appeals (Meter, P.J., and Griffin and Saad, JJ.), in an opinion authored by Judge Meter, again upheld the jury verdict on plaintiff’s sexual harassment claim. *Burns v City of Detroit*, ___ Mich ___; ___ NW2d ___ (Docket No. 213029, issued November 1, 2002). Specifically, the Court held “that the comments at issue . . . do not constitute protected speech under the United States and Michigan constitutions and that the imposition of liability for the comments does not raise valid concerns of vagueness and overbreadth.” *Id.* On the issue whether defendants’ comments constitute protected speech, the Court opined:

Clearly, the comments at issue here were “no essential part of any exposition of ideas . . .” [*Chaplinski v State of New Hampshire*, 315 US 568, 572; 62 S Ct 766; 86 L Ed 2d 1031 (1942).] Indeed, the comments were more akin to “fighting” words and essentially constituted a vulgar, vituperative, ad hominem attack against an individual. [Defendants] continually referred to plaintiff as a “b----,” called her a “f-----g female,” ridiculed her lack of a man, and, importantly, threatened her with personal harm. These “epithets” and this “personal abuse,” directed toward a particular individual, were not “in any proper sense communication of information or opinion safeguarded by the Constitution.” *Id.*; *Cantwell [v Connecticut]*, 310 US 296, 310; 60 S Ct 900; 84 L Ed 2d 1213 (1940).] Accordingly, the language at issue simply does not reach the level of constitutionally-protected speech under the doctrine from *Chaplinsky*, and the sexual harassment judgment did not violate Const 1963, art 1, § 5, or U.S. Const, Am I. While defendants are free to express their views in the workplace, the constitution does not shield them from liability for verbally attacking a coworker by use of ad hominem, sexually-explicit vulgarities. [Expletives edited.]

The Court of Appeals further held that, because the facts clearly supported a finding of sexual harassment, the disputed provisions of the Civil Rights Act are not vague for failing to provide notice of proscribed conduct and do not confer unstructured or unlimited discretion to the jury in deciding whether an offense was committed. Furthermore, the Court held that the provisions of the Michigan Civil Rights Act are not overbroad because they “do not unconstitutionally chill a person’s rights to free speech.” Further, under the “reasonable person” standard set forth by the Michigan Supreme Court in *Radke v Everett*, 442 Mich 368, 394; 501 NW2d 155 (1993), “ ‘a reasonable person would understand’ that the civil rights act does not prohibit constitutionally-protected

speech, such as the expression in general of unpopular ideas, but instead prohibits communication of a sexual nature, like that at issue here, that substantially interferes with a person's work or creates an intimidating, hostile, or offensive work environment." Accordingly, the Court upheld the constitutionality of the statute and affirmed the jury's verdict in favor of plaintiff on her sexual harassment claim.

17. Public Office, Political Activities and Affiliations:

- (a) I ran unopposed in the 2002 general election. My term expires on December 31, 2008.

21. Party to Civil or Administrative Proceedings:

In December 2000, I filed an arbitration claim with NASD against an investment firm and principals for violation of securities laws (unsuitability). My lawyer is Michael Rizik, Jr., who may be contacted for further details. Mr. Rizik's address and phone number: 8226 S. Saginaw, Grand Blanc, MI, (810) 953-6000.

In July 2002, I filed a Complaint for Divorce. My lawyer is Donald McGinnis, Jr., who may be contacted for further details. Mr. McGinnis' address and phone number: 1721 Crooks Road, Suite 101, Troy, MI, (248) 643-6002.

24. Sources of Income:

See Addendum for Financial Disclosure Report for Nominees, attached.

FINANCIAL STATEMENT

NET WORTH

AMENDED STATEMENT

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	\$ 7000	Notes payable to banks-secured	\$ 6,000
U.S. Government securities-add schedule	n/a	Notes payable to banks-unsecured	n/a
Listed securities-add schedule	509,615	Notes payable to relatives	n/a
Unlisted securities-add schedule	n/a	Notes payable to others	n/a
Accounts and notes receivable:	n/a	Accounts and bills due	n/a
Due from relatives and friends	n/a	Unpaid income tax	n/a
Due from others	n/a	Other unpaid income and interest	n/a
Doubtful	n/a	Real estate mortgages payable-add schedule	240,000
Real estate owned-add schedule Residence	600,000	Chattel mortgages and other liens payable	n/a
Real estate mortgages receivable	n/a	Other debts-itemize:	n/a
Autos and other personal property	10,000		
Cash value-life insurance	n/a		
Other assets itemize:	n/a		
		Total liabilities	(246,000)
		Net Worth	880,615
Total Assets	1,126,615	Total liabilities and net worth	
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor	n/a	Are any assets pledged? (Add schedule)	n/a
On leases or contracts	n/a	Are you defendant in any suits or legal actions?	n/a
Legal Claims	n/a	Have you ever taken bankruptcy?	n/a
Provision for Federal Income Tax	n/a		
Other special debt	n/a		

LISTED SECURITIES SCHEDULE

Hon. Henry William Saad

SECURITY	SHARE QUANTITY	MARKET VALUE
Citigroup Inc	400	14,075
Intel	700	10,899
ML S&P 500 Ind Fd Cl A	3,763	40,489
Dell Computer Corp	1,440	38,505
Exxon Mobil Corp	400	13,976
JP Morgan Chase & Co	150	3,600
Mellon Financial Corp	200	5,222
Putnam Inv Fnd Cl A	3,287	28,925
Spectra Fnd Inc	1,576	7,044
Alcoa Inc	200	4,556
Costco Wholesale Crp Del	200	5,612
Merck & Co Inc	200	11,322
ML & Co Inc	500	18,975
Nasdaq-100 Trustm I	540	13,159
Wachovia Corp	308	11,223
Aim Prem Eq Fnd Cl B	963	6,808
Franklin Mut Qual Fd Cl C	657	9,099
ML Eurofd Cl A	1,319	14,245
Putnam Fd for Grwth Cl B	565	7,881
Amer Inv Co Cl A	1,315	30,876
Amer Centy Inc & Gr Fd	1,679	36,501
Dreyfus Appr Fd	1,395	43,524
ML Fund Gr A	545	7,035
Coca Cola	210	9,206
Fannie Mae USA	250	16,082
General Electric	800	19,480
Microsoft	360	18,612
Motorola Inc	1,095	9,471
Oracle Corp	2,000	21,600
Pfizer Inc	500	15,285
Procter Gamble	190	16,328
J M Smucker Co	3	119
	MARKET VALUE TOTAL LISTED SECURITIES	\$509,615

REAL ESTATE/MORTGAGE SCHEDULE - HOUSE

Hon. Henry William Saad

<u>Value</u>	<u>Mortgage Payable to Homeside Lending Co.</u>
\$600,000	\$240,000

Chairman HATCH. Well, thank you. I appreciate that.

I was going to turn to Senator Leahy first and have him ask whatever questions he felt inclined to do, but let me at least start it, and hopefully he will arrive or one of the Democrats will. Usually we have at least one who will represent the Democrats.

Judge Saad, you have a lot of experience as a practicing attorney, as a teacher of law, as a State appellate judge. How has this experience prepared you to be a judge on the Sixth Circuit Court of Appeals?

Judge SAAD. Thank you, Mr. Chairman, for that question. I think the most important quality of an appellate judge is the ability and the willingness to listen to both sides, to give the litigants and the attorneys who argue before the court the respect due the positions they have.

Chairman HATCH. Thank you. I have—

Judge SAAD. To keep—I'm sorry.

Chairman HATCH. Keep going. I am sorry. I thought you were through. Go ahead.

Judge SAAD. To keep an open mind, not to pre-judge matters, to give both the—not only the fact of impartiality but the appearance of impartiality. I've had the honor of teaching legal ethics, what we call professional responsibility, in one of our local law schools. And what we teach the students and what I have tried to teach interns, externs, anybody that I work with, is that you accord the parties a fair hearing, you keep an open mind. You're governed by the rule of law, not your own intuitions. And, indeed, as complicated as the law is these days, if we just go by gut instinct and intuition, I think all of us who are lawyers know that you would end up with some difficulty.

The real purpose of appellate review is to make, at least in our court, as an intermediate appellate court in Michigan, is to be an error-correcting court, to follow the rule of law, which means also to follow the rule of law that governs our conduct as judges, so that if the standard of review is clearly erroneous or de novo or abuse of discretion, those rules govern us. So we abide by the rules, and we give people a fair hearing, keep an open mind.

Chairman HATCH. Well, thank you.

Let me interrupt for a second and put the statement of Senator Richard Durbin into the record at the appropriate place.

You have been active in a number of legal, civic, and charitable organizations. Could you please explain to the Committee what you have done to reach out to all segments of society and what results you feel that you have achieved in doing this type of work?

Judge SAAD. Well, I think it is important for a lawyer and our professional rules of responsibility say that it's important for a lawyer to give back to the community. So as a lawyer, I was involved in, as I'm sure the record will show, numerous charitable and legal organizations: Wayne County Neighborhood Legal Services, which provided legal service to the poor; New Detroit, which tried to seek some common ground with some of the issues that Detroit faced in the mid- to late 1960's. I've worked with the National Conference of Christians and Jews for outreach and ecumenical purposes. Teaching law school is another way to give back to the community. I teach at two local law schools, and I'm on an advisory board of

a third. And the list can go on, but I don't want to take all your time going through all that. But I think it's very important in all of these outreach activities.

I've also worked with various committees of the American Bar Association over the years. I've worked on committees of the Michigan Bar Association, the Detroit Bar Association. So giving back to your profession both by working through committees of the various bar associations and I think your ethnic and religious communities for purposes of bringing people together is very important. And then I think the litigants in your courtroom have the impression that not only are you somebody who takes the law seriously, but you take your role as a human being in giving back to society very seriously.

Chairman HATCH. I know you very well. I know your reputation. I know what you have done. I have a tremendous amount of respect for you. I don't see any reason to ask you any further questions.

I think what I am going to do, though, is ask you to stay here because I have been informed that perhaps Senator Edwards will be coming. I would like to give any Democrat who wants to ask any questions some time with you.

Judge SAAD. I would be pleased to do that, Mr. Chairman.

Chairman HATCH. I hate to have you just sit and wait, but I want to be fair to my colleagues.

Judge SAAD. I would be pleased to wait at your discretion.

Chairman HATCH. Well, thank you so much. Then what I will do is I will begin with the other district court nominees, and I will move ahead with them. But if any of the Democrats arrive, I will have to interrupt them so that they can get back to you, if that is all right with the district court nominees as well.

Judge SAAD. Okay.

Chairman HATCH. So, with that, we will ask you to stick around for a while. I won't keep you all day. If nobody shows up, they won't show up.

Judge SAAD. Thank you, Mr. Chairman. I'd be happy to. Thank you.

Chairman HATCH. Okay. Thank you.

Chairman HATCH. Then if I could have Larry Alan Burns, Glen E. Conrad, Henry F. Floyd, Kim R. Gibson, Michael W. Mosman, and Dana Makoto Sabraw all take your seats, I would appreciate it. Well, if you could all raise your right hands, if you would. Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Judge BURNS. I do.

Judge CONRAD. I do.

Judge FLOYD. I do.

Judge GIBSON. I do.

Mr. MOSMAN. I do.

Judge SABRAW. I do.

Chairman HATCH. Thank you very much. Please take your seats, and we will go from my left to your right. And we will start with you, Judge Burns, if you have any comments you would care to make. I think most of you have introduced your family and your friends, but those of you who haven't might want to take the oppor-

tunity to do that. In that regard, we welcome all of you here. This isn't always the most pleasant Committee to watch or to sit through. It has become one of the most partisan committees I have ever sat on, and, frankly, it gets really old to me. But that is the way it is, and it is a great Committee and we have great people on this Committee, people of tremendous ability, but a lot of deep feelings. And so I apologize in part for the Committee and the way we act from time to time, but there are some deep, strong feelings, and I think people need to know that.

Judge Burns, we will start with you. You need to press this little button in front. You will see a little red light come on if you press it lightly.

Judge BURNS. I think I did it.

Chairman HATCH. Okay. You will all need to do that.

STATEMENT OF LARRY ALAN BURNS, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Judge BURNS. I have no opening statement. I want to reiterate what Judge Saad said. I'm pleased to be here. I thank the Chairman and the Committee for holding a hearing and am looking forward to answering any questions the Committee may have.

[The biographical information follows:]

QUESTIONNAIRE FOR NOMINEES REFERRED
TO THE
UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Larry Alan Burns (Larry Alan Cockburn, 1954-57 – last name changed to Burns by my father when I was age 3)
2. Address: List current place of residence and office address(es).

Residence: Poway, California

Office: United States District Court, Edward J. Schwartz Courthouse,
940 Front Street, Suite 1165, San Diego, California 92101
3. Date and place of birth:

June 29, 1954; Pasadena, California
4. Marital Status (include maiden name of wife, or husband's name): List spouse's occupation, employer's name and business address(es).

My wife's name is Kristi Francis Burns (*nee*, Kristi Lyn Francis). She is a Registered Nurse at Sharp Memorial Hospital, 7901 Frost Street, San Diego, California, 92123.
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Colleges/Law Schools Attended	From	To	Degree Received	Date Degree Received
University Of San Diego School Of Law	June 1976	Dec. 1978	J.D.	May 1979
Point Loma College	Sept. 1974	June 1976	B.A.	June 1976
Northwest Nazarene College	Sept. 1972	June 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.

Employer	From	To	Paid Position	Job Title	Address
U.S. District Court	June 1997	Present	Yes	U.S. Magistrate Judge	Edward J. Schwartz Courthouse 940 Front Street Suite 1165 San Diego, CA 92101
U.S. Department Of Justice	April 1985	June 1997	Yes	Assistant U.S. Attorney	Office Of The U.S. Attorney, S.D. Cal. 880 Front Street San Diego, CA 92101
Bank Of Commerce	Feb. 1994	June 1997	Yes	Director, Corporate Secretary	9918 Hibert Street Suite 101 San Diego, CA 92131
San Diego County District Attorney	Sept. 1979	April 1985	Yes	Deputy District Attorney	Hall Of Justice 330 West Broadway San Diego, CA 92101
U.S. Department Of Justice	May 1978	August 1978	Yes	Legal Intern	Office Of The U.S. Attorney, S.D.N.Y. One St. Andrews Plaza New York, NY 10007

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, 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.

- ▶ Consumer Trial Lawyers of San Diego "Judge of the Year" Award, 2002
- ▶ Associate, American Board of Trial Advocates (inducted 2002)
- ▶ Fellow, American College of Trial Lawyers (inducted 1997)
- ▶ Master at the Bench, William B. Enright Inn of Court, 1991-98

- ▶ "AV" rating by Martindale Hubbell, 1989-97 (no longer rated once I was appointed Magistrate Judge)
- ▶ U.S. Department of Justice Awards and Recognition:
 - Sustained Superior Performance of Duty, 1989, 1990, 1991, 1992
 - Director's Award for Superior Performance as an Assistant U.S. Attorney, 1991
 - Outstanding Assistance to Crime Victims, 1990 and 1992 (National Award)
 - Commended by the Director of the FBI on four occasions, 1989, 1990, 1993, 1995
- ▶ Faculty Mentoring Honoree, San Diego State University, 1996
- ▶ Outstanding Faculty Award, National University, 1985
- ▶ Fellow, U.S. Department of Education, Indian Fellowship Program, 1976-79

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 Board of Trial Advocates, 2002-Present (Associate)
- ▶ Association of Business Trial Lawyers, 2002-Present (Board of Governors)
- ▶ San Diego Inn of Court, 2002-Present (Board of Directors)
- ▶ American College of Trial Lawyers, 1997-Present (Fellow)
- ▶ William B. Enright Inn of Court, 1991-98 (Founding Member and Master at the Bench)
- ▶ Federal Bar Association, 1997-Present
- ▶ Louis M. Welsh Inn of Court, 1985 (Associate)
- ▶ San Diego County Bar Association, 1979-85; 1991-97
- ▶ California District Attorney's Association, 1979-85
- ▶ American Bar Association, 1979-80

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 California Bar Association, of which I am a member, occasionally engages in lobbying on matters affecting the legal profession. I do not belong to any other organizations that lobby before public bodies.

From 2001 to the present, I have been active in the Knights of Vartan, a national, non-sectarian, non-political, non-denominational fraternal organization operating locally under the auspices of the Armenian Church in San Diego, and emphasizing charitable activity and community service. The San Diego chapter supports, and members participate in, various charitable, philanthropic and educational activities. Last year the San Diego chapter sponsored and funded a film presentation on the life of author William Saroyan. The presentation was open to students from all local colleges and to the community at large. The year before last, our local chapter raised donations to keep an elementary school in Armenia heated and open during the winter months, and also established a bone marrow donor registry in Southern California.

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 California courts (admitted May 1979)
- ▶ United States District Court - Southern District of California (admitted May 1979)
- ▶ United States Court of Appeals for the Ninth Circuit (admitted February 1988)

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.

PROSECUTION OF FEDERAL HOMICIDE CASES, U.S. Department of Justice Office of Legal Education (1st ed. 1996) (Contributing author (wrote Chapter 11) to manual on federal homicide prosecutions for Assistant U.S. Attorneys)

Larry A. Burns, *Tough New Statute Puts Away Dangerous Felons*, LAW ENFORCEMENT QUARTERLY, Spring 1990, at 13 (Discussing federal Armed Career Criminal Act, 18 U.S.C. § 924(e), and successful prosecutions brought under the Act)

Larry A. Burns, *Taking The Fifth*, 4 CRIM. JUST. J. 347 (1980) (Book review of TAKING THE FIFTH by Mark Berger, Lexington Books, D.C. Heath Co., 1980)

Note, *Double Jeopardy in Indian Country*, 6 AM. INDIAN L. REV. 95 (1979) (Student note discussing confluence of criminal jurisdiction in "Indian Country," 18 U.S.C. § 1151)

Copies of the above publications are attached at Tab 1.

During the past 15 years I have made numerous presentations on trial advocacy and federal criminal law at educational programs sponsored by bar organizations, public law offices and academic institutions. The following is a representative list:

- ▶ American Board of Trial Advocates, "Trial By Masters Program" (Cross-Examination of Forensic Economists) April 26, 2003
- ▶ San Diego Inn of Court (Cross-Examination) October 10, 2002
- ▶ American Board of Trial Advocates, "Trial By Masters Program" (Cross-Examination of Forensic Psychiatrists) April 28, 2001
- ▶ Federal Bar Association (Conducting Voir Dire in Federal Court) September 16, 1999
- ▶ San Diego Inn of Court (Voir Dire Techniques In State & Federal Court) October 20, 1997

- ▶ Univ. of San Diego School of Law Criminal Clinic (Grand Jury Practice) March 4, 1997, July 11, 1996, January 27, 1994; February 1, 1993; September 16, 1993
- ▶ State Bar of California, Annual Meeting 1997 (Criminal Law Issues Relevant to the Civil Practitioner) (group presentation) September 13, 1997
- ▶ San Diego Criminal Defense Lawyers Club (Criminal Charging Decisions) April 12, 1995
- ▶ California Western School of Law Criminal Clinic (Grand Jury Practice) January 25, 1995, September 22, 1995 and February 7, 1994
- ▶ Court T.V. (*People v. O.J. Simpson*) (Commentator on Opening Statements) January 20, 1995
- ▶ California Western School of Law Criminal Clinic (Opening Statement) March 23, 1994
- ▶ California Western School of Law Trial Symposium (Opening Statement) January 25, 1994
- ▶ San Diego County Office of the District Attorney All-Office Training Seminar (Cross-Examination) January 23, 1993
- ▶ California Western School of Law Trial Symposium (Cross-Examination) January 22, 1993
- ▶ Anti-Defamation League of B'Nai B'Rith (Federal Prosecution of Hate Crimes) April 8, 1991
- ▶ California Bar Association, Continuing Education of the Bar (CEB) (Effective Criminal Trial Tactics) February 7 and 13, 1990
- ▶ U.S. District Court - S.D. California, Symposium on Trial Advocacy in Federal Court (Voi Dire; Cross-Examination) June 16, 1989
- ▶ San Diego City Attorney's Office All-Office Training Seminar (Closing Argument) January 16 and 18, 1988

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

My health is excellent. I had a full physical exam in October 2001 and a physical check-up with a physician on March 6, 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 was appointed as a United States Magistrate Judge for the Southern District of California in June 1997. As a magistrate judge, I preside in federal civil and criminal cases. Approximately 85% of my duties involve civil litigation and the rest involve criminal matters. In civil litigation, I manage a rolling docket that averages 225 cases at a time, and encompasses a diverse array of civil claims including tort, contract, labor, insurance, patent, trademark, securities, discrimination, and civil rights disputes. My civil case duties include conducting settlement conferences, resolving all discovery and other non-dispositive motions, and generally managing the cases to ensure that they move forward expeditiously.

I also decide dispositive civil motions and conduct other case-dispositive hearings with the consent of the parties or on report and recommendation to a United States District Judge. Finally, I prepare written decisions, on report and recommendation, for the district judges in non-capital *habeas corpus* cases and in administrative appeals from the denial of social security benefits. During the past four years, I have presided over three civil jury trials and one civil non-jury trial. I have also assisted parties in settling more than 450 civil cases.

My criminal duties include reviewing and authorizing the issuance of federal criminal complaints, search warrants, and arrest warrants; conducting arraignments, bail, and detention hearings, and removal and extradition hearings; taking guilty pleas in felony and misdemeanor cases; and presiding over all aspects of federal misdemeanor and petty offense cases, including trial and sentencing.

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) *In the Matter of the Extradition of Stefan Platko*, 213 F.Supp.2d 1229 (S.D. Cal. 2002)
Munoz v. Kolender, 208 F.Supp.2d 1125 (S.D. Cal. 2002)
United States v. \$160,066.98 from Bank of America, 202 F.R.D. 624 (S.D. Cal. 2001)
Empresa Constructora Contex v. Iseki, Inc., 106 F.Supp.2d 1020 (S.D. Cal. 2000)
United States v. Vasquez, 74 F.Supp.2d 964 (S.D. Cal. 1999)
Pogue v. Ratelle, 58 F.Supp.2d 1140 (S.D. Cal. 1999)
Cooper v. Garcia, 55 F.Supp.2d 1090 (S.D. Cal. 1999)
Aarhus v. United States, et al., 00cv0128-LAB (unpublished)
Rogers v. Clarendon America Insurance Co., 00cv1267-LAB (unpublished)
Clements v. Alameida, 02cv1376-JM (LAB) (unpublished)

- (2) None.

- (3) Following are the significant opinions I have written on federal constitutional issues:

Munoz v. Kolender, 208 F.Supp.2d 1125 (S.D. Cal. 2002)
Pogue v. Ratelle, 58 F.Supp.2d 1140 (S.D. Cal. 1999)
Cooper v. Garcia, 55 F.Supp.2d 1090 (S.D. Cal. 1999)

I have written no opinions on state 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 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;

Following my graduation from law school, I joined the San Diego County Office of the District Attorney. The Office of the District Attorney is today located in the Hall of Justice, at 330 West Broadway, San Diego, California, 92101. During six years as a Deputy District Attorney from 1979 to 1985, I served in the Municipal Court Division, the Superior Court Division, the Family Support Division, the Complaints and Extradition Division, and in the North San Diego County Branch Office of the District Attorney. As a Deputy District Attorney, I handled practically every type of criminal case, including major frauds and capital homicide prosecutions, and tried more than 100 felony and misdemeanor cases to jury verdicts.

In 1985, I was recruited to the U.S. Attorney's Office in San Diego. The U.S. Attorney's Office is located at 880 Front Street, San Diego, California, 92101. During 12 years with the U.S. Attorney's Office from 1985 to 1997, I served in the Complaints Section, the General Crimes Section, the Narcotics Section, and the Violent Crimes Section. I tried more than 50 felony criminal cases to jury verdicts in federal court and in state court as a cross-designated Special Deputy District Attorney. I also argued approximately 40 cases before the Ninth Circuit Court of Appeals and two cases before the California Fourth District Court of Appeal. Additionally, I held several supervisory and management positions in the office.

From 1991 to 1993, I served as Assistant Chief of the Criminal Division and Chief of the Violent Crimes Section, and I supervised approximately 30 lawyers. In 1993, I was named Deputy U.S. Attorney (3rd in authority in the office), and was responsible for helping to establish and to implement the policies and initiatives of the Justice Department and the United States Attorney in San Diego and Imperial Counties. As Deputy U.S. Attorney, I supervised over 100 lawyers, and oversaw a multi-agency Violent Crime Task Force that consisted of over 100 federal, state and local law enforcement agents. I was named Senior Trial Counsel for the U.S. Attorney's Office in 1995, and I held that position until my appointment to the bench in 1997.

In addition to my legal practice outlined above, my legal experience includes teaching law classes at both the college and graduate school level. From 1981 to 1986, as an Adjunct Professor, I taught approximately six classes a year, including a graduate course in evidence and an undergraduate course on the judicial process, at National University in San Diego, California. From 1987 to 1989, I taught as an Adjunct Professor at National University School of Law, also in San Diego. In 1987, I taught Criminal Law to first-year law students. During 1988 and 1989, I taught Trial Techniques to second and third-year students. Finally, from 1988 to 1996, as an Instructor at San Diego State University, I taught two upper-division courses each year in the School of Public Administration on the role of the prosecutor in our judicial system.

- 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?

Before my appointment as a Magistrate Judge in 1997, I engaged in criminal practice as a federal and state prosecutor. From 1979 to 1981, I tried over 50 misdemeanor cases to jury verdicts. I began regularly trying a wide variety of felony cases in 1982. From 1985 to 1997, I concentrated on the prosecution of violent offenses and career offenders. During this period, I tried numerous murder cases, including two capital cases, and I prosecuted approximately 15 cases under the federal Armed Career Criminal Act.

Additionally, from 1994 to 1997, after receiving written approval from the U.S. Department of Justice to engage in outside employment, I served on the board of directors and as corporate secretary to the Bank of Commerce in San Diego. As the only lawyer on the bank board, I monitored all civil litigation involving the bank, met with state and federal banking regulators regarding compliance issues, and was responsible for hiring the bank's outside counsel, reviewing their work, and serving as liaison between the board and outside counsel.

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

As a prosecutor, I represented the interests of the State of California and, later, the United States. I worked with a multitude of client agencies including all local police departments in San Diego County, the Federal Bureau of Investigation, the Drug Enforcement

Administration, the Internal Revenue Service, and the law enforcement components of the Treasury Department, among others. Beginning in 1989, I specialized in the prosecution of violent crime cases, including murder, bombing, arson and firearms violations.

- 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.

From 1979 to 1983, I appeared on a daily basis in the California Municipal and Superior Courts. As an example, in January 1981 I tried ten misdemeanor cases to jury verdicts and I was in court every weekday of that month. In 1983, I was transferred to the Complaints and Extradition Division of the San Diego District Attorney's Office, and I appeared in court less frequently.

From 1984 to 1985, I served as a felony trial deputy in the San Diego County Superior Court, where I once again appeared in court on a daily basis. During this period, I tried several long cause matters, including a two-month-long fraud case and a three-month-long murder case.

During my first six months as an Assistant U.S. Attorney in 1985, I handled a high-volume arraignment and misdemeanor disposition calendar before U.S. Magistrate Judges in federal court in San Diego. I then served for one year in 1986 as the grand jury assistant, presenting routine cases for indictment to federal grand juries in the Southern District of California. Beginning in 1987 and continuing through 1993, I regularly tried felony cases, and I handled a wide variety of other criminal matters in the U.S. District Court in San Diego. I also regularly argued cases before the Ninth Circuit Court of Appeals and, on two occasions, before the California Fourth District Court of Appeal. Additionally, on approximately ten occasions during this time period, I tried felony cases in the San Diego County Superior Court as a cross-designated Special Deputy District Attorney. I was promoted to an upper-management position in the U.S. Attorney's Office in 1993 and served in that position until 1995. From 1993 to 1995, I appeared less regularly in court, and I tried only three cases. From 1995 to 1997, as Senior Trial Counsel in the U.S. Attorney's Office, I returned to regularly trying cases in the District Court and to regularly arguing cases in the federal court of appeals.

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

From 1979 to 1985, I practiced exclusively in the California state courts. Beginning in 1985 and continuing through 1997, 90% of my practice was in the United States District Court in San Diego and the Ninth Circuit Court of Appeals. The remaining 10% of my appearances were in the San Diego County Superior Court and the California Fourth District Court of Appeal.

3. What percentage of your litigation was:

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

98% of my litigation experience was criminal; 2% was *quasi-civil* in nature, involving *habeas corpus* and forfeiture matters.

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.

From 1979 to 1997, I tried more than 350 cases to verdict. I was sole counsel in all but two of the cases; in the two cases I co-tried, I was lead counsel.

5. What percentage of these trials was:

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

50% of the cases I tried to verdict were tried to juries; the remaining 50% were non-jury trials.

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.

United States v. Morrison, Crim. No. 95-0708-IEG, aff'd, 113 F.3d 1020 (9th Cir. 1997)

This was the first federal "three strikes" case to be brought in California and one of the first such cases brought in the country, following Congress's 1994 enactment of the law. After the defendant pled guilty to bank robbery, the district court convened a special sentencing hearing at which it found that he had suffered two or more serious felony prior convictions. The court sentenced the defendant to life imprisonment without parole. I handled this case as sole counsel, and successfully defended the sentence and the federal three strikes law before the Ninth Circuit.

Opposing Counsel: Judi M. Sanzo
 3755 Avocado Boulevard, Suite 521
 La Mesa, CA 91941
 (619) 579-0299

Judge Presiding: Hon. Irma E. Gonzalez, U.S. District Court - S.D. Cal.

Dates: March 7-13, 1996

United States v. Martínez, Crim. No. 93-0206-K, aff'd, 49 F.3d 1398 (9th Cir. 1995)

This was the first federal carjacking case brought in California. The defendant was charged with carjacking, using a firearm during a crime of violence, and being an Armed Career Criminal. I tried this case as sole counsel, and the defendant was found guilty of all charges by a jury following a six-day trial. I later successfully defended the convictions and the federal carjacking statute on appeal.

Opposing Counsel: Mary E. Maguire
 Office of the Federal Public Defender
 830 East Main, Suite 1100
 Richmond, VA 23219
 (804) 565-0860

Judge Presiding: Hon. Judith N. Keep, U.S. District Court - S.D. Cal.

Dates: June 2-7, 1993

United States v. Mathews, et al., Crim. No. 90-0663-B, aff'd, 36 F.3d 821 (9th Cir. 1994)

Two defendants were charged with manufacturing and detonating a bomb, affecting commerce. The bomb detonated in a public place, causing disfiguring injuries to an innocent passer-by. One defendant pled guilty on the day of trial. As sole counsel, I tried the second defendant before a jury. He was found guilty of all charges following a three-day trial. I later successfully defended the conviction before the Ninth Circuit.

Opposing Counsel: Michael J. Dowd
 Milberg, Weiss, Bershad, Hynes & Lerach
 600 West Broadway, Suite 1800
 San Diego, CA 92101
 (619) 231-1058

~ and ~

Steven F. Hubachek
 Federal Defenders of San Diego
 225 Broadway, Suite 900
 San Diego, CA 92101
 (619) 234-8467

Judge Presiding: Hon. Rudi M. Brewster, U.S. District Court - S.D. Cal.

Dates: January 12-14, 1993

***People v. Nix, et al., San Diego County Superior Court No. CRN 21521, aff'd, No. D017523.
 (California Fourth District Court of Appeal, March 29, 1994)***

This was a special circumstances murder-for-hire case. The defendant was charged with conspiracy to commit murder and murder for financial gain. I managed separate federal and state grand jury investigations of the case that spanned 24 months and led to the indictments of six defendants. The indictments alleged that the principal defendant, Nix, hired others to murder one of his former employees who had brought a civil suit against him. Five defendants pled guilty in federal and state court prior to the trial of the principal defendant. I tried the case as sole counsel in the North County Division of the San Diego County Superior Court, while on special assignment as a cross-designated Deputy District Attorney. Following a two-week jury trial, the defendant was found guilty of conspiracy and first degree murder. The jury also found to be true the special circumstance that the murder was committed for financial gain. The case was featured in the January 13, 1992 issue of *People Magazine* and on the December 12, 2000 episode of the nationally syndicated television program *The Prosecutors*. The defendant's convictions and life-without-parole sentence were affirmed after appeal.

Opposing Counsel: William R. Fletcher, Esq.
 Post Office Box 8
 Carlsbad, CA 92108
 (760) 434-3553

Judge Presiding: Hon. J. Morgan Lester (retired)*
 San Diego County Superior Court, North County Division
 *Address and phone number in retirement:
 7777 North Wickham Road, #12-510
 Melbourne, FL 32940
 (321) 960-5834

Dates: July 13-28, 1992

United States v. Compton, Crim. No. 91-0171-B, aff'd, 5 F.3d 358 (9th Cir. 1993)

The defendant in this case was charged with aircraft piracy (skyjacking) and interfering with a flight crew after he attempted to commandeer a commercial airline flight from Oakland, California bound for Austin, Texas. The defendant represented he had placed a bomb on the aircraft and threatened he would ignite nitroglycerin he claimed to be holding unless the flight was rerouted to Cuba. When the pilots stopped to refuel in San Diego, law enforcement agents stormed the plane, overpowered the defendant, and took him into custody. Neither a bomb nor nitroglycerin was found. I tried this case as sole counsel, and the defendant was found guilty of all charges following a four-day jury trial. I successfully defended the conviction later before the Ninth Circuit.

Opposing Counsel: Jerry M. Leahy
444 West C Street, Suite 330
San Diego, CA 92101
(619) 233-0750

Judge Presiding: Hon. James M. Fitzgerald (Senior U.S. District Judge - Dist. of Alaska), *sitting by special assignment*, U.S. District Court - S.D. Cal.

Dates: January 28-31, 1992.

People v. Harrison, San Diego County Superior Court No, CRN 16848, aff'd, No. D012506 (California Fourth District Court of Appeal, June 30, 1992)

This was a highly-publicized case, in which the defendant was charged with murdering one of the first winners of the California lottery. The murder charge was filed some four years after the crime was committed, and the prosecution was based entirely on circumstantial evidence. I tried the case as sole counsel in the North County Division of the San Diego County Superior Court, while on special assignment as a cross-designated Deputy District Attorney. The defendant was found guilty of first degree murder following a two-week non-jury trial. The conviction was affirmed after appeal.

Opposing Counsel: Alan May (deceased)

Judge Presiding: Hon. David B. Moon (retired)*
San Diego County Superior Court, North County Division
* Address and phone number in retirement:
16950 Avenida Luis, Post Office Box 972
Rancho Santa Fe, CA 92067
(858) 759-6119

Dates: February 28 - March 16, 1990

United States v. Bland, Crim. No. 88-0749-JLI, aff'd, 961 F.2d 123 (9th Cir. 1992)

This was the first case brought in the Southern District of California under the then recently-enacted Armed Career Criminal Act. After abducting, torturing, and murdering a seven-year-old girl, the defendant was apprehended in San Diego. A loaded handgun was discovered in the car he was driving. I tried this case as sole counsel. After a three-day trial, a jury found the defendant guilty of being a convicted felon in possession of a firearm. At a later sentencing hearing, the district judge found the defendant to be an Armed Career Criminal and sentenced him to life without parole. I successfully defended the conviction and the sentence before the Ninth Circuit. This prosecution was featured in the August 21, 1989 issue of *U.S. News & World Report*.

Opposing Counsel: Mario G. Conte
Federal Defenders of San Diego
225 Broadway, Suite 900
San Diego, CA 92101
(619) 234-8467

Judge Presiding: Hon. J. Lawrence Irving (retired)* U.S. District Court - S.D. Cal.
* Address and phone number in retirement:
101 West Broadway, Suite 1700
San Diego, CA 92101
(619) 233-5474

Dates: November 14-16, 1989

United States v. LaFleur, et al., Crim. No. 89-0075-E, aff'd, 971 F.2d 200 (9th Cir. 1992)

Two defendants were charged with kidnaping and murder on a government reservation. The defendants abducted an 82-year-old man from the parking lot of a shopping center, robbed him, then shot him to death on the Camp Pendleton military reservation. One defendant pled guilty to first degree murder on the day of trial. I tried the second defendant as lead counsel before a jury. The jury found the defendant guilty of kidnaping and first degree murder following a ten-day trial. I later successfully defended the convictions and life-without-parole sentences before the Ninth Circuit.

Co-Counsel: Nancy L. Worthington
2495 Sanders Road
Sebastopol, CA 95472
(707) 823-5266

Opposing Counsel: Mario G. Conte
 Federal Defenders of San Diego
 225 Broadway, Suite 900
 San Diego, CA 92101
 (619) 234-8467
 ~ and ~
 John O. Lanahan
 1202 Kettner Boulevard, Suite 4300
 San Diego, CA 92101
 (619) 237-5498
 ~ and ~
 Richard Boesen
 1230 Columbia Street, Suite 660
 San Diego, CA 92101
 (619) 233-5121

Judge Presiding: Hon. William B. Enright (retired)* U.S. District Court - S.D. Cal.
 *Address and phone number in retirement:
 U.S. District Court
 940 Front Street, Suite 5195
 San Diego, CA 92101
 (619) 557-5537

Dates: June 20 - July 7, 1989

United States v. DeGross, Crim. No. 87-0043-B, *rev'd*, 913 F.2d 1417 (9th Cir. 1990), *rev'd en banc*, 960 F.2d 1433 (9th Cir. 1992)

This was an alien smuggling case. I tried the case as sole counsel, and the defendant was found guilty by a jury. During jury selection, defense counsel attempted to systematically exclude all male members of the venire. The district court sustained the government's objection to defense counsel's actions, finding: (1) that the government had standing to object to the systematic exclusion of a particular group from the venire; and (2) that gender constituted a cognizable group under the rule announced in *Batson v. Kentucky*, 476 U.S. 79 (1986). Both rulings were upheld by the Ninth Circuit, sitting *en banc*, although the defendant's conviction was ultimately reversed. This was the first federal case to extend the right to object under *Batson* to the government in a criminal case and the first federal case to recognize gender as a cognizable class. The United States Supreme Court, in subsequent cases, adopted both rulings. Following remand from the court of appeals, the defendant pled guilty to two counts of alien smuggling.

Opposing Counsel: Edmundo Espinoza-Bojorquez
 Post Office Box 1150
 Del Mar, CA 92014
 (310) 291-5836

Judge Presiding: Hon. Rudi M. Brewster, U.S. District Court - S.D. Cal.

Dates: May 27-29, 1987

People v. Key, San Diego County Superior Court No. 57182, aff'd, No. D002293
(California Fourth District Court of Appeal, March 25, 1986)

This was a retrial of a kidnaping and rape case following reversal by the California Court of Appeal (*People v. Key*, 152 Cal.App.3d 492 (1984)). (I did not try the first case.) The victim was accosted by the defendant on a local freeway while she attempted to examine the tires of her automobile. The defendant forced the victim into his car at knife point, sexually assaulted her, then drove to his apartment where he twice raped her. Hours later, he abandoned the victim on a remote section of freeway far away from her car. I tried this case as sole counsel before a jury, and the defendant was convicted of all charges after a nine-day trial. The convictions were affirmed following appeal.

Opposing Counsel: William P. Daley
 110 West C Street, Suite 1407
 San Diego, CA 92101
 (619) 238-1905

Judge Presiding: Hon. Robert J. O'Neill (retired)*
 San Diego County Superior Court
 *Address and phone number in retirement
 110 Juniper Street
 San Diego, CA 92101
 (619) 236-1110

Dates: August 8-17, 1984

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.)

From 1990-97, as unpaid, collateral duty to my service as an Assistant U.S. Attorney, I served as an Equal Employment Opportunity (EEO) investigator for the U.S. Department of Justice. In this position, I investigated and helped to resolve numerous complaints of race,

age, and gender discrimination within the Department of Justice. During my years of service in this role, I personally took over 100 depositions, and I was commended for my performance on three occasions by the Executive Office for United States Attorneys.

[Faint, illegible text]

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.

I will continue to follow the conflicts procedure currently in place in the United States District Court for the Southern District of California. Under that established procedure, I submitted a conflicts list to the Clerk of the Court at the time of my appointment as a magistrate judge. The data on my conflicts list was added to the court's computerized case assignment program, which automatically notifies me anytime I am assigned a case involving parties or counsel on my conflicts list. Upon receiving such notification, I issue an order recusing myself from the case. I update my conflicts list semi-annually.

In rare instances in the past, a conflict has arisen *after* a case was assigned to me. In such situations, I have followed the requirements of 28 U.S.C. § 455(a) and (b) (setting forth statutory grounds for disqualification) and Canon 3 of *The Code of Conduct for United States Judges*.

There are no categories of litigation nor do I have any financial arrangements that present potential conflicts of interest to my service as a federal judge.

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, 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.)

I have attached a copy of my 2002 Financial Disclosure Report at Tab 2.

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

My financial net worth statement, with required schedules, is attached at Tab 3.

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, never.

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.

On an ongoing basis during the past 18 years, I have assisted disadvantaged students as a mentor. As a college and law school instructor from 1982 to 1996, I helped dozens of disadvantaged students achieve their goals of obtaining a higher education and securing a good job in a respected profession following graduation. I was honored for my efforts by San Diego State University with a Faculty Mentoring Award in 1996.

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, never.

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 selection committee in the Southern District of California. In January 2003, the committee recommended me for nomination as a United States District Judge to Mr. Gerald Parsky, who assists the President with federal nominations in California, and to the White House.

I submitted a written application to the Southern District Judicial Advisory Committee in November 2002. In January 2003, the Committee personally interviewed me. Following my interview with the Committee, Mr. Parsky and Mr. Eric George, a former member of the Senate Judiciary Committee staff, also interviewed me. In February 2003, I was interviewed in Washington, D.C. by three members of the White House Counsel's staff and by a representative from the U.S. Department of Justice. On March 1, 2003, the White House Counsel notified me that the President intended to nominate me as a United States District Judge, subject to the completion of Federal Bureau of Investigation and U.S. Department of Justice background investigations. On April 28, 2003, Mr. Kyle Sampson of the White House Counsel's Office notified me that my background investigations had been completed and that the White House intended to forward my name to the Senate 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.

My general view is that trial judges should make decisions, not law. Separation of powers dictates that policymaking be left to the legislative and executive branches of government. Also, because federal courts are courts of limited jurisdiction, a federal trial judge should always consider whether he or she has legal power to take action. Legal doctrines such as standing, ripeness, mootness, and abstention, as well as deference to co-equal branches of government, inform the decision of whether there is jurisdiction and how it should be exercised. The federal courts play an important, albeit limited, role in our society. Judgments rendered by federal trial judges should generally reflect the image of limited authority taking into account precedent.

Chairman HATCH. Well, thank you.
Judge Conrad?

**STATEMENT OF GLEN E. CONRAD, NOMINEE TO BE DISTRICT
JUDGE FOR THE WESTERN DISTRICT OF VIRGINIA**

Judge CONRAD. Senator, likewise, I'm very pleased to be here. It's not very often that we in the judiciary get to see our representative Government at work, and it's thrilling for me to attend this hearing and to participate and to answer the Senators' questions. [The biographical information follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)
GLEN EDWARD CONRAD
2. Address: List current place of residence and office address(es).
Residence: Roanoke, VA
Office: Room 320 Poff Federal Building, 210 Franklin Road SW, Roanoke, VA 24011 (PO Box 2822, Roanoke, VA 24001)
3. Date and place of birth.
June 29, 1949 Radford, VA
4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).
Married. Mary Ann Steger Conrad (homemaker)
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.
The College of William and Mary, Marshall Wythe School of Law 9/71 - 5/74, Juris Doctorate - May 1974
The College of William and Mary, 9/67 - 5/71, Bachelor of Arts (government)) - May 1971
6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.
United States District Court for the Western District of Virginia - 1/75 to present

10/81 - present.	United States Magistrate Judge, Roanoke Division
10/81 - 5/78	United States Magistrate Judge, Charlottesville Division
5/76 - 5/78	United States Magistrate Judge, Abingdon Division
1/75 - 5/76	United States Probation Officer/Law Clerk, Abingdon Division

Colonial Williamsburg, Inc. - 6/72 - 12/74, Interpreter/host
College of William and Mary Athletic Department - 1/71 - 12/74

American Legion Boys State of Virginia - 1974 - 1993
Board of Directors, Chief Instructional Counselor, Program Director
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.
I received a partial undergraduate scholarship based on scholastic achievement in science. I also received numerous honors and recognitions as an undergraduate at the College of William and Mary. I received the W.A.R. Goodwin Scholarship, a full tuition award, at the Marshall Wythe School of Law. I have been recommended for reappointment as Magistrate Judge by three separate Merit Selection Committees over the past 26 years.
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.
**Virginia Bar Association
 Judicial Section Council Member 1/99 - 1/02
 American Bar Association
 Roanoke City Bar Association
 Virginia Trial Lawyers Association
 National Council of United States Magistrate Judges
 Civil Justice Reform Act Advisory Committee for the Western District of Virginia
 Virginia Women Attorneys Association
 Fourth Circuit Judicial Conference**
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.
**(A)
 Wilderness Society
 Virginia Nature Conservancy
 Friends of Claytor Lake
 Humane Society
 Nature Conservancy
 Society for Prevention of Cruelty to Animals
 Audubon Society
 Virginia Wildlife Center
 (B)
 Virginia Student Aid Foundation
 William & Mary Law School Association
 Chesapeake Bay Foundation
 Western Virginia Land Trust Association
 Phi Alpha Delta Legal Fraternity
 Sigma Nu Educational Foundation
 William and Mary Athletic Educational Foundation
 Sigma Nu Fraternity
 Wonju Sister Cities Program; Tskov Russia Sister Cities Program**

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 District Court, Western District of Virginia - 6/10/76
 Supreme Court of Virginia - 10/11/71

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.

While serving as a judge over the past 26 years, I have not undertaken to write any books, articles, or reports which relate to legal issues or controversies in which I may be expected to make a decision. I have contributed to a multitude of Continuing Legal Education efforts, including collaboration in producing course material as follows:

- 2001 Trying Cases in the Western District of Virginia
 1999 Trying Cases in the Western District of Virginia
 1998 Federal Court Civil Practice
 1994 How to Avoid Traps of the Trade - A Perspective From the Bench and the Bar
 1994 Practice in Virginia's Western District; Changes in the Federal Rules of Civil Procedure and Report of the Civil Justice Reform Act Advisory Committee
 1994 Federal Court Civil Practice and Procedure
 1993 Report of the Civil Justice Reform Act Advisory Committee of the United States District Court for the Western District of Virginia
 1992 Winning Social Security Disability Claims
 1991 Trial Practice in Virginia - How to Avoid Traps of the Trade - Perspectives From the Bench and the Bar
 1988 Federal Court Civil Practice and Procedure
 1984 Federal Court Civil Practice and Procedure - Recent Developments and Local Quirks

Additionally, I contributed to the following articles authored by United States District Judge James C. Turk:

- American Journal of Trial Advocacy - Vol. 7, No. 1, Fall 1983 The Nation's First Application of the Exhaustion Requirements of 42 U.S.C. §1977(e) - "The Virginia Experience"
 Virginia Bar Association Journal - Vol. VIII, No. 2, Spring 1982 GCA: A New System for Computing "Good Time" in Virginia Prisons
 Virginia Law Review - Vol.64, No. 8, December 1978 -Foreword: Access to the Federal Courts by State Prisoners in Civil Rights Actions

I have also authored a variety of articles for numerous Bar Association newsletters primarily dealing with changes in Federal Rules of Procedure or as to general practice of law in the federal court. A partial listing of such efforts includes the following:

Roanoke Bar Review - Vol. 1, No. 2, Aug. 2001 Navigating The Changes in the Federal Rules

Roanoke Bar Review - Vol. 5, No. 1, Feb. 2003 Recent Changes To The Federal Rules of Criminal Procedure Reflect The Realities Of Practice in an Increasingly Modernized Society

Although I do not have copies of any speeches I have given over the last twenty plus years, some of the groups I have addressed and the speech topics are as follows:

- (A) I have spoken at Continuing Legal Education (CLE) programs sponsored by the Virginia Law Foundation at least every other year on topics ranging from federal practice in general, federal practice in the Western District of Virginia, social security law, and the mediation process;
- (B) On April 27, 1998, I addressed the Ninth Circuit Judges' Meeting on the implementation and application of the Prison Litigation Reform Act;
- (C) On two different occasions, I have hosted members of the Judiciary and Court staff from other district courts to share ideas regarding the implementation of prisoner litigation procedures;
- (D) I speak every two to three years at the annual regional meetings of the Blue Ridge Parkway, United States Forest Service, and United States Fish & Wildlife Service, on topics such as search and seizure, courtroom demeanor, and administrative practice and procedures;
- (E) I have addressed numerous local bar meetings, including most recently the Roanoke Chapter of the Virginia Women Attorney Association and the Roanoke Paralegal Association on issues such as federal practice, discovery procedures, and the federal mediation process;
- (F) Every summer from 1974 through 1993, I addressed the American Legion - Virginia Boys State Program on topics such as state and federal court systems, political candidate selection alternatives, and election laws. I also participated in a similar program for the North Carolina Boys State Program, and have addressed a variety of American Legion Posts over the years on the Boys State Program;
- (G) Over the years, I have delivered several high school commencement addresses with motivational themes; and

(H) I have spoken to several civic organizations, schools, and church groups on such topics as the past year's Supreme Court term, constitutional issues, and changes in criminal law.

13. Health: What is the present state of your health? List the date of your last physical examination.
Good. 3/13/03
14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.
United States Magistrate Judge - appointed
United States District Court for the Western District of Virginia
10/81 - present. United States Magistrate Judge, Roanoke Division
5/78 - 10/81 United States Magistrate Judge, Charlottesville Division
5/76 - 5/78 United States Magistrate Judge, Abingdon Division
15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.
- (A) 1. **Cheatham v. Lynchburg City Jail**, 1992 W.L. 333911 (W.D.Va. 1992)
Granted summary judgment for defendant Lynchburg City officials and sheriff in class action brought by former inmates alleging that their constitutional rights had been violated by being subject to conditions of extreme overcrowding and denial of recreation time. Held that although class members established constitutional violations under the Eighth Amendment, they did not prove that city officials and sheriff had the requisite intent to punish.
2. **Mann v. Metropolitan Life Ins. Co.**, 1999 W.L. 33453411, 44 Fed. R. Serv.3d 674 (1999)
Held that, pursuant to 28 U.S.C. §1450 and the Supreme Court's decision in **Granny Goose Foods, Inc. v. Teamsters**, 415 U.S. 423 (1974), discovery obligations established in state court remain effective in federal court upon removal, absent contrary order by the federal court.

3. **West v. Virginia Department of Corrections**, 847 F.Supp. 402 (W.D.Va. 1994)

Female plaintiff challenged her denial of participation in all male Virginia Boot Camp Incarceration Program, as a violation of the equal protection clause of the Fourteenth Amendment. Found that program discriminated on basis of gender and could not withstand intermediate scrutiny as there was no substantial relationship between the gender classification and an important governmental objective

4. **Holmes v. Cooper**, 872 F.Supp. 298 (W.D.Va. 1995)

Granted summary judgment for defendant prison officials in action brought by *pro se* inmate under 42 U.S.C. §1983. Plaintiff claimed that his constitutional due process rights were violated when his good conduct allowance was downgraded during annual review without a formal hearing. Held that defendants were entitled to judgment as a matter of law because plaintiff's constitutional rights were not implicated in the downgrade decision and thus, the court was without jurisdiction.

5. **United States v. Murphy**, 893 F.Supp. 614 (W.D.Va. 1995)

In case challenging the constitutionality of Child Support Recovery Act of 1992 (CSRA), 18 U.S.C. §228, which criminalizes failure to pay support to a child residing in another state, held that under Supreme Court's decision in **United States v. Lopez**, 514 U.S. 549 (1995), Congress had authority under the commerce clause to enact such a statute.

6. **McAlpin v. Leeds & Northrup Co.**, 912 F.Supp. 207 (W.D.Va. 1994)

In products liability case with multiple defendants, denied motion to dismiss by certain defendants, holding that under Virginia law, manufacturer's duty to warn under negligence theory is not abrogated upon sale of product, and there is no duty to retrofit under Virginia law.

7. **Whitlock v. Chater**, 959 F.Supp. 324 (W.D.Va. 1997)

Held that there was not substantial evidence to support Social Security Commissioner's decision that child was not dependent on wage earner. Laid out proper method of evaluating whether child is dependent on insured wage earner under Social Security Act.

8. **Frazier v. State Farm**, 957 F.Supp. 816 (W.D.Va. 1997)

Denied summary judgment to plaintiffs who were seeking to estop insurance company from avoiding coverage for house fire under vacancy clause, based on actions of insurance company's agent. Held that agent's actions were not sufficient basis for estoppel and agent had no affirmative duty to inquire further as to possible exclusion from coverage based on plaintiff's comments during a conversation.

9. **Alexander v. Apfel**, 14 F.Supp.2d 839 (W.D.Va. 1998)

In case dealing with denial of plaintiff's application for supplemental security income benefits, held that when the Social Security Administration's Appeals Council relies on interim evidence provided after the decision of an Administrative Law Judge (ALJ), to deny a claim of disability, it must provide some justification as to why the new evidence does not merit further administrative action.

10. **White v. Director, Department of Corrections**, 105 F.Supp.2d 515 (W.D.Va. 2000)

Report and recommendation made in petition for writ of habeas corpus pursuant to 28 U.S.C. §2254, adopted by District Judge James C. Turk. Recommended denial of petitioner's claims as not cognizable by a federal court since the prior decision by the Virginia Supreme Court was neither factually unsubstantiated nor in contravention of established federal law.

(B) 1. **Lane v. Secretary, Department of Health and Human Services**, Civil Case No.2:88CV00112, Decided on: 2/15/89

Denial of plaintiff's applications for disability insurance benefits and supplemental security income were before the court on appeal from the Social Security Administration. Affirmed the Administrative Law Judge's (ALJ) determination that *res judicata* attached to the final administrative decision on plaintiff's prior application, and held that the court was without subject matter jurisdiction to consider any claims for disability after such date. . The Fourth Circuit vacated and remanded this decision in an unpublished opinion. **Lane v. Secretary, Department of Health and Human Services**, 894 F.2d 402 (1990). The Court of Appeals found that plaintiff had made a prima facie showing of intellectual deficit and incompetence in 1984, the year the administrative final decision was rendered, thus raising question about his ability to appeal the earlier denials of benefits. Therefore, according to the Fourth Circuit, application of *res judicata* was improper without a determination by the Secretary of Lane's mental competence at the time of his previous applications.

2. **Oak Hall Cap and Gown Co. v. Old Dominion Freight Line, Inc.**, Civil Case No.7:88CV00146

Plaintiff bought suit against defendant shipping company under the Carmack Agreement of the Interstate Commerce Act, 49 U.S.C. §11707, alleging that the goods transported by defendant were totally destroyed upon delivery. Judgment award to plaintiff following bench trial and appropriate damages assessed. On appeal to the Fourth Circuit, the decision was affirmed. However, the Court of Appeals remanded the case and directed additional information regarding decision to deny plaintiff's costs. **Oak Hall Cap and Gown Co. v. Old Dominion Freight Line, Inc.**, 899 F.2d 291 (4th Cir. 1990).

3. **Stewart v. Sullivan**, Civil Case No.7:89CV00979,
Affirmed decision of the ALJ that plaintiff was engaged in substantial gainful employment at the time his disability insured status expired, holding that the decision was supported by substantial evidence. In Stewart v. Sullivan, 947 F.2d 942 (4th Cir. 1991), the Court of Appeals for the Fourth Circuit held that the ALJ's decision was not supported by substantial evidence and reversed decision.

4. **Vanover v. Sullivan**, Civil Case No. 2:89CV00038,
In case involving an appeal of a denial of social security disability benefits by the Secretary of Health and Human Services, summary judgment entered against the plaintiff. Held that the decision of the Administrative Law Judge was supported by substantial evidence. On appeal to the Fourth Circuit, the decision was vacated and remanded. The Court of Appeals held that the Secretary did not properly consider all the evidence that was before it and the decision was therefore not supported by substantial evidence. Vanover v. Sullivan, 928 F.2d 400 (4th Cir. 1991).

5. **Garland v. Catland and Simpson**, Civil Case No.7:93CV00795 ,
Decided On: 9/28/94
Pro se plaintiff's case ordered dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Plaintiff complained that prison guards inflicted cruel and unnecessary punishment when they sprayed a large amount of mace on him and a fellow inmate, in response to a shouting match in which the inmates were engaged. On appeal, the Fourth Circuit found that plaintiff's allegations, construed in the light most favorable to plaintiff, did state a claim that prison guards used excessive force in violation of the Eighth Amendment. Garland v. Catland, 28 F.3d 1209 (4th Cir. 1994).

6. **United States v. Murphy**, 893 F.Supp. 614 (W.D.Va. 1995)
In case challenging the constitutionality of Child Support Recovery Act of 1992 (CSRA), 18 U.S.C. §228, which criminalizes failure to pay support to a child residing in another state, I held that under Supreme Court's decision in United States v. Lopez, 514 U.S. 549 (1995), Congress had authority under the commerce clause to enact such a statute. On appeal to the district court, the district judge held that venue was improper and dismissed defendant's case. See Murphy v. United States, 934 F.Supp. 736 (1996). In United States v. Murphy, 117 F.3d 137 (4th Cir. 1997), the Court of Appeals for the Fourth Circuit overturned the district court decision and held that venue was proper in the Western District of Virginia.

7. **Alexander v. Apfel**, Civil Case No.6:97CV00049, Decided On: 8/13/98
14 F.Supp.2d 839 (W.D.Va. 1998)

In case dealing with denial of plaintiff's application for supplemental security income benefits, held that when the Social Security Administration's Appeals Council relies on interim evidence provided after the decision of an Administrative Law Judge (ALJ), to deny a claim of disability, it must provide some justification as to why the new evidence does not merit further administrative action. This decision was criticized by Judge Jones in **Ridings v. Apfel**, 76 F.Supp.2d 707 (W.D.Va. 1999). In his opinion, Judge Jones held that the Appeals Council is not required to state reasons why review is denied.

8. **Morke v. Tyler**, Civil Case No.7:01CV00625, Decided On: 3/28/02
A dismissal of *pro se* litigant's case without prejudice for failing to state a claim, was vacated and remanded by the Fourth Circuit in **Morke v. Tyler**, 54 Fed.Appx. 402 (4th Cir. 2003). The Court of Appeals held that appellant should have been permitted to amend his complaint, bought under 42 U.S.C. §1983 at least once without leave of court, pursuant to Fed. R. Civ. P. 15(a).

- (C) **Cheatham v. Lynchburg City Jail**, 1992 W.L. 333911 (W.D.Va. 1992)
West v. Virginia Department of Corrections, 847 F.Supp. 402 (W.D.Va. 1994)
Holmes v. Cooper, 872 F.Supp. 298 (W.D.Va. 1995)
United States v. Murphy, 893 F.Supp. 614 (W.D.Va. 1995)
White v. Director, Department of Corrections, 105 F.Supp.2d 515 (W.D.Va. 2000)
Garland v. Catland and Simpson, Civil Case No.7:93CV00795
Garland v. Catland, 28 F.3d 1209 (4th Cir. 1994)
Murphy v. United States, 934 F.Supp. 736 (1996)
United States v. Murphy, 117 F.3d 137 (4th Cir. 1997)

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;
1/75 - 5/76. Law Clerk to United States District Judge Ted Dalton (deceased), Western District of Virginia
2. 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;
1/75 - 5/76. United States Probation Officer, Western District of Virginia.
While serving as a probation office, I was responsible for supervising criminal defendants serving terms of probation. I also prepared Pre-Sentence reports for the court's use in sentencing convicted defendants.

NOTE: Held positions of both Probation Officer and Law Clerk from 1/75 - 5/76.

5/76 to present - Appointed United States Magistrate Judge 5/76.

- 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?
N/A
 2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.
N/A
- 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.
N/A
 2. What percentage of these appearances was in:
 - (a) federal courts;
 - (b) state courts of record;
 - (c) other courts.

N/A

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

N/A
 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.

N/A
 5. What percentage of these trials was: N/A
 - (a) jury;
 - (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:
- N/A
- (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.
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.)
- Served as a member of the Civil Justice Reform Act Advisory Committee for the Western District of Virginia -**
The Civil Justice Reform Act Committee was comprised of attorneys, law professors, lay persons, and myself as the representative of the Court. Pursuant to the mandate of the Civil Justice Reform Act, the committee reviewed civil practice in the Western District of Virginia, surveyed attorneys, compared our practice with that in other districts, and ultimately prepared a report for the judges of the Western District of Virginia recommending measures to improve the efficiency of the court, and to reduce the costs associated with civil litigation.
- Served as a member of the Virginia Bar Association Judicial Section -**
As a member of Virginia Bar Association Judicial Section, we organized presentations for the entire bar membership, made proposals for the improvement of judicial administration in Virginia, and considered recommendations for the

Virginia Bar Association to make to the legislature regarding the practice of law in the Commonwealth of Virginia.

**Participated in mediation training at Harvard University School of Law;
Mediated on an average of over 100 civil cases per year during the last four years,
with a success rate of 85% to 90%.**

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.
I have contributed to the Civil Service Retirement System since 1975 and to Thrift Savings Plan since 1996..
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 adhere strictly to the recusal protocol of the Federal Code of Judicial Conduct, and I plan to continue to do so. Our district has its own computerized recusal protocol which governs case distribution and automatically rejects any assignment that would create a conflict of interest.
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.)
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.
As a member, officer, and president of William and Mary College Republicans, I was actively involved in several political campaigns from 1967 through 1974. I do believe I had formal roles in several campaign efforts though I am unable to recall the exact position or the particular candidates. Since becoming a United States Magistrate Judge, I have not been a participant in any political activity.

AO-10 (w)
Rev. 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)

1. Person Reporting (Last name, first, middle initial) CONRAD, GLEN E.	2. Court or Organization WESTERN DISTRICT VIRGINIA	3. Date of Report 04/28/2003
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) US DISTRICT JUDGE NOMINEE	5. Report Type (check type) X Nomination, Date 04/28/2003 Initial ___ Annual ___ Final ___	6. Reporting Period 01/01/2002 to 04/28/2003
7. Chambers or Office Address 210 FRANKLIN RD - ROOM 320 PO BOX 2822 ROANOKE, VA 24001	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 section where you have no reportable information. Sign on the last page.		

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

POSITION	NAME OF ORGANIZATION / ENTITY
<input checked="" type="checkbox"/> NONE (No reportable positions.)	
1	
2	
3	

III. 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	

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

DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
<input checked="" type="checkbox"/> NONE (No reportable non-investment income.)		
1		
2		
3		
4		

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	CONRAD, GLEN E.	04/28/2003

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 checked="" type="checkbox"/>	NONE (No reportable liabilities.)		
1			
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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting CONRAD, GLEN E.	Date of Report 04/28/2003
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(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)

VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions

A. Description of Assets (including trust assets) <i>Place "(X)" 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) 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)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions.)									
1 American Electric Power CS	B	Dividend	K	T					
2 VA State Housing Dev Author Multi Family Dwell Rev Bonds	A	Interest							
3 Conoco Corp CS (formerly Phillips Petroleum Co)	A	Dividend	K	T					
4 Schwab Money Market Fund	A	Dividend	L	T					
5 Dominion Resources CS	A	Dividend	J	T					
6 Home/2 lots, Pulaski Co, VA		None	M	O					
7 Suntrust Banks, Inc. IS	B	Dividend	M	T					
8 CSX Corp CS	A	Dividend	J	T					
9 Chevron Texaco Corp CS	B	Dividend	K	T					
10 St. Paul's Companies CS	A	Dividend	J	T					
11 JP Morgan Chase & Co CS	A	Dividend	K	T					
12 Glaxo Smithkline CS	A	Dividend	K	T					
13 Merck & Co. Inc. CS	A	Dividend	K	T					
14 Nuveen VA Prem Income Municipal Fund	A	Dividend	J	T					
15 Verizon Communications CS	B	Dividend	K	T					
16 Hanover Co IDA Revenue Bonds	A	Interest							
17 Quest Communications	A	Dividend	J	T					

Incl Gain Codes: A=\$1,000 or less (Col. B1, D4)	B=\$1,001-\$2,500 O=\$100,001-\$1,000,000	C=\$2,501-\$5,000 H1=\$1,000,001-\$5,000,000	D=\$5,001-\$15,000 H2=\$5,000,001 or more	E=\$15,001-\$50,000
Val Codes: J=\$15,000 or less (Col. C1, D3)	K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000	L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000	M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000	N=\$250,001-\$500,000 P4=\$50,000,001 or more
Val Mth Codes: Q=Appraisal (Col. C2)	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting CONRAD, GLEN E.	Date of Report 04/28/2003
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VII. Page 2 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) <i>Place "X" 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) 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 Gain Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions.)									
18 AT&T Corp CS	A	Dividend	J	T					
19 Roanoke, VA IDA Revenue Bonds	A	Interest							
20 First Fin Fund, Inc. (Mutual Fund)	A	Dividend	L	T					
21 Bell South Corp CS	A	Dividend	K	T					
22 Wachovia Corp CS	A	Dividend	K	T					
23 FBR X		None	K	T					
24 Wachovia Bank X		None	L	T					
25 Vacation home (1/5 interest)		None	M	Q					
26 Gateway Inc CS	A	Dividend	J	T					
27 Abbott Laboratories CS	A	Dividend	J	T					
28 Pfizer Inc CS	A	Dividend	J	T					
29 AT&T Wireless Services CS		None	J	T					
30 Comcast Corp CS			J	T					
31 Franklin VA Tax Free Income Fund (X)	B	Dividend	M	T					
32 FBR Virginia Tax Free Bond Fund (X)	B	Dividend	M	T					
33 NY Life Continued Interest Account (X)	A	Dividend	M	T					
34 Suntrust Money Market (X)	A	Dividend	L	T					

1 Inc/Gain Codes: A=\$1,000 or less (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 H2=\$5,000,001 or more E=\$15,001-\$50,000

2 Val Codes: J=\$15,000 or less (Col. C1, D3) 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

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting CONRAD, GLEN E.	Date of Report 04/28/2003
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(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)

VII. Page 3 INVESTMENTS and TRUSTS – income, value, transactions

A. Description of Assets (including trust assets) <i>Place "(X)" 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) 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.)									
35 House/lot (X)		None			sell	3/03	M		G.Morgan
36 Stamp collection (X)		None	L	W					
37 Coin collection (X)		None	J	W					
38 ScottTrade Money Market		Dividend	K	T					
39									
40									
41									
42									
43									
44									
45									
46									
47									
48									
49									
50									
51									

Inc/Gain Codes: A=\$1,000 or less (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 H2=\$5,000,001 or more	E=\$15,001-\$50,000
Val Codes: J=\$15,000 or less (Col. C1, D3) O=\$500,001-\$1,000,000	K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000	L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000	M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000	N=\$250,001-\$500,000 P4=\$50,000,001 or more
Val Mth Codes: Q=Appraisal (Col. C2) U=Book Value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting CONRAD, GLEN E.	Date of Report 04/28/2003
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VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.
(Indicate part of report.)

Section VII.

VII. (INVESTMENTS and TRUSTS)

Line #6 - Appraisal date - May 2, 2001

Line #23 and #24 - Spouse joint ownership w/parent

Line #25 Appraisal date September 1999

Line # 35 Appraisal date July 2002

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	CONRAD, GLEN E.	04/28/2003

IX. CERTIFICATION

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

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

Signature

Glen E. Conrad

Date

4-28-03

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

GLEN EDWARD CONRAD

ASSETS

Cash on hand and in banks: \$241,737.00
 (Suntrust Money Market:
 \$74,740.00)
 (NY Life \$158,997.00)
 (Checking: \$3,000; spouse \$5,000)

Spouse joint checking account w/
 parent(Wachovia Bank) 95,529.93

Proceeds from sale of
 inherited real estate (held in
 trust pending will probate) 137,500.00

Securities:
 (See attached)

Real estate owned:
 Personal residence \$350,000.00
 1/5 Interest Northpoint,
 Duck, NC \$100,000.00
 House/2 lots, Claytor Lake, VA \$100,000.00

350 acres farmland in Albemarle
 County, VA (spouse continency
 beneficial interest
 in family trust) \$166,900.00

Automobiles owned: 59,000.00
 1995 Buick (\$4,000)
 1998 Volvo (\$15,000)
 2001 Lexus (\$40,000)

Personal property 85,000.00
 (collections)

LIABILITIES

Mortgage: personal residence \$65,000.00
 Countrywide Home Loans

Glen Edward Conrad

Securities:

American Electric Power	24,172.00
Conoco Corp	24,095.00
Schwab Money Market Fund	73,386.03
Dominion Resources	5,364.81
Suntrust Banks, Inc.	108,768.00
CSX Corp	5,606.00
Chevron Texaco Corp	39,670.40
St. Paul's Companies	9,204.48
JP Morgan Chase & Co.	31,006.00
Glaxo Smithkline	38,760.00
Merck & Co.	32,156.00
Nuveen VA Prem Income Municipal Fund	8,680.00
Verizon Communications CS	40,624.00
Quest Communications	8,018.48
AT&T Corp	7,467.44
First Financial Fund, Inc.	64,780.19
Bell South Corp	23,668.00
Wachovia Corp	29,855.10
Gateway, Inc.	1,310.00
Abbott Laboratories	7,624.00
Pfizer	6,072.00
AT&T Wireless Services	3,736.02
Comcast Corp	7,669.44
Franklin VA Tax Free Income Fund	106,721.81
FBR Virginia Tax Free Bond Fund	142,183.08
ScottTrade Money Market	20,217.81
FBR(spouse jointly owned w/parent)	32,854.30
Davenport & Co.(contingency beneficial interest in various securities in a family trust)	67,324.57

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 sitting judge for over 26 years, I have not had the opportunity to participate in true *pro bono* activities. I have tried to honor requests from school groups and other organizations to speak about the legal profession and matters of legal interest. My wife and I are involved in a number of charities that serve the disadvantaged. My wife is incoming chair of the American Red Cross - Roanoke Chapter. We both contribute financially to this and other public service organizations. My wife also chairs a committee for the local unit of the American Cancer Society. Further, we actively support the Roanoke Rescue Mission and the work of the 4-H Extension Offices. We also help sponsor indigent students and foreign orphanages through the Sister Cities organization.

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 believe that I currently belong, or have ever belonged, to an organization that invidiously discriminates on the basis of race, sex, or religion. Other than for my social fraternity and honorary groups in college and high school, I have participated in no organization which limits membership on any basis.

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 our jurisdiction.

I solicited support from all statewide bar associations involved in the endorsement process. I was endorsed by all these groups including:

**Virginia State Bar
Virginia Bar Association
Virginia Trial Lawyers Association
Virginia Women Attorneys Association
Virginia Association of Defense Attorneys**

I also was endorsed by all of my local bar associations including:

**Roanoke City Bar Association
Roanoke County Bar Association
Franklin County Bar Association**

I was interviewed by both United States Senators from Virginia as well as their Chiefs of Staff. I also was interviewed by representatives of the White House and the Department of Justice.

I was impressed by the fact that all those conducting the interviews demonstrated familiarity with the particular needs and problems of the Western District of Virginia.

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.

During the endorsement and interview process, no one attempted to discuss any pending case or legal issues. No one has sought from me any commitment as to how I would rule in a particular case, situation, or set of circumstances.

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.

Separation of powers is one of the cornerstones of our nation's democracy. Each branch of government is charged to execute certain tasks and discharge various responsibilities. At the same time, through our intricate constitutional and statutory system of checks and balances, each branch promotes efficient operation of its sister branches. Designed to prevent any one branch of government from attaining or assuming supremacy, the doctrine of separation of powers undergirds the Constitution.

In order for this intricate system of checks and balances to properly function, it is axiomatic that each branch of government must act within its authorized range of power. For the judiciary branch, this duty of restraint is embodied in Article III, Section 2 of the Constitution, which mandates resolution of "cases" and "controversies." It is incumbent upon the judiciary to determine which cases and controversies "are of the justiciable sort referred to in Article III." It is towards this end that courts rely upon the doctrines of standing, ripeness, and mootness.

The standing doctrine requires courts to inquire as to whether a putative party in interest in a legal dispute has actually suffered some measure of harm that can be redressed by some means that the court can provide. The effect of the ripeness doctrine is to require parties to make effort to redress the wrong before bringing the matter before the court. By applying the mootness doctrine, courts avoid reaching decisions on matters that have already resolved themselves by the occurrence of some independent event. The overall purpose of these doctrines is to create self-imposed limitations on the judiciary's power to issue opinions and render judgments. They are based on the principle that judicial power should be exercised sparingly and with self-control.

Chairman HATCH. Well, you are a glutton for punishment if you want to see this representative Government.

[Laughter.]

Chairman HATCH. No, I appreciate that. I am just trying to be humorous.

Judge Floyd?

**STATEMENT OF HENRY F. FLOYD, NOMINEE TO BE DISTRICT
JUDGE FOR THE DISTRICT OF SOUTH CAROLINA**

Judge FLOYD. Thank you, Mr. Chairman. I have no opening statement except to reiterate that I'm glad to be here and I appreciate the opportunity to have this hearing and answer your questions.

[The biographical information follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Henry Franklin Floyd

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

Residence: Pickens, South Carolina

Offices: Pickens County Courthouse
214 E. Main Street
Pickens, SC 29671

Greenville County Courthouse
305 E. North Street
Greenville, SC 29602

3. Date and place of birth.

November 5, 1947
Brevard, North Carolina

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: Ruth Elizabeth (Libba) Hunt Floyd
Occupation: Coordinator of Middle School Instruction
Pickens County School District
1348 Griffin Mill Road
Easley, SC 29640

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

9/66 - 5/70 Wofford College, Spartanburg, South Carolina
Received B.A. in History in May 1970

9/70 - 5/73 University of South Carolina School of Law
Columbia, South Carolina
Received J.D. in May 1973

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

Jan. 1971 - Nov. 1971 Worked for Lt. Gov. Earle E. Morris as an Administrative Assistant.

Dec. 1972 - Dec. 1978 Served as Representative in the South Carolina House of Representatives.

Aug. 1973 - Nov. 1973 Served as 1st Lieutenant in U.S. Army at Ft. Benjamin Harrison, Indianapolis, Indiana.

Dec. 1973 - Dec. 1977 Partnered in the Law Firm of Floyd & Welmaker, P.A., Pickens, South Carolina.

Jan. 1978 - June 1992 Partnered in the Law Firm of Acker, Acker, Floyd & Welmaker, P.A., Pickens, South Carolina.

July 1992 - present Serving as Circuit Court Judge for the Thirteenth Judicial Circuit, South Carolina.

1980 - 1992 Served as a member of the Board of Directors for the Pickens County Public Defender Corporation.

1978-1992 Participated in a hobby investment club called Pickens Investment Club. I withdrew and cashed out my interest upon being elected as Circuit Judge so as to avoid any conflict.

1982-1992 Participated in Pumpkintown Associates, a hobby investment group from which I withdrew upon my election as Judge to avoid any conflict.

1984-1992 Served on the Advisory Board for First National Bank of Pickens County and likewise withdrew upon my election as judge.

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.

ROTC at Wofford College, Commissioned 2nd Lt. U.S. Army, May 1970. Reserve status 1970-1973 except for 3 months active service August 1973-November 1973 at Ft. Benjamin Harrison. Inactive Reserve 11/11/73 through 5/21/78. Highest rank achieved 1st Lt. Serial #247-78-4288. 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.

Eagle Scout in Boy Scouts of America; Member Blue Key National Honor Society, 1970; Scabbard & Blade National Military Honor Society, 1970; Who's Who in American Colleges & Universities.

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.

Pickens County Bar Association
 Greenville County Bar Association
 South Carolina Bar Association
 American Bar Association
 State Trial Judges Section of American Bar Association
 South Carolina Association of Circuit Judges, President 1995-1997
 American Judicature Society
 South Carolina Circuit Judges Advisory Committee
 Supreme Court Advisory Committee on Standards of Judicial Conduct
 South Carolina Trial Lawyers Association (past member)
 South Carolina Supreme Court Commission on Judicial Conduct
 South Carolina Judicial Conference

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 believe that the American Bar Association and American Judicature Society do engage in lobbying before public bodies; however, I am unfamiliar with the extent to which this occurs.

OTHER ORGANIZATIONS:

Pickens Country Club; (see by-laws attached)
 South Carolina Judicial Invitational Golf Tournament;
 Member, The Commerce Club; (see by-laws attached)
 Alumni member of Pi Kappa Alpha social fraternity;
 Member of Grace United Methodist Church, Pickens, South Carolina;
 Member of Pickens County Bar Association;
 Member of Greenville County Bar Association;
 Member of South Carolina Bar Association;
 Member of American Judicature Society;
 Member of American Bar 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.

South Carolina Supreme Court, admitted 11/3/73
 United States District Court for South Carolina, admitted 9/12/74
 United States Court of Appeals, Fourth Circuit, admitted 9/12/74
 Supreme Court of the United States, admitted 6/2/80

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.

- 1) "*Comparative Negligence in South Carolina*," S.C. Bar CLE Division, June 1992.
- 2) "*Comparative Negligence: Friend or Foe?*" S.C. Bar CLE Division, October 1992.
- 3) "*SCRCP Rule 40 and the Complex Litigation Track*," S.C. Bar CLE Division, June 1995.
- 4) "*Post Trial Procedures: Punitive Damage Award Review, Motions for New Trial Nisi, and Motions for New Trial Absolute*," S.C. Bar CLE Division, September 1996.
- 5) "*The Complex Case in the State Court System: Trial by Endurance*," S.C. Bar CLE Division, January 1998.
- 6) "*Post Trial Motions: New Developments in Case Law*," S.C. Bar CLE Division, September 1998.
- 7) "*Winning Evidence: Making Rules Work for You*," S.C. Bar CLE Division, February 1999.
- 8) "*The Criminal Trial Benchbook for New Circuit Judges*," S.C. Court Administration, 2000.
- 9) "*Differentiated Case Management System*," S.C. Court Administration, 2002
 [Presented to the South Carolina Solicitors' Conference and Public Defenders' Conference showing results of the Richland County Pilot Project. Also, attached is a copy of the article from *The State* entitled "Project Slashes Backlog of Richland Court Cases"].
- 10) "*Legislative Report*," The Pickens Sentinel, at varying intervals from 1973 – 1976
 [During my tenure in the House of Representatives, I published status reports to my constituents regarding legislative happenings].
- 11) "*Law Day Speech*," Greenville County Bar Law Day Luncheon, May 1, 2003.

The following are titles of speeches I have given over the past twelve years but I cannot locate my notes. Therefore, I will list the speech and give a brief synopsis of the content:

"Ethics in Closing Arguments" S.C. Solicitors Association, October 1992.
The speech was about the "do's" and "don'ts" in making a closing argument under the rules and case law of South Carolina.

"Prior Bad Acts" S.C. Solicitors Association, October 1993
The speech was about South Carolina Rule of Evidence 404(b) also known in South Carolina as the Lyle rule. Under the rule certain prior bad acts are admissible in a trial. The speech was a survey of the case law and the procedure to follow in seeking admission of 404(b) material. It also addressed the difficulty trial courts have applying this rule.

"State Court Update" Greenville County Bar Association – A Day with the Judges, December 1993
It was simply a recap of major state court appellate decisions for that year.

"Mass Tort Litigation – Is Efficiency an Enemy of Justice?" Greenville County Bar Association, December 1994
At the time this talk was given I was managing on a statewide basis all the breast implant litigation and the speech addressed some of the problems I was encountering.

"Rule 40: A Basis for Differentiated Case Management" S.C. Circuit Judges' Association Annual Conference, August 1995
This was basically a repeat of the previously presented talk on Rule 40 from the June 1995 CLE (copy attached)

"Courtroom Decorum" S.C. Women Lawyers Association, May 1998
The speech was a list of tips from my point of view about maintaining proper decorum.

"A Reporter's Guide to Opening and Closing Court Doors" S.C. Bar and S.C. Press Association Joint Seminar, June 1998
The speech addressed the South Carolina rules and case law concerning when and under what circumstances a court proceeding could be closed and the press's right to challenge the closing.

In addition to these speeches or presentations, from 1973 to the present I have made no more than a dozen public speeches. Most were made to civic clubs. Some were to entities like a municipal or county association. All of the talks were either informing the group about the status of legislation, about legislative procedures, or about court procedures. I have given a few speeches about the humorous things that have happened to me in the courtroom.

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

My present state of health is good. Date of last examination 3/18/03

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.

1992-present, Circuit Court Judge for the Thirteenth Judicial Circuit of South Carolina. Elected by the Legislature. Circuit Court is a court of general trial jurisdiction ranging from minimum penalties of thirty days to imposition of the death penalty on the criminal side and on the civil side complete and concurrent jurisdiction over civil matters except for domestic and probate litigation with some exceptions. Also, I have been designated to sit as an Acting Justice on the South Carolina Supreme Court from time to time.

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.

Before responding specifically to the question I would like the Committee to know that most of the cases in the South Carolina Circuit Courts are resolved in both criminal and civil court by oral rulings from the bench or by jury verdicts. From those decisions, appeals are taken. Therefore, many of the significant cases I have tried do not contain written orders to evaluate but rather only appellant decisions to review.

I am going to give you ten significant orders issued but I am also going to list the ten most important cases I have tried with the appellate review cites.

Part 1, ten most significant opinions written:

- 1) Walker Scott Russell et.al. v. Wachovia Bank, N.A. et.al. 99-CP-42-367, S.Ct. Opn. # 25599 (2/24/03)
- 2) Glover v. Suitt Construction Co. et al., 93-CP-23-2159 [318 S.C. 465, 458 S.E.2d 535 (1995)]
- 3) In Re: Breast Implant Litigation - Case Management Order Greenville County 95-BIL-10000

- 4) Hanahan v. Simpson, et.al. (Order for Sanctions) 92-CP-23-4296 [326 S.C. 140, 485 S.E.2d 903 (1997)]
- 5) Diamonds, et. al. v. Greenville County 95-CP-23-2144 [325 S.C. 154, 480 S.E.2d 718 (1997)]
- 6) Builder Mart, et.al. v. First Union Corp. 98-CP-23-2131 [349 S.C. 500, 563 S.E.2d 352 (Ct. App. 2002)]
- 7) Bakala v. Bakala 576 S.E.2d 156 (Opinion of S.C. Supreme Court as Acting Justice)
- 8) Carolina First Corp., a South Carolina corporation, et.al. v. Whittle, et.al. 96-CP-23-3123 [343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000)] case settled before Supreme Court ruled on cert.
- 9) Eastman Brown Holdings, LLC, et.al. v. City of Greenville, et.al. 00-CP-23-2382 [currently on appeal]
- 10) Sheppard v. State of S.C. 98-CP-23-1494 [currently on appeal]

Most significant cases tried were as follows:

- 1) Walker Scott Russell et al. v. Wachovia Bank, N.A. et.al. S.Ct. Opn. # 25599 (2/24/03) Opinion not yet released for publication.
- 2) Hanahan v. Simpson, et.al. (Order for Sanctions) 326 S.C. 140, 485 S.E.2d 903 (1997)
- 3) State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999)
- 4) State v. Humphries, 351 S.C. 362, 570 S.E.2d 160 (2002)
- 5) Johnson v. Hoechst Celanese Corp., et.al. 317 S.C. 415, 453 S.E.2d 908 (Ct. App. 1995)
- 6) State v. Manning, 88-GS-17-756, 88-GS-17-1046, 93-GS-17-1048 (tried in October 1999)
- 7) State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999)
- 8) In RE: Breast Implant Product Litigation, 331 S.C. 540, 503 S.E.2d 448 (1998)
- 9) Carolina First Corp., a South Carolina corporation, et.al. v. Whittle, et.al. 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000)
- 10) State v. Hicks, 330 S.C. 207, 499 S.E.2d 209 (1998)

Part 2

In responding to this question, I did not list affirmations where an error was held "harmless". Included under the response are cases where I was initially reversed by the Court of Appeals but upon certiorari review by the Supreme Court the Court of Appeals was reversed and my judgment affirmed.

- 1) State v. Willie Lee Ballenger, 322 S.C. 196, 470 S.E.2d 851 (1996) The Court of appeals reversed me on a "throw down" drug case for failure to direct a verdict of acquittal. The Supreme Court granted cert. to review the decision and reversed the Court of Appeals, thereby affirming my decision to send the case to the jury.

- 2) State v. Grovenstein, 335 S.C. 347, 517 S.E.2d 216 (1999) The Court of Appeals reversed me upon the procedure I used when it was discovered the alternate juror was in the jury room during deliberations. The Supreme Court granted cert. to review the decision and reversed the Court of Appeals thereby affirming my remedy in handling the issue. Also, they held the Court of Appeals used the wrong standard. In addition the case went back to the Court of Appeals on remand as to other issues. The Court of Appeals reversed my application of the rape shield statute. The case is cited in 340 S.C. 210, 530 S.E.2d 406 (Ct. App. 2000). The Supreme Court granted cert. to review that decision and before an opinion was handed down by the Supreme Court, the parties resolved the matter by agreement and the appeal was withdrawn.
- 3) State v. William T. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000) The Court of Appeals reversed me concerning the admission of drug evidence found in a moped within the curtilage of the Defendant's mother's home. The Supreme Court granted cert. to review the decision and reversed the Court of Appeals. The Supreme Court held the search was private and the Defendant had no expectation of privacy and that the Court of Appeals applied the wrong standard of review. In short, my decision was affirmed.
- 4) Osteen v. Greenville County School District, 323 S.C. 432, 475 S.E.2d 775 (1998) The Court of Appeals reversed a workers compensation decision of mine dealing with the application of the personal comfort doctrine. The Supreme Court granted cert. and reversed the Court of Appeals and affirmed my ruling.
- 5) Hanahan v. Simpson, 326 S.C. 140, 485 S.E.2d 903 (1997) This was a complicated wills contest. The Supreme Court affirmed my handling of the wills contest but reversed my Order of Sanctions under the South Carolina Frivolous Procedure Act and Rule 11 of the South Carolina Rules of Civil Procedure. They made a policy decision that if a judge denied summary judgment then whether or not the trial judge directs a verdict or sends the case to the jury, sanctions are not available to the prevailing party.
- 6) State v. Michael Anthony Martin/ State v. Pierre Wilson [Martin - 340 S.C. 597, 533 S.E.2d 572 (2000)] [Wilson - 339 S.C. 491, 530 S.E.2d 126 (2000)] This was a murder case tried in Pickens County. The defendants were tried together. They were convicted and appealed. The Supreme Court reversed both convictions on the ground I should have directed a verdict of acquittal for both.
- 7) State v. James Lynch, III, 344 S.C. 635, 545 S.E.2d 511 (2001) This was a murder and burglary case. The Defendant was convicted on both counts. On appeal, the murder conviction was affirmed but the burglary conviction was reversed. The basis of the reversal was the Court said I allowed an improper amendment to the indictment.

- 8) Hill v. State, 350 S.C. 465, 567 S.E.2d 847 (2002) This is a post conviction relief case. The Supreme Court although acknowledging I was right that an erroneous charge was given on the law of assault and battery of a high and aggravated nature, the Court held the Defendant suffered no prejudice and reversed. The case was tried during the time the Court of Appeals and Supreme Court changed the law on the common law offense of assault and battery of a high and aggravated nature.
- 9) Cooper v. State, 338 S.C. 202, 525 S.E.2d 886 (2000) This is a PCR case wherein for the first time the Supreme Court applied its Al-Shabazz v. State ruling to determine what issues were to be handled under a PCR claim or an Al-Shabazz claim. Also, at issue was whether or not the PCR statute of limitations barred the claim. The Court held the "time for credits served" was not barred by the Post Conviction Relief statute and should be determined under the Al-Shabazz process.
- 10) State v. Fuller, 337 S.C. 236, 523 S.E.2d 168 (1999) This was a murder case tried in Greenville. Mr. Fuller was convicted and on appeal the Supreme Court reversed. The grounds were that I did not let Mr. Fuller represent himself and the admissions of accomplice testimony under South Carolina Rules of Evidence 804(b)(3). The argument on appeal was pretty contentious between the State and defense because this was a novel issue at the state level since South Carolina adopted essentially the federal rules of evidence in 1995.
- 11) Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994) This was a PCR case involving the question of whether or not trial counsel was ineffective for failing to request the so called "King charge" (asking that the lesser included offense be charged) The Supreme Court by a vote of 4-1 said counsel was not ineffective. They reversed my decision. I would point out that a dissent is rare at our Supreme Court.
- 12) Lora Cunningham, a minor by GAL Linda Grice v. Helping Hands, Inc. and the City of Aiken Dept. of Public Safety, 352 S.C. 485, 575 S.E.2d 549 (2003) This is a negligence action involving a city fire truck running over a 15 year old resident of Helping Hands, Inc. while the children of Helping Hands were visiting a fire station. I granted summary judgment in favor of both the City and Helping Hands. On appeal, the summary judgment against the City was affirmed but the Supreme Court ultimately reversed me as to Helping Hands, Inc. The Supreme Court even held the Court of Appeals' analysis reversing me to be wrong. The issue involved the validity of the assumption of risk doctrine under pre Davenport v. Cotton Hope Plantation Horizontal Property Regime, 333 S.C. 71, 508 S.E.2d 565 (1998) decision. Our Supreme Court is still fleshing out the various defense doctrines like assumption of risk in light of the Supreme Court adopting comparative negligence in 1991.

- 13) State v. Murphy, 322 S.C. 321, 471 S.E.2d 739 (Ct. App. 1996) This was a case of intent to commit criminal sexual conduct with a minor. Mr. Murphy was convicted and he appealed. The Court of Appeals by a 2-1 vote reversed saying I should have charged assault of a high and aggravated nature. The Supreme Court and Court of Appeals over the past ten years have been all over the board about the relationship between ABHAN and AHAN and CSC. This case was tried in 1995 and now under the current state of the law, I might well be affirmed.
- 14) IN Re: Breast Implant Product Liability Litigation, 331 S.C. 540, 503 S.E.2d 445 (1998) I was assigned by the Chief Justice to manage all breast implant litigation in the State Courts in South Carolina. There were approximately 1500 cases pending, and one of the central issues that needed to be decided was whether or not the providing of breast implants constituted a sale or service under the Uniform Commercial Code. Statistically, it was shown that the substantial majority of breast implants were done for cosmetic reasons and there was a considerable amount of advertising by various physicians promoting the implantation. Based upon that and other information, I ruled that the distribution of breast implants constituted a sale rather than a service. A process was put into place to have the Supreme Court hear that issue before any cases were decided. The Supreme Court agreed to take the issue under a writ of certiorari. They ruled that the distribution of breast implants was a service rather than a sale thereby resolving the most important issue in the overall litigation.
- 15) Revis v. Allshouse and Auto-Owners Insurance Co. (and) Revis v. Allshouse UPO No. 94-UP-185 (Ct.App. 1994) Affirmed in part, reversed in part. This was a pedestrian/auto accident. I was affirmed on the issue of whether or not the court had jurisdiction over the auto owner but reversed on finding the Court did not have jurisdiction over the underinsured insurance carrier. The Court of Appeals found that when jurisdiction is retained in the underlying action, the statute of limitations does apply to the underinsured carrier.
- 16) State v. Blassingame , UPO No. 94-UP-246 (Ct. App. 1994) Reversed and Remanded. Mr. Blassingame was tried in absentia for violation of certain drug statutes. The trial judge was the Honorable Clyde A. Eltzroth. Upon conviction, Judge Eltzroth sentenced the Defendant and sealed the sentence until the Defendant could be located. A bench warrant was issued and the Defendant was arrested and brought before me to impose sentence which I did. An appeal was then taken and certain of Judge Eltzroth's rulings were reversed and a new trial was ordered. In this case, I was only performing the duty of imposing the sealed sentence in accordance with our procedure.
- 17) L. Rowland v. The Schafer Company, Inc. and J. Rowland v. The Schafer Company, Inc., UPO No. 2000-UP-259 (Ct. App. 2000) This was a workers compensation case. I held that Rowland was a statutory employee under our

workers compensation statute. The Court of Appeals disagreed with my factual analysis and determined Rowland was not a statutory employee.

- 18) In the Matter of Millie Beeks: Rollison v. Beeks, UPO No. 95-UP-263 (Ct. App. 1995) This was an appeal from the Probate Court wherein I was asked to review the Probate Judge's decision appointing a guardian ad litem. I affirmed the Probate Judge on that issue, and the Court of Appeals affirmed me on appeal. However, they reversed my affirmation of the Probate Judge's decision appointing co-guardians and payment of attorney fees to guardian.
- 19) Rhodes v. McDonald, et al. of whom Gillespie and Southern Insulation Co. are Appellants, 345 S.C. 500, 548 S.E.2d 220 (Ct. App. 2001) The Court of Appeals affirmed my decision concerning a jury award of actual damages arising from a warranty action brought by a homeowner against a contractor. They reversed my decision allowing the jury to award punitive damages. It was a case of first impression that needed an answer concerning punitive damages and the Uniform Commercial Code.
- 20) Marty Mack, Employee v. Landmark Nissan, Employer, et.al. UPO No. 96-UP-334 (Ct. App. 1996) This was a workers' compensation appeal. I reversed the Workers Compensation Commission's decision to deny benefits to Mr. Mack. Upon appeal to the Court of Appeals, they reversed my decision. The Court of Appeals just took a different view of the underlying facts in the case than the way I viewed them.
- 21) Mullinax v. Bates, 317 S.C. 394, 453 S.E.2d 894 (1995) The Supreme Court reversed my ruling in a non-jury proceeding that the Appellant's claim was barred under Rule 13 of South Carolina Rules of Civil Procedure regarding compulsory counterclaims. The Supreme Court found the claim Appellant sought to file was not a compulsory one thereby upon remand she was allowed to go forward. The case did provide guidelines to the trial bench because the Supreme Court adopted a test we could clearly understand in future cases.
- 22) State v. Proctor, 345 S.C. 299, 546 S.E.2d 673 (Ct.App. 2001) The Court of Appeals reversed my revocation of the Appellant's probation holding that his adult probation case did not begin until he completed his youthful offender parole. It was a case of interpreting what another judge's sentence meant. As it turned out, I revoked five years of a 25-year sentence for arson and terminated the balance of the sentence. Now when he goes on probation, if he violates that status he is once again facing 25 years.
- 23) Sullivan v. Mayfield, et.al. and Mattison v. Mayfield and VanAllen v. Mayfield UPO No. 96-UP-265 (Ct. App. 1996) Affirmed in part, reversed in part and remanded. The Court of Appeals reversed my granting of summary judgment in an automobile negligence case in effect saying there was an issue of fact for the

jury. I thought the case had very little merit, and summary judgment should be granted. When it was tried on remand before another judge the result was a verdict consistent with my summary judgment granting.

- 24) ExParte: Foster In re: Thomas Pope, Solicitor v. Pate, et.al. 350 S.C. 238, 565 S.E.2d 290 (2002) The issue was whether or not a defendant in a civil forfeiture action was entitled to an appointed Guardian Ad Litem. I said yes but the Supreme Court said I did not make enough findings so adopted a test for the future and remanded the case for further factual findings.
- 25) Roberts v. Carolina Cannery, Inc. et.al. UPO No. 2000-UP-640 (Ct.App. 2000) Another circuit court judge let the Respondent out of default. The case was tried before me. Upon appeal, the Court of Appeals said the prior judge erred in setting aside the default. In our state one circuit judge cannot reverse the order of another circuit judge. So in this case there was nothing else for me to do but try the case.
- 26) The Jay Group, LTD v. The Bootery of Haywood Mall, et.al. 335 S.C. 114, 515 S.E.2d 542 (Ct.App. 1999) The issue was whether or not a North Carolina judgment was entitled to full faith and credit in South Carolina. I held it was, based upon my interpretation of North Carolina law. The Court of Appeals held otherwise.
- 27) De Bondt v. Carlton Motorcars, Inc., et al. 342 S.C. 254, 536 S.E.2d 399 (Ct. App. 2000) The case dealt with the purchase of an automobile. This matter was before me on a motion for summary judgment filed by Mercedes Benz. Another judge had previously granted summary judgment to Carlton Motorcars. That decision was later reversed. I granted summary judgment on all causes of action against Mercedes Benz. The Court of Appeals reversed me on the granting of summary judgment as to the Unfair Trade Practices Act and Manufacturers and Dealers Act but affirmed me on the fraud and negligent misrepresentation cause of action.
- 28) State v. Evans 343 S.C. 685, 541 S.E.2d 852 (Ct. App. 2001) This case arose out of a triple homicide where the mother was accused of killing her three children. The issue before me was whether or not Ms. Evans was in custody and should have been afforded her Miranda warnings. The Court held that I used the appropriate standard to evaluate the Miranda issue which is an objective standard of custody; however, because I made additional remarks about her mental situation, the Court felt that I might have been using a subjective standard. Of course, the comments about mental issues could be construed as a subjective voluntariness analysis. I believe the Court of Appeals is "being picky"; nevertheless, they reversed and remanded the matter for further factual findings. In the interim, the South Carolina Supreme Court has granted cert. to review the Court of Appeals decision and it is still pending before the Supreme Court.

Part 3

As noted above, in criminal cases written orders are not routinely issued so I am just listing the appellate cites:

Diamonds, et. al. v. Greenville County. 95-CP-23-2144 Application of the South Carolina Constitution provision in Art. VIII, Section 14 to a local ordinance. Appellate decision found at 325 S.C. 154, 480 S.E.2d 718 (1997)

State v. William T. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000) Search and seizure question.

State v. Susan Ann Fletcher, 322 S.C. 256, 471 S.E.2d 702 (Ct. App. 1996) cert. denied. Prosecutorial vindictiveness.

State v. Florence Robinson Evans, 343 S.C. 685, 541 S.E.2d 852 (Ct. App. 2001) Miranda issue. Cert. granted 9/27/01 and still pending on review before the South Carolina Supreme Court.

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.

1972-1978; Elected member of House District 3, South Carolina House of Representatives

Member, Appalachian Region Council of Governments. Appointed by legislative delegation

1978-1990; Commissioner, South Carolina Forestry Commission. Appointed by the Governor

1981; Ran unsuccessfully for the South Carolina Senate

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;

I was admitted to the Bar on November 3, 1973, and started my law practice on December 1, 1973. For the first several months, I practiced by myself waiting for my partner to join the firm which he did sometime in 1974. The firm was known as Floyd & Welmaker, P.A., 208 Garvin Street, Pickens. I continued in that practice until December 31, 1977.

On January 1, 1978, we merged with a firm known as Acker & Acker, P.A. and the new firm was known as Acker, Acker, Floyd & Welmaker, P.A. While awaiting construction of a building we practiced at Cedar Rock Street, Pickens, South Carolina for about seven months and moved later into the new office at 114 S. Lewis Street. I continued in that location until I was ready to be sworn in as Circuit Court Judge on July 1, 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
2. Describe your typical former clients, and mention the areas, if any, in which you have specialized

Initially, the firm of Floyd & Welmaker was predominantly involved in civil, criminal and domestic litigation with the general office practices of deeds, wills, estates, and real property closings. When the firms were merged in 1978, Acker & Acker was predominantly a firm involved in property, probate, trust, and commercial activities. As we entered into the merger, eventually there was a division of the labor among the partners, and I continued primarily in the litigation areas of civil, criminal and domestic relations. However, I did undertake to be more involved in the probate litigation, real property litigation, and continued on the small side of general 'walk-in' traffic of wills, deeds, and contracts. I also represented some regulated utilities, municipalities, the County of Pickens and an electric cooperative. Essentially, my practice remained pretty much the same from 1978 until 1992.

Pickens and Pickens County is generally a small area by comparison and our typical clientele included general working people with everyday problems from criminal charges, domestic relations disputes and routine civil disputes. The firm also represented some lending institutions, municipalities, and the county. We also participated in bond issues and corporate sales.

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.
2. What percentage of these appearances was in:

a) Federal Courts

- b) State court of record;
 - c) Other courts
3. What percentage of your litigation was:
- a) Civil;
 - 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.
5. What percentage of these trials was:
- a) Jury;
 - b) Non-jury.

I appeared in court frequently, and the frequency of my appearances in court remained fairly stable during my entire career as a lawyer. The percentages of appearances are as follows: 2% in Federal courts; 80% in state courts of record; 18% in other courts. The percentage of my litigation was as follows: civil (excluding domestic relations) 25%; criminal 35%; domestic relations 40%. Over an 18 year period of time, I would estimate that I tried to verdict or judgment in courts of record approximately 400 cases. I would estimate that 95% of the time I was either chief or sole counsel. Approximately 50% of these trials were jury and 50% non-jury.

18. **Litigation:** Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:
- a) The date of representation;
 - b) The name of the court and the name of the judge or judges before whom the case was litigated; and
 - c) The individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. State v. Cox, 335 S.E.2d 809, 287 S.C. 260 (Ct. App. 1985)

This was the first capital murder case tried in Pickens County after the reinstatement of the death penalty. It was a murder for hire case. Originally, I was appointed to assist the Public Defender. The case was tried, the Defendant convicted and the jury recommended a life sentence. The case was appealed by the Appellate Defense Commission. On appeal, the conviction was reversed and remanded for new trial. Upon retrial (1/87) Mr. Cox's family retained me to defend Tim. The jury acquitted Tim Cox.

Date of Rep: 6/83 and 1/87

Court/Judge: Pickens County General Sessions, Spec. Circuit Judge Paul Moore

Co-counsel/Opposing counsel: Co-counsel: J. Redmond Coyle (6/83)
 P. O. Box 898
 Pickens, SC 29671
 864-878-3514

Opposing: William B. Traxler, Jr. (6/83)
 P. O. Box 10127
 Greenville, SC 29603
 864-241-2730

(2nd trial – 1987)

Court/Judge: Pickens County General Sessions, Judge Robert L. McFadden
 Co-counsel/Opposing counsel: Opposing: Benjamin T. Stepp
 501 E. McBee Ave., Ste 202
 Greenville, SC 29601
 864-233-8714

2. State v. Crunkleton, 90-GS-37-1179, Date: 3/26/91

This case was tried in March of 1991 arising out of manslaughter charges against my client, Bud Crunkleton, as a result of an attack by Bud's part pit bull/part rottweiler dog upon a five year old child who was mauled and killed by the dog. It was the first time that a person had been prosecuted for manslaughter in South Carolina as a result of the Vicious Dog Act. The jury acquitted Mr. Crunkleton.

Date of Rep: 10/90

Court/Judge: Oconee County General Sessions Court, Judge Luke Brown

Co-counsel/Opposing counsel: Opposing: Tommy B. Edwards
 P. O. Box 8002
 Anderson, SC 29622
 864-260-4040

3. Giles v. Lanford & Gibson, Inc., 328 S.E.2d 916, 285 S.C. 285 (Ct. App. 1985)

I represented William Giles in this case which involved the use of the theory of constructive fraud in which a Plaintiff does not have to prove intent in order to recover under a cause of action in fraud. The plaintiff was a homeowner with a builder's risk policy who claimed his agent misled him as to the effect of coverage. The jury gave the plaintiff \$25,000 in damages.

Date of Rep: 5/81

Court/Judge: Greenville County Court of Common Pleas, Judge Frank Eppes

Co-counsel/Opposing counsel: Opposing: Herman E. Cox
 115 Broadus Ave.
 Greenville, SC 29601
 864-242-4711

4. Blue Ridge Electric Cooperative, Inc. v. Combined Utility System of the City of Easley,
303 S.E.2d 91, 279 S.C. 135 (1983)

I represented Blue Ridge Electric Cooperative in this case involving a declaratory judgment concerning an eminent domain statute specially provided for electric utility acquisition of electric cooperative property. In South Carolina for a number of years there has been a great deal of dispute between electric utilities and electric cooperative concerning territorial assignment and its acquisition. This suit was designed to have the Supreme Court identify whether or not the statutory provision referred to above was a minimum or could an arbiter or court exceed the statutory provisions if the evidence was appropriate. The Court held that the statute was not an unconstitutional exercise of legislative authority by the general assembly or a denial of equal protection and that the trial judge did not err in refusing to instruct the arbiter as to the elements of just compensation. The trial judge's decision was affirmed which in essence means that my client did not prevail. However, it resolved some longstanding issues for future disputes between electric utilities and electric cooperatives.

Date of Rep: retained client from 1975

Court/Judge: Pickens County Court of Common Pleas, Spec. Circuit Judges

James W. Sparks and Joseph W. Board

Co-counsel/Opposing counsel: Opposing: J.D. Todd, Jr.
300 E. McBee Ave., Ste 500
Greenville, SC 29601
864-242-6440
Felix L. Finley, Jr.
P. O. Box 543
Pickens, SC 29671
864-878-2442

5. Hayes v. Tompkins, 337 S.E.2d 888, 287 S.C. 289, (Ct. App. 1985)

This is a case involving an implied easement of necessity under South Carolina law. The case was tried and the lower court held there was an implied easement of necessity which was favorable to Mr. Hayes and also found that there was a right of apportionment of maintenance costs which was in favor of Mr. Tompkins. Both sides appealed; each side lost their respective appeals; and, the decision as outlined above remained in effect. The value of this case is that for the first time the appellate court of this State announced that apportionment of costs can be an equitable remedy notwithstanding an agreement between the parties based upon law from the State of Iowa which the Court adopted.

Date of Rep: 6/82

Court/Judge: Pickens County Court of Common Pleas, Judge Robert H. Cureton

Co-counsel/Opposing counsel: Opposing: Felix L. Finley, Jr.
P. O. Box 543
Pickens, SC 29671
864-878-2442

6. State v. Richard Spearman 84-GS-39-142: Date: 3/24/84

This is the second death penalty case tried in Pickens County after the reinstatement of the death penalty in South Carolina. Mr. Spearman was charged with murder and the aggravating circumstance of armed robbery. Our objective in this case was to see whether or not Mr. Spearman could avoid the death penalty because the evidence clearly showed that he was guilty of murder and armed robbery. We tried the case over several days and the jury became deadlocked. Under South Carolina law the trial judge must impose the life sentence which he did. Mr. Spearman had no appreciable criminal record and a very supportive family, and the conduct for which he stood trial was very much out of character. We were pleased with the ability to save his life.

Date of Rep: 12/83

Court/Judge: Pickens County Court of General Sessions, Judge Frank Eppes

Co-counsel/Opposing counsel: Co-counsel: J. Redmond Coyle

P. O. Box 898

Pickens, SC 29671

864-878-3514

Opposing: William B. Traxler, Jr.

P. O. Box 10127

Greenville, SC 29603

864-241-2730

7. Parrish v. Gilstrap, et al., 312 S.E.2d 4, 280 S.C. 184 (1984)

This is a case that demonstrates the criteria necessary to be established for a writ of mandamus. In the instant action, the Appropriations Act of the South Carolina General Assembly for 1979-80 mandatorily provided for a sum certain for the benefit of each county probate judge. Pickens County refused to comply with the statute and the writ of mandamus was sought and granted. On appeal the decision of the circuit judge was affirmed. This case is an often-cited case in recent years concerning issuance of writs of mandamus.

Date of Rep: 6/80

Court/Judge: Pickens County Circuit Court, Spec. Circuit Judge Stuart H. Hall

Co-counsel/Opposing counsel: Opposing: Felix L. Finley, Jr.

P. O. Box 543

Pickens, SC 29671

864-878-2442

8. State v. Morgan, 319 S.E.2d 335, 282 S.C. 409 (1985)

I handled this case at trial and appellate level. The significance is that among lawyers who handle DUI cases the Court clearly established the rules about how and when to raise the issue of corpus delicti, vis a vis custodial/non-custodial statements made during a routine traffic accident investigation. It also clarified the application of Miranda warnings as well as the extent to which a trial judge can charge the jury upon the issue of a statement rendered by an intoxicated person. I lost the case but won a lot of wisdom.

Date of Rep: 11/82
 Court/Judge: Pickens County Court of General Sessions, Judge C. Victor Pyle
 Co-counsel/Opposing counsel: Opposing: O. Warren Mowry, Jr
 25 Augusta Court
 Greenville, SC 29605
 864-232-8125

9. State v. Holcombe, 79-GS-37-244, Date: 10/20/79

I list this case because it is the most frustrating criminal case that I ever tried. Mr. Holcombe was charged and convicted under the theory of transferred intent for the murder of a 4-year-old girl. The State's theory was he was intending to kill the husband of his lover. There were a lot of evidentiary issues that were developed during the trial that I thought would have resulted in an acquittal. Also, this was being tried during the development of the Sandstrom v. Montana era wherein the U.S. Supreme Court was addressing the issue of burden shifting. The burden shifting issues were raised but our Supreme Court summarily denied the appeal and the U.S. Supreme Court refused to grant cert. by (I believe) a vote of 7-2. Ironically, had I not objected to the burden shifting issue, most probably he would have been given a new trial as a result of a post conviction relief application because shortly after the U.S. Supreme Court denied cert. to Mr. Holcombe there was a shift toward granting relief for burden shifting charges without a harmless error analysis. I truly believe that Mr. Holcombe should have been, at worst, found guilty of involuntary manslaughter, if not acquitted.

Date of Rep: 1/79
 Court/Judge: Oconee County Court of General Session, Judge Howard Ballenger
 Co-counsel/Opposing counsel: Opposing: Henry Raines (deceased)
 John Fields
 10 Commons Blvd.
 Seneca, SC 29678
 864-882-1812

10. Culler v. Blue Ridge Electric Cooperative, 422 S.E.2d 91, 309 S.C. 243 (1992)

This is a case alleging wrongful discharge brought by the employee Culler against Blue Ridge Electric Cooperative. The employee alleged that he was discharged for failure to contribute to the employer's political action committee; however, upon trial the evidence proved to the contrary and the Supreme Court affirmed the lower court. Significance of the case is that it is one in a line of cases that has been developing the law of at-will employment in South Carolina and where the courts will allow tort actions notwithstanding the at-will employment law.

Date of Rep: retained client from 1975
 Court/Judge: Pickens County Court of Common Pleas, Spec. Circuit Judge Charles B. Simmons, Jr.
 Co-counsel/Opposing counsel: Co-counsel: G. Edward Welmaker
 Opposing: Hal J. Warlick
 (Opposing counsel disbarred, address unknown)

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.)

For a few years I served on the Board of Commissioners on Grievances and Discipline which was empowered to deal with complaints against members of the Bar in this State and to make certain recommendations for disciplinary conduct. That was a very trying experience but I do believe that it helped prepare me to be a trial judge. I also participated in negotiations regarding territorial assignment of utility territory, negotiations concerning the acquisition of property for major water and utility lines. As county attorney, I was involved in the issuance of revenue and general obligation bonds. Also, I was responsible for guiding County Council through Freedom of Information requests and discussions of appropriate areas for the enactment of ordinances which I found to be quite challenging.

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, as I understand the question. I am vested with the South Carolina Retirement System, and I have a small individual retirement account with Prudential Financial.

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 procedure I have used as a judge over the past 11 years is hereinafter stated. I have maintained a copy of my former firm's client list up until the day I left the firm. I also have retained lists of stock and property I own or formerly owned as well as a list of my family's (to include brother, sister, father, mother and my wife's family) places of employment. When I am ready to try a case, I have reviewed it for potential conflicts. If there is a question I disclose that to the parties and their attorneys to determine if a waiver or recusal should follow. Over the past 11 years I have had very few conflicts.

I am not aware of any categories of litigation or financial arrangements that likely present conflicts of interest but in all cases would follow the guidelines of the Code of Judicial Conduct (28 USC 455).

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

No

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

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.

In 1970 I was an administrative aid to then Senator Earle E. Morris, Jr. who was campaigning for Lt. Governor of South Carolina. I essentially was a driver and the person to keep him on schedule and handle messages.

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	\$ 31000.00	Notes payable to banks-secured	\$ 14000.00
U.S. Government securities-add schedule	None	Notes payable to banks-unsecured	\$ 34500.00
Listed securities-add schedule	\$ 6380.00	Notes payable to relatives	-0-
Unlisted securities--add schedule	\$ 2600.00	Notes payable to others	-0-
Accounts and notes receivable:		Accounts and bills due	\$ 14425.00
Due from relatives and friends	\$ 4700.00	Unpaid income tax	-0-
Due from others	-0-	Other unpaid income and interest	-0-
Doubtful	-0-	Real estate mortgages payable-add schedule	\$ 232500.00
Real estate owned-add schedule	\$ 677000.00	Chattel mortgages and other liens payable	-0-
Real estate mortgages receivable	-0-	Other debts-itemize:	-0-
Autos and other personal property	\$ 75000.00		
Cash value-life insurance	\$ 13000.00		
Other assets itemize:			
net retirement (joint)	\$ 200000.00		
		Total liabilities	\$ 295425.00
		Net Worth	\$ 714255.00
Total Assets	\$1009680.00	Total liabilities and net worth	\$1009680.00
CONTINGENT LIABILITIES	none	GENERAL INFORMATION	
As endorser, comaker or guarantor		Are any assets pledged? (Add schedule)	No, other than stated above
On leases or contracts		Are you defendant in any suits or legal actions?	Yes, see Pt IV. Confidential #10
Legal Claims		Have you ever taken bankruptcy?	No
Provision for Federal Income Tax			
Other special debt			

REAL ESTATE SCHEDULE

Description	Titled	Date	Present Value
Residence, Pickens County, S.C.	HFF/EHF	1980	\$315,000
Development Lot, Pickens County, S.C.	HFF	1970's	\$ 32,000
Farm, Pickens County, S.C.	HFF 1/4 interest	1970's	\$200,000±
12.2 acres Greenville County, S.C.	EHF	1999	\$130,000
TOTAL			\$677,000.00

SECURITIES SCHEDULE

No. of Shares Stock	Description of Security	Type of Ownership	Cost	Market Value	Pledged
220 shares unknown	Southern Company	100%	\$25/share	\$6380.00	no
2 shares	Prudential Securities Pickens Country Club	100%	\$2000 \$150/share	\$1600.00 <u>\$1000.00</u>	no no
	TOTAL			\$ 8980.00	

AO-10 (w)
Rev. 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)

1. Person Reporting (Last name, first, middle initial) Floyd, Henry F.		2. Court or Organization District Court-South Carolina	3. Date of Report 05/16/2003
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) U.S. District Judge - nominee		5. Report Type (check type) <input checked="" type="checkbox"/> Nomination, Date 05/15/2003 <input type="checkbox"/> Initial <input type="checkbox"/> Annual <input type="checkbox"/> Final	6. Reporting Period 01/01/2002 to 04/22/2003
7. Chambers or Office Address P. O. Box 1390 Pickens, SC 29671		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 section where you have no reportable information. Sign on the last page.

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

POSITION	NAME OF ORGANIZATION / ENTITY
<input checked="" type="checkbox"/> NONE (No reportable positions.)	
1	
2	
3	

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

DATE	PARTIES AND TERMS
<input type="checkbox"/> NONE (No reportable agreements.)	
1 1992	S.C. Judges and Solicitors Retirement System
2	
3	

II. 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.)		
1 2001	S.C. Judicial Dept. salary	122,000.00
2 2002	S.C. Judicial Dept. salary	119,000.00
3 05/01/03	S.C. Judicial Dept. salary	45,161.00
2002/03	School District of Pickens County salary	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Floyd, Henry F.	05/16/2003

REIMBURSEMENTS -- transportation, lodging, food, entertainment.
(includes those to spouse and dependent children. See pp. 25-27 of Instructions.)

<input type="checkbox"/> NONE (No such reportable reimbursements.)	SOURCE	DESCRIPTION
	EXEMPT	

GIFTS
(includes those to spouse and dependent children. See pp. 28-31 of Instructions.)

<input type="checkbox"/> NONE (No such reportable gifts.)	SOURCE	DESCRIPTION	VALUE
	EXEMPT		

LIABILITIES
(includes those of spouse and dependent children. See pp 32-33 of Instructions.)

<input type="checkbox"/> NONE (No reportable liabilities.)	CREDITOR	DESCRIPTION	VALUE CODE*
	Cornerstone National Bank	unsecured credit line	K
	Peoples National Bank	unsecured note	J

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Floyd, Henry F.	Date of Report 05/16/2003
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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 "00" 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) 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 Southern Company common stock	A	Dividend	J	T	EXEMPT				
2 Prudential 20/20 Fund	A	Dividend	J	T	EXEMPT				
3									
4									
5									
6									
7									
8									
9									
10									
11									
12									
13									
14									
15									
16									
17									

1 Inc/Gain Codes: A=\$1,000 or less B=\$1,001-\$2,500 C=\$2,501-\$5,000 D=\$5,001-\$15,000 E=\$15,001-\$50,000
 F=\$50,001-\$100,000 G=\$100,001-\$1,000,000 H=\$1,000,001-\$5,000,000 I=\$5,000,001 or more

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

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Floyd, Henry F.	05/16/2003

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

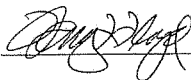
FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Floyd, Henry F.	05/16/2003

IX. CERTIFICATION

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

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

Signature



Date

May 16, 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

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 participated in the South Carolina Bar pro bono program. I probably got a case per month which would take roughly 4 hours or so. For several years, I served on the Pickens County Public Defender Board. It was a three-member board with oversight responsibility for indigent representation. No pay or gratuity was involved and it took a few hours per month.

I also participated in community and church food bank programs for several years.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

None

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

No as to Part 1.

With regard to the second question, a few years ago I expressed an interest in a District Court judgeship.

Toward the end of January 2003 Senator Graham's office asked for a résumé and that I respond to a background questionnaire, which I did. On Thursday, January 30, 2003, the White House Counsel's office called and advised me that Senator Graham had sent my name, along with two others, to President Bush for consideration. On February 6, 2003, I met with the White House Counsel's Office and a person from the Justice Department. It was about a thirty-minute interview on my background and some of my experiences in state court.

The following week Senator Graham called and asked for my South Carolina Bar Judicial ratings, and I sent them to him.

On Friday, March 7, 2003, I was advised that President Bush had indicated after a review of my file he intended to nominate me to the vacancy in the South Carolina District Court assuming a successful background check.

On Wednesday, March 12, I received a packet of forms from the Department of Justice which I completed and have undergone FBI background investigation. I was nominated on May 15, 2003, by President Bush.

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 an important concept for a District Judge to understand and apply. As the Committee is well aware, we have three separate but equal branches of government. It is the Legislative branch's duty to enact laws subject to the limitations placed upon it by the Constitution. The Executive branch's duty is to enforce the laws passed by the Legislative branch and to exercise other powers granted unto it by the Constitution. The Judicial branch has the duty to decide disputes between the other two branches. It also has the duty to exercise the power granted unto it by the Constitution and the statutes passed by the Legislative branch.

The Judicial branch must also reasonably apply the Constitution and properly interpret statutes when called upon to do so.

I believe the role of a judge is to rule on the basis of existing law be it established by statute, appellate decision, or the Constitution. With regard to appellate decisions, a District Court Judge should adhere to the principle of stare decisis. The principle of stare decises provides stability in the law. Also, disputes decided by the courts should be truly ripe for decision. Ripeness would also require that the issue of standing be fairly determined.

Finally, it is not appropriate that a judge use a case to impose or express his own view of the law.

Chairman HATCH. Well, thank you so much.
Judge Gibson?

**STATEMENT OF KIM R. GIBSON, NOMINEE TO BE DISTRICT
JUDGE FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

Judge GIBSON. Thank you, Mr. Chairman. I don't have any opening statement either. I want to express my appreciation to the Committee for having me here and what a great honor it is to appear before this body, and especially nice is the fact that a lot of my family could be here with me, and I'm sure it's something they'll always remember.

[The biographical information follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name: (include any former names used.)
Kim Richard Gibson.
2. Address: List current place of residence and office address(es).
Residence: Pennsylvania
Office: Somerset County Courthouse, 111 East Union Street, Somerset, Pennsylvania, 15501.
3. Date and place of birth:
May 29, 1948 at Trenton, New Jersey.
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 Rebecca L. (Arbogast) Gibson, mother/homemaker, not employed outside of home.
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.
Dickinson School of Law, Carlisle, Pennsylvania, 1972-1975, Juris Doctor degree (magna cum laude) 1975.
United States Military Academy, West Point, New York, 1966-1970, Bachelor of Science degree 1970.

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 1998 to present:

Judge, Court of Common Pleas of 16th Judicial District (Somerset County), Pennsylvania.

January 1988 to January 1998:

Solicitor for Somerset County, Pennsylvania.

March 1980 to January 1988:

Assistant County Solicitor for Somerset County, Pennsylvania and Attorney for Somerset County Children and Youth Services.

1984 through 1987

Board of Directors, Tressler Lutheran Services.

September 1978 to March 1980:

Public Defender for Somerset County Court of Common Pleas.

September 1978 to January 1998:

Private law practice as a sole practitioner in Somerset, Pennsylvania.

1981 to October 1996:

Judge Advocate Officer in United States Army Reserves.

June 1970 to September 1978:

United States Army Officer on active duty.

October 1975 to May 1976:

Assistant Post Judge Advocate, Fort Monroe, Virginia.

May 1976 to August 1978:

Post Judge Advocate, Headquarters Fort Monroe, Fort Monroe, Virginia.

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 1970:

Graduated from West Point and commissioned as 2nd Lieutenant in the United States Army in the branch of Armor.

August-October 1970:

Attended and graduated from Armor Officer Basic Course at Ft. Knox, Kentucky.

October 1970:

Attended and graduated from Airborne School, Ft. Benning, Georgia.

October 1970-February 1971:

Attended and graduated from Army Ranger School, Ft. Benning, Georgia.

February 1971-June 1972:

Platoon Leader, Company Executive Officer, and Battalion Staff Officer in 2nd Battalion, 66th Armor, 2nd Armored Division.

June 1972-August 1975:

Attached to Army War College at Carlisle, Pennsylvania while attending Dickinson School of Law; served in Judge Advocate Office.

August 1975-October 1975:

Attended and graduated from Judge Advocate General Officer basic course.

October 1975-August 1978:

Assigned to Judge Advocate General office at Ft. Monroe, Virginia (duties are set forth in question number 17).

1978-1981:

Inactive United States Army Reserves.

1981-1990:

Judge Advocate General Officer in 42nd Military Law Center, Pittsburgh, Pennsylvania, United States Army Reserve.

January 1991-1993:

Commander, 127th JAG Detachment, United States Army Reserve for three years - this unit was activated in January 1991 for Desert Storm and was inactivated in April 1991 and returned to reserve status.

1993-1996:

Judge Advocate Office, 99th ARCOM, Oakdale, Pennsylvania.

October 1996:

Retired from the United States Army Reserve as a Colonel, JAG.

Total Military Service (including West Point) - July 1966-October 1996, with 8 ½ years active duty.

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

1966:

Awarded Presidential (university) scholarship to Colgate University, however, decided to attend United States Military Academy.

1973:

Awarded membership in Dickinson Law Review (served as an editor in 1974-1975).

1973:

American Jurisprudence Award for achievement in Contracts.

1973:

American Jurisprudence Award for achievement in Trusts.

1975:

Graduated second in class at Dickinson School of Law and received the following graduation awards:

Hornbook Award (Junior and Senior year); Corpus Juris Secundum Award (Junior year); Edward Polisher Estate and Gift Tax Award; Prentice Hall Federal Tax Award.

1995:

Selected to attend United States Army War College at Carlisle, Pennsylvania, but retired from United States Army Reserves prior to completion of course.

2002:

Selected and named Co-Chairman of Flight 93 Task Force (2002-present) (the citizens task force created by Public Law 107-226 of the 107th Congress). Task Force purpose is to consider and formulate plans for a permanent memorial to the passengers and crew of Flight 93, including its nature, design and construction - additional duty is to select the members of the Flight 93 Federal Advisory Commission to be submitted to the Secretary of Interior for review and appointment.

Military Awards: Ranger Tab, Parachutist Badge (Airborne Wings), NDSM/ASR/ARCOM-3/ARCOTR-NDSM 1 BSS/ARCAM/ARCAM-2/ARCAM-3/AFRM, .45 Cal. Pistol-Expert Badge, Rifle M16 Expert Badge.

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.

Pennsylvania Bar Association.

Somerset County Bar Association.

(Editor, Somerset Legal Journal 1980-1981; Executive Committee, Somerset County Bar Association, 1984-1986).

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 following are the organizations to which I belong. To my knowledge, none of the organizations are active in lobbying before public bodies.

American Legion (1978-present).

(Judge Advocate for Somerset Post and for Shanksville Post for number of years).

Somerset Little League coach/manager (1994-present).

Somerset Rotary Club (early to mid 1980's-present).

During my time in the club, there have been great efforts made to attract female members and those efforts have resulted in a significant female membership.

Board of Directors, Tressler Lutheran Services (1984-1987).

Former Co-Chairman of Shanksville Friendly Town, Fresh Air Fund of New York City (1979-mid 1980's).

Former Co-Fund Representative of Fresh Air Fund of New York City for Western Pennsylvania and Maryland (early 1980's).

Member of September 11/Flight 93 Memorial Concert Committee (2002) (citizens committee which organized and presented a televised memorial concert in Somerset, Pennsylvania on September 11, 2002).

Member of Somerset Country Club since 1996 (copy of By-Laws attached).

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 Pennsylvania, 1975 to present; U.S. Court of Claims, 1976; United States Tax Court, 1976; United States Court of Military Appeals; U.S. District Court for Western Pennsylvania, 1981 to present; Somerset County Court, 1978 to present.

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

Writings:

Comment, *Illegitimacy in Pennsylvania*, 78 Dickinson Law Review 684 (1974) (copy attached).

Casenote, Criminal Law - *The Right of an Accused to a Preliminary Hearing When Incarcerated in Another County, Commonwealth v. Brabham*, 79 Dickinson Law Review 366 (1975) (copy attached).

Newspaper Guest Columns: "A Reservist Expresses his Pride," Somerset Daily American, Editorial Page, March 11, 1991; "An Uncertain Little Lad Earns His Wings," Somerset Daily American, Editorial Page, August 26, 1991; "Some Lessons to be Learned in Little League Baseball," Somerset Daily American, Editorial Page, April 4, 1998 (formerly appeared as "Baseball Memories Will Last Forever," March 11, 1991); "America Exists Because of Its Veterans," Somerset Daily American, Editorial Page, November 12, 2001 (copies of these columns/editorials are included in the Federal Judicial Application submitted with this questionnaire).

Although not actually a writing of mine, an interview of me is included in the publication, *Courage After the Crash - Flight 93 Aftermath*, at Pages 75-76, published 2002 S.A.J. Publishing, Glenn J. Kashurba, M.D (copy attached).

Speeches: I am a frequent Memorial Day/Veteran's Day speaker, as well as a speaker at schools on leadership, citizenship, and law. The following is a listing of those speeches.

List of Public Speeches:

1. Kim R. Gibson Remarks at Somerset County Courthouse at Judicial Swearing-in Ceremony - January, 1998 (copy attached).
2. Purple Heart Convention - June 18, 1998 at Somerset, Pennsylvania (copy attached).
3. National Night Out - August 4, 1998 at Somerset, Pennsylvania (copy attached).
4. Veteran's Day Speech - November 8, 1999 at Rockwood Rotary, Rockwood, Pennsylvania (copy attached).
5. Veteran's Day Speech - November 11, 1999 at Berlin, Pennsylvania (same as number 4 above).
6. National Night Out - August 7, 2001 at Somerset, Pennsylvania (no written speech).
7. Memorial Day Speech - May 28, 2001 at Hollsopple, Pennsylvania (copy attached).
8. Flag Retirement Ceremony - June 9, 2001 at Ursina (Confluence Boy Scouts), Pennsylvania (copy attached).

9. Veteran's Day Speech - November 10, 2000 at Shade - Central City High School, Cairnbrook, Pennsylvania (same as number 5 above).
10. Somerset Honor Society - April 30, 2001 at Somerset High School, Somerset, Pennsylvania (copy attached).
11. Memorial Day Speech - May 24, 1998 at Berlin, Pennsylvania (copy attached).
12. Memorial Day Speech - May 25, 1998 at Salisbury, Pennsylvania (same as number 11 above).
13. Memorial Day Speech - May 25, 1998 at Mt. Pleasant Cemetery, Hyndman, Pennsylvania (same as number 11 above).
14. Veteran's Day Speech - November 9, 2001, Somerset Rotary, Somerset, Pennsylvania (copy attached).
15. Veteran's Day Speech, Somerset County Ceremony, Somerset County Courthouse - November 10, 2001 (copy attached).
16. Speech to Berlin-Brothersvalley High School - November 11, 1999 at Berlin, Pennsylvania (copy attached).
17. Speech to Berlin Elementary School - November 11, 1999, Berlin, Pennsylvania (copy attached).
18. Veteran's Day Speech at Somerset High School - November 8, 2001, Somerset, Pennsylvania (copy attached).
19. Hooversville Memorial Day Speech - May 29, 2000 (copy attached).
20. Civil Air Patrol - October 10, 1998 at Somerset, Pennsylvania (copy attached).
21. Shanksville-Stonycreek School - November 9, 2001 (copy attached).
22. Memorial Day Speech at Lambertsville Cemetery - May 31, 1999 (copy attached).
23. Memorial Day Speech at Stoystown, Pennsylvania - May 31, 1999 (copy attached).
24. Flag Day Speech - June 14, 1999, Salisbury, Pennsylvania (copy attached).

25. Somerset Memorial Day Speech - May 26, 1997 (copy attached).

26. Community Presentation - various dates and service groups during 1998 (copy attached).

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 3, 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.

January 1998 to present - Judge, Court of Common Pleas, 16th Judicial District, (Somerset County), Pennsylvania.

This is an elected position. I was elected in November, 1997.

The Court of Common Pleas, 16th Judicial District, is a Pennsylvania state trial court and is the court of general jurisdiction for the County of Somerset. As a trial judge I hear all types of cases, including criminal, civil, family, estates, juvenile delinquency, support, and dependency of children.

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.

Answer to (1):

Note: Some of the cases contained in 15.(3) below would have been included in the group of cases set forth in this section, however, since they are set forth in (3), I did not include those cases in this subsection.

One - *Zeglin v. Gahagen*, No. 369 Civil 1999, Somerset County Court of Common Pleas, Opinion and Order dated March 21, 2000 (copy attached).

Summary: This case involved a boundary dispute. In reaching the decision on this issue, six different doctrines in real estate law were applied and evaluated. In applying the doctrine of acquiescence and occupancy for the statutory period, I had to determine whether the theory of tacking was applicable. This issue had not been definitively decided in Pennsylvania. My decision that tacking can be applied to this doctrine was reversed by the Superior Court and then affirmed by the Pennsylvania Supreme Court in a unanimous opinion at No. 94 WAP 2001 on December 19, 2002. (See (2) below) (copies attached).

Two - *Yutzy, et al. v. Columbia Gas of Pennsylvania, Inc.*, 55 Somerset Legal Journal 232 (1998) (copy attached).

Summary: This case dealt with post-trial motions regarding a lengthy and complicated civil jury trial involving a wrongful death cause of action resulting from a natural gas explosion causing severe burns to the decedent. The parties accepted the decision on the post-trial motions and did not appeal.

Three - *Moore v. Moore*, 56 Somerset Legal Journal 110 (1999) (copy attached).

Summary: This case examines the issue of whether a party requesting alimony pendente lite must demonstrate need. In evaluating this issue, I carefully analyzed the appellate cases to determine whether need had been eliminated as a requirement for alimony pendente lite. This case illustrates my approach to controlling law in that the trial court should not infer additional meaning to appellate decisions just because to do so may be convenient or may lend itself to reaching a conclusion which the trial court wishes to reach. The appellate decisions must be interpreted honestly based upon what the case actually states.

Four - *Greeley v. Saadat*, 819 Civil 1997, Somerset County Court of Common Pleas, Memorandum and Order dated December 31, 1998 (copy attached).

Summary: This case examines the issues of punitive damages, contractual liability, and specificity of pleading in the context of a medical malpractice case.

Five - *Campbell v. Hudson*, 57 Somerset Legal Journal 122 (2000) (copy attached).

Summary: This case examined the issue of whether incarceration of a defendant constitutes a valid basis upon which to modify a support obligation. In this case, the support obligor was incarcerated based upon his conviction of assaulting the support recipient. I determined that the defendant's incarceration was directly related to his support obligation and a support obligor may not use a self-imposed incapacity to earn income as a reason to avoid his support responsibility.

Six - *Staton v. Commonwealth of Pennsylvania*, 42 Special 2001, Court of Common Pleas of Somerset County, Pennsylvania, Memorandum and Order dated May 13, 2002.

Summary: This case involved an application for return of currency seized pursuant to a vehicle stop and search. The resolution of the issue required analysis of the statute as well as appellate cases which were helpful but which required the trial court to attempt to resolve apparent conflicts between them.

Note: This decision was appealed to the Pennsylvania Commonwealth Court which affirmed the trial court decision at No. 1366 C.D. 2002 on November 6, 2002 (copy attached).

Seven - *Tucker v. Seven Springs Mountain Resort, et al.*, 56 Somerset Legal Journal 268 (1998) (copy attached).

Summary: This case involved a skiing accident and came before the court on a motion for judgment on the pleadings. The court had to examine the issues of exculpatory clauses, assumption of risk, inherently dangerous activities and equal protection/due process. The motion was granted and the case was dismissed.

Note: The case was appealed to the Pennsylvania Superior Court which affirmed the trial court on October 20, 1998 at 657 Pittsburgh 1998 (copy attached). The Pennsylvania Supreme Court denied allocatur on September 20, 1999.

Eight - *Tunstall Fuel Co., et al. v. Latshaw*, 556 Civil 1995, Somerset County Court of Common Pleas, Memorandum and Order dated May 28, 1998 (copy attached).

Summary: In this case involving preliminary objections seeking dismissal of plaintiffs' claims, it was necessary to evaluate and discuss environmental and contamination issues. These issues involved the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Pennsylvania Storage Tank and Spill Prevention Act (STSPA) and the Pennsylvania Hazardous Sites Cleanup Act (HSCA). Also, a discussion of hazardous substances and hazardous wastes was necessary to decide the case.

Nine - *Mazey v. Mazey*, 59 Somerset Legal Journal 134 (2001) (copy attached).

Summary: This case involved the issue of entitlement to spousal support where the defendant wife asserted that the husband seeking support had engaged in a course of conduct which was inconsistent with the marital relationship which had made her life intolerable and burdensome. I found for the defendant wife and denied spousal support for the plaintiff husband.

Ten - Tunstall, et al. v. Boose, et al., 59 Somerset Legal Journal 157 (2000) (copy attached).

Summary: This case involves claims of legal malpractice. Plaintiffs alleged causes of action based upon breach of contract, negligence, and negligent misrepresentation. In examining these causes of action, the topics of privity, third party beneficiary, attorney fees, and prejudgment interest had to be addressed. By order dated December 15, 2000, all claims were dismissed, however, the plaintiffs were granted leave to file an amended complaint regarding the breach of contract cause of action. Upon reconsideration, by Order dated April 12, 2001, the plaintiffs were permitted to file an amended complaint regarding the negligence cause of action in order to plead assignment of that cause of action.

Answer to (2):

Memorandums/Opinions with Orders

1. *Zeglin v. Gahagen*, No. 369 Civil 1999, Opinion and Order of trial court dated March 21, 2000; trial court reversed by Pennsylvania Superior Court Opinion at 1616 WDA 2000; Pennsylvania Supreme Court reversed the Superior Court and affirmed and reinstated the trial court decision and order at 94 WAP 2001 (December 19, 2002 Opinion - unanimous) (The case summary is set forth in (1) above).

Orders

1. *Commonwealth v. Nelson*, 59 Criminal 2001, Somerset County Court of Common Pleas, Order dated December 19, 2001 dismissing a summary appeal for failure to appear. The defendant who appealed the summary conviction failed to appear when the case was called and the district attorney moved to dismiss the appeal. The court granted that motion and excused the witness who had been subpoenaed to appear. The defendant then appeared after the appeal had been dismissed.

The Superior Court reversed my order dismissing the summary appeal based upon defendant's failure to appear. Upon reflection, after reading the Superior Court decision, I believe that the appellate decision is the better resolution of the issue under all of the circumstances.

Answer to (3):

One - *Commonwealth v. Tomko*, 489 Criminal 1997, Somerset County Court of Common Pleas, Memorandum and Order dated March 10, 1998 (copy attached).

Summary: This case involves Fourth Amendment issues regarding a vehicle stop and subsequent search. In examining this issue, the court reviewed cases decided by the United States Supreme Court, Third Circuit Court of Appeals, Pennsylvania Superior Court, and Pennsylvania Supreme Court. The motion to suppress was denied.

Two - *Commonwealth v. Laughard*, 57 Somerset Legal Journal 169 (1998) (copy attached).

Summary: This case involves Fourth Amendment search issues and the issue of whether a photographic identification was unduly suggestive. In resolving these issues, the court had to examine the related issues of valid consent by a third party having co-equal and apparent authority and confiscation by a private citizen. The motion to suppress was denied.

Three - *Commonwealth v. Shuster*, 57 Somerset Legal Journal 155 (1998) (copy attached).

Summary: This case involves Fourth Amendment issues with reference to Miranda warnings and the waiver of Miranda rights. Also, the issue of an inventory search and chain of custody were examined. The motion to suppress was denied.

Four - *Commonwealth v. Peters*, 56 Somerset Legal Journal 99 (1998) (copy attached).

Summary: The issue in this case is whether the police officer had reasonable grounds to believe that the defendant was operating his vehicle while under the influence of alcohol. The conclusion of the court was that reasonable grounds were established.

Five - *Commonwealth v. Bytheway*, 56 Somerset Legal Journal 307 (1998) (copy attached).

Summary: This case involves Fourth Amendment search and seizure issues, specifically whether reasonable and articulable grounds existed which caused the officer to form a reasonable suspicion that a violation had occurred, thereby justifying a vehicle stop. In this case, the finding was that the stop was not reasonable and suppression was granted.

Six - *Commonwealth v. Unger*, 58 Somerset Legal Journal 413 (2001) (copy attached).

Summary: This case involves the issue of whether a witness identification was unduly suggestive and therefore should be suppressed. The totality of the circumstances test was applied in accordance with *Neil v. Biggers*, 409 U.S. 188 (1972) and *Simmons v. United States*, 390 U.S. 377 (1968). The defendant's motion to suppress and motion in limine were denied except for a one-on-one show identification which was suppressed.

Note: The defendant later entered a plea of guilty to the pharmacy robbery.

Seven - *Commonwealth v. Zemba*, 397 Criminal 1999, Somerset County Court of Common Pleas, Memorandum and Order dated August 8, 2000 (copy attached).

Summary: This case involves the issue of the effectiveness of stand-by counsel who was required to conduct examination of a witness after the pro se defendant was disruptive and was excluded from the courtroom (he was subsequently found to be in contempt of court). The defendant's post-sentence motion was denied.

In No. 1493 WDA 2000, the Pennsylvania Superior Court affirmed the trial court on May 29, 2001 (copy attached).

Eight - *Tunstall Fuel Co. v. Commonwealth of Pennsylvania, Department of Transportation*, 134 Civil 2001, Somerset County Court of Common Pleas, Memorandum and Order dated November 13, 2001 (copy attached).

Summary: In this eminent domain case, the constitutionality of the Pennsylvania condemnation statute in existence at the time of the taking of the property at issue was questioned and challenged. The challenged statute was determined to be constitutional. This finding was affirmed by the Pennsylvania Commonwealth Court at No. 2973 C.D. 2001 on July 15, 2002.

Nine - *Commonwealth v. Marple*, 1181 Criminal 2000, Somerset County Court of Common Pleas, Memorandum and Order dated October 21, 2002 (copy attached).

Summary: This case involved a Post-Conviction Collateral Relief Motion in which the defendant asserts that his guilty plea was not knowing, voluntary and intelligent based upon ineffective assistance of counsel and an inadequate colloquy by the Court. The PCRA motion was denied.

Ten - *Commonwealth v. Sopich*, 691 Criminal 1997, *Commonwealth v. Sopich*, 692 Criminal 1997, consolidated for hearing, Somerset County Court of Common Pleas, Memorandum and Order dated May 5, 1998 (copy attached).

Summary: This case involves Fourth Amendment issues regarding search and seizure. The resolution of the case required analysis of the concept of the open fields doctrine and the concept of "curtilage" with substantial reliance on *Oliver v. United States*, 466 U.S. 170 (1984) and *United States v. Dunn*, 480 U.S. 294 (1987). Suppression was denied.

Eleven - *Commonwealth v. Narcisse*, 310 Criminal 1997, Somerset County Court of Common Pleas, Memorandum and Order dated April 28, 1998 (copy attached).

Summary: This case presented Fourth Amendment search and seizure issues, including reasonable and articulable suspicion, plain view, pat-down (Terry) search, impoundment of vehicle and search warrant. Suppression was denied.

Twelve - *Commonwealth v. Warren*, 972 Criminal 1998, Somerset County Court of Common Pleas, Memorandum and Order dated September 10, 1999 (copy attached).

Summary: In addition to the discovery and privilege issues addressed in this case, the court also addressed constitutional issues related to the right to a "public" trial in the context of a preliminary hearing held at a state correctional institution. A new preliminary hearing was ordered.

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.

Somerset County Solicitor - January 1988-January 1998. Appointed by Board of Commissioners of Somerset County in January 1988 and re-appointed in January 1992 and January 1996.

No unsuccessful candidacies or nominations.

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 was in sole practice from September 1978 to January 1998 at the following addresses:

104 North Center Avenue, Somerset, Pennsylvania, 15501 (1978-1983).

160 West Main Street, Somerset, Pennsylvania, 15501 (1983-1998).

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;

None, other than those set forth in question number 6 Employment Record and question number 7 Military Service.

- 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?

October 1975 to May 1976:

Assistant Post Judge Advocate, Fort Monroe, Virginia. The principal duties involved serving as defense counsel in military justice matters, contract review and negotiations, and providing legal assistance to military personnel and their dependents.

May 1976 to August 1978:

Post Judge Advocate, Headquarters Fort Monroe, Fort Monroe, Virginia. The position of Post Judge Advocate carries with it the responsibility for all operations of a law office composed of three lawyers, three secretaries, and one claims adjuster. The Post Judge Advocate is the primary legal advisor to the Post Commander, his staff and subordinate commanders in matters of military justice and all aspects of installation management. He also acts as final approving, paying and recovery authority for all personal injury and property damage claims against the government and for similar claims on behalf of the government. Furthermore, he is responsible for the legal interpretation and review of all government contracts in excess of \$10,000.00, and for the supervision of all public employee labor contracts and negotiations. During my tenure I participated as a negotiator in two contract negotiations between Fort Monroe and local R411 of NAGE. I also acted as the United States Attorney at the United States Magistrate Court for two years. These duties also provided extensive experience in equal employment complaints and hearings. The Post Judge Advocate also performs duties as the government prosecutor in courts-martial.

From 1978 to 1998, I was a sole practitioner with a general law practice in Somerset, Pennsylvania. I was also the solicitor for various municipalities and for a school district and the County of Somerset. As a general practitioner, I handled criminal, civil, corporate, family, real estate, support, juvenile and estate matters. For about one and one-half years, I was a public defender.

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

My typical clients were small businesses, middle class individuals with legal problems, municipal governmental bodies, and school districts. I did not specialize in any particular area, but I did do a significant amount of governmental related work.

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

I appeared in court more frequently in my first years than I did in my later years of practice. I believe this resulted from my overall law practice experience which taught me to go to court only if necessary.

2. What percentage of these appearances was in:

- (a) federal courts;

Estimated 5%

My appearances in federal court were infrequent and were usually related to defending the County of Somerset;

- (b) state courts of record;

Estimated 90%

This is where the great majority of my court appearances occurred.

- (c) other courts.

Estimated 5%

I did appear to some degree before district justices and state administrative bodies.

3. What percentage of your litigation was:

- (a) civil;

Estimated 75%

- (b) criminal.

Estimated 25%

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.

Estimate of 40. Would always have been sole counsel.

5. What percentage of these trials was:

(a) jury;

Estimated 33 1/3%

(b) non-jury.

Estimated 66 2/3%

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.

One-

In re M.L.H. - Appeal of M.H. and J.H., 514 A.2d 29, 490 Pa. 54 (1980)
(copy attached).

This was a termination of parental rights case which was appealed to the Pennsylvania Supreme Court on the issue of whether there was sufficient evidence to support the termination of parental rights by the trial court.

I represented Somerset County Children and Youth Services Agency, the appellee.

I participated in the case as assistant county solicitor and attorney for Children and Youth Services. The Pennsylvania Supreme Court sustained the trial court and ruled in favor of my client. This result permitted the child to be adopted and to have some stability and permanence in his life.

(a) 1980

(b) Pennsylvania Supreme Court

Judges - Chief Justice Eagen, Justice O'Brien, Justice Roberts, Justice Nix, Justice Larsen, Justice Flaherty, Justice Kaufman

(c) Co-counsel -
William L. Kimmel
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 166 East Union Street
 Somerset, Pennsylvania, 15501
 (814) 445-9651

Opposing counsel -
Richard J. Bedford
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 Pittsburgh, Pennsylvania, 15219
 (412) 281-5999

Two-

Duncan - Lagnese and Associates, Incorporated v. The Stoney Creek Valley Sewer Authority, Borough of Shanksville, et al., 449 A.2d 666, 303 Pa. Super. 236 (1982) (copy attached).

This case involved a claim by an engineering firm to collect fees from municipalities with which it did not enter into a contract. The claim was based upon the theory that the engineering firm was an intended third party beneficiary of the contract between the engineering firm and the sewer authority. The trial court had dismissed this cause of action.

I represented Shanksville Borough, one of the defendant municipalities

I defended the case for Shanksville Borough. The Superior Court sustained the trial court and ruled in favor of my client. This saved this small borough from paying a judgment which it could not afford to pay.

(a) 1982

(b) Pennsylvania Superior Court

Judges - Judge Hester, Judge McEwen, Judge Johnson

(c) **Co-counsel -
none**

Counsel for other parties -

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Pittsburgh, Pennsylvania, 15219
(412) 263-2000

Three-

In the Interest of MH, a Minor, 49 Somerset Legal Journal 168 (1983)
(copy attached).

This case involved a petition filed by Somerset County Children and Youth Services requesting protective supervision of the child MH in order to ensure that she received chemotherapy treatment for leukemia, based upon a medical specialist's determination that the child had an urgent need for such treatment. The parents refused to have the child undergo chemotherapy treatment; rather, they opted to pursue "nutritional treatment" in Kentucky. Therefore, the agency filed the petition seeking protective supervision for medical purposes.

I represented Somerset County Children and Youth Services Agency.

In November 1983, in a lengthy opinion, the court refused to order chemotherapy but rather ordered that the child be monitored by blood tests every thirty days to determine whether chemotherapy should be ordered in the future.

In July, 1984 (approximately one year after the filing of the petition), chemotherapy finally occurred at Hershey Medical Center. The child died in September 1985.

The trial judge in this case said upon his retirement from the bench that this was the most difficult case in his career. For me and my client, it was an extremely disappointing and tragic case. To this day I can still see MH as she was in 1983.

- (a) 1983
- (b) Somerset County, Pennsylvania, Court of Common Pleas, 16th Judicial District

Judge - Judge Charles H. Coffroth

- (c) Co-counsel -
none

**Opposing counsel -
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118 West Main Street, Suite 301
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**Guardian Ad Litem for Child
Gordon D. Reynolds**
204 West Main Street, Suite 102
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(814) 445-9516

- Four-
County of Somerset v. Mishell J. George, Appeal of Pennsylvania National Casualty Insurance Company, 587 A.2d 360, 138 Pa. Cmwlth. 87 (1991) (copy attached).**

This case involved the claim of the County of Somerset against the surety for a tax collector. The surety defended by claiming that it was discharged from its liability on the surety bonds because the tax collector had made annual settlements with the county for the tax years when the theft of the tax revenue had occurred. The County responded by demonstrating that the tax collector had engaged in the practice of "lapping." Lapping refers to a practice of paying one entity's tax dollars to another entity, thereby covering up the shortage. By means of expert testimony, lapping was established, thereby demonstrating that the annual settlements by the County were induced by fraud.

The court ruled for the County of Somerset and found that the surety was liable on its bond. This resulted in the recovery of a significant amount of taxes which had been misappropriated by the tax collector.

(a) 1991

(b) Pennsylvania Commonwealth Court

Judges - Judge McGinley, Judge Pellegrini, Senior Judge Silvestri

(c) Co-counsel -
none

Counsel for other parties -

Jeffrey L. Berkey

Scull Building

124 North Center Avenue

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Patricia Carey Zucker

27 North Front Street

Harrisburg, Pennsylvania 17101

(717) 234-3282

Five-

Beener v. Beener Coal Co., Inc., 48 Somerset Legal Journal 237 (1989)
(copy attached).

This case involved a claim for equipment rental against the coal company by a co-owner of the equipment. The other co-owner had agreed first to discontinue the rental payments and then had agreed to reduce the monthly rental payments. The key issue was the authority of the co-owner to bind the claimant co-owner. Resolution of this issue involved an in-depth analysis of agency law and authority.

I represented the defendant coal company.

The court ruled for my client and found that the co-owner of the equipment was bound by the other co-owner's actions. This ruling resulted in my client saving a large sum of money at a time when coal operations were difficult to maintain due to an extremely low profit margin.

- (a) 1989
- (b) Somerset County, Pennsylvania, Court of Common Pleas, 16th Judicial District

Judge - Judge Charles H. Coffroth

- (c) Co-counsel -
none

Opposing counsel -
Daniel W. Rullo
146 West Main Street
Somerset, Pennsylvania, 15501
(814) 443-4681

Six-

Holsopple v. Chobany, 38 Somerset Legal Journal 310 (1979) (copy attached).

The issue was whether a school superintendent was personally liable for a contract where the school district had not authorized entering into the contract, and therefore the school district was not liable.

I represented the small businessman (excavator) seeking payment for landscaping work which he had performed for a school district based upon dealings with the superintendent.

The court ruled that the plaintiff could recover from the superintendent personally if his misrepresentation was made with fraudulent intent. Therefore, the plaintiff was permitted to pursue his claim. Following this ruling, a settlement was reached and the plaintiff recovered a substantial portion of his claim. Prior to my involvement in the case, the plaintiff had brought suit against the school district and his claim had been dismissed.

- (a) 1979
- (b) Somerset County, Pennsylvania, Court of Common Pleas, 16th Judicial District

Judge - Judge Norman A. Shaulis

- (c) **Co-counsel -
none**

**Opposing counsel -
Samuel D. Clapper**
146 West Main Street
Somerset, Pennsylvania, 15501
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Seven-

***Cauffiel v. Cauffiel*, 41 Somerset Legal Journal 191 (1982) (copy attached).**

This case was heard by the court soon after a new Divorce Code had been adopted in Pennsylvania. The issue faced by the court was whether in making an equitable distribution of marital property there should be a presumption of equal entitlement between the parties.

I represented the spouse who was requesting an unequal distribution of marital assets rather than a fifty percent distribution to each spouse.

The court agreed with my argument for an unequal distribution rather than a presumptive equal entitlement. The court rejected such a presumption. Subsequent appellate cases agreed with the decision in this case. This case was particularly satisfying since opposing counsel was one of the most eminent and respected family law practitioners in Pennsylvania.

- (a) **1982**

- (b) **Somerset County, Pennsylvania, Court of Common Pleas, 16th Judicial District**

Judge - Judge Norman A. Shaulis

- (c) **Co-counsel -
none**

**Opposing counsel -
Robert Raphael**
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437 Grant Street
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(412) 471-8822

Eight-

***Commonwealth v. Tresnicky*, 45 Somerset Legal Journal 338 (1985) (copy attached).**

The issue in this habeas corpus proceeding was whether the Commonwealth had established a prima facie case of homicide by vehicle.

I represented the defendant.

The court agreed with my client's position regarding the failure of the prosecution to establish a prima facie case and therefore dismissed the charge of homicide by vehicle. The case was later resolved by a plea of guilty to a different offense with a lower grading.

- (a) 1985
 - (b) Somerset County, Pennsylvania, Court of Common Pleas, 16th Judicial District
- Judge - Judge Norman A. Shaulis

- (c) Co-counsel - none
- Opposing counsel -
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 (814) 443-1624

Nine-

***Trent v. PBS, Inc., et al.*, 50 Somerset Legal Journal 303 (1992) (copy attached).**

This case involved a claim for damages against coal companies based upon contamination of a farm's water supply caused by strip mining. Defendant coal companies defended by asserting the doctrines of res judicata, collateral estoppel and laches based upon prior litigation involving the same defendants and the Department of Environmental Resources.

I represented the farm owners who were the plaintiffs.

The court rejected the defendants' arguments and permitted the plaintiffs to proceed with their causes of action. This case was eventually settled for a significant recovery which permitted the plaintiffs to obtain replacement water and to remain financially solvent.

- (a) 1992
- (b) **Somerset County, Pennsylvania, Court of Common Pleas, 16th Judicial District**

Judge - Judge Norman A. Shaulis

- (c) **Co-counsel -**
Jerry L. Spangler
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John J. Dirienzo
Scull Building
124 North Center Avenue
Somerset, Pennsylvania, 15501
(814) 445-7948

James B. Yelovich
Union Kimberly Building
166 East Union Street
Somerset, Pennsylvania, 15501
(814) 443-1624

Ten-

Task Force for the Preservation of the Somerset County Armory v. Somerset County Board of Commissioners, 54 Somerset Legal Journal 149 (1996) (copy attached).

This case involved an attempt by a citizens group to obtain an injunction against the county to prevent the demolition of a structure which was being removed to make way for a new county office building and parking garage. The group asserted that an injunction should issue based upon the Pennsylvania Historic Preservation Act and the Pennsylvania Constitution.

I represented the county and opposed the injunction.

The court sustained the county's preliminary objections, denied the injunction, and dismissed the plaintiff's case.

The building has been demolished and an architecturally fine county office building has been constructed on the site.

(a) 1996

(b) **Somerset County, Pennsylvania, Court of Common Pleas, 16th Judicial District**

Judge - John M. Cascio

(c) **Co-counsel -
none**

**Opposing counsel -
Kimberly Hindman
122 West Union Street
Somerset, Pennsylvania, 15501
(814) 445-5266**

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.)

Judicial

Was instrumental in initiating Victim Impact Panels as a requirement for DUI offenders (including those placed on ARD) in Somerset County. These panels are believed to have a significant impact on reducing repeat DUI offenses.

Was instrumental in initiating, and currently serve as the judge for, Juvenile Drug Court in the Somerset County Court of Common Pleas. This is only the second court of its kind in Pennsylvania. The Juvenile Drug Court initially involves weekly contact by the judge in court with the juvenile offender and his or her parent, and continues with frequent court appearances of the juvenile and a parent, along with intensive supervision and counseling. The results of the Juvenile Drug Court so far have been encouraging. The Juvenile Drug Court is intended as an additional innovative measure to be used in conjunction with law enforcement, juvenile court, the juvenile probation department, and intensive treatment and counseling, to address the serious drug and alcohol problems of juveniles who are adjudicated delinquent.

Attorney Related

Served as Somerset County Solicitor for ten years (1988-1997) under both Republican and Democrat controlled Boards of Commissioners. When the Board changed from a Republican majority to a Democrat majority in 1992 I was retained as county solicitor. This retention was an almost unprecedented event which was noted in positive editorial comments by the Tribune Democrat newspaper (Johnstown).

Serving as solicitor for the Shanksville-Stonycreek School District for 18 years from 1980-1997 provided me with the opportunity to assist that school and community, and the students, in many rewarding ways.

Serving as solicitor for the Somerset County Children and Youth Services Agency from 1980-1987 provided me with great insight into the problems facing youth today, and also provided many opportunities to assist children who were being neglected or abused.

Serving as the commander of my JAG detachment during the period of Operation Desert Storm was a rewarding challenge. We mobilized and reported for active duty with less than forty-eight hours prior notice. Although the activation of my unit (the military order provided for service on active duty as long as one year) resulted in the closing of my law office due to my being a sole practitioner, the experience was very positive in terms of contributing to the Gulf War effort and was the most rewarding experience of my military career which spanned thirty years (1966-1996).

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, except the deferred compensation and retirement accounts set forth on the attached financial net worth statement.

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.

None are anticipated unless a party or important witness is an individual whose relationship with me would affect my ability to render a fair and impartial decision, or would create the impression or perception that my judicial impartiality would be affected. If these factors were present in a case then I would follow the guidelines of the Code of Judicial Conduct for recusal issues.

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.

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.)

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.

None, other than my involvement in my own campaign for judge in 1997.

AG-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) Gibson, Kim R.	2. Court or Organization District Court - Western District of Pennsylvania	3. Date of Report 04/30/03		
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) U.S. District Judge	5. Report Type (check appropriate type) XX Nomination, Date 04/29/03 ___ Initial ___ Annual ___ Final	6. Reporting Period 01/01/2002 to 04/15/2003		
7. Chambers or Office Address Somerset County Courthouse 111 East Union Street Somerset, PA 15501	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	Co-Chairman	Flight 93 Memorial Task Force
2		
3		

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

	DATE	PARTIES AND TERMS
<input type="checkbox"/>	NONE (No reportable agreements.)	
1	1978	Somerset County Employees Retirement Plan, pension received each month beginning in 2001
2	1998	Pennsylvania State Employees Retirement Plan, pension upon retirement and reaching 60 years of age
3	1996	United States Army Reserves Retirement, pension received upon reaching 60 years of age

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	2001	Administrative Office of Pennsylvania Courts (judge salary)	\$ \$116,117.52
2	2001	Somerset County Employees Retirement (county pension)	\$ \$1,072.56
3	2002	Administrative Office of Pennsylvania Courts (judge salary)	\$ \$119,341.29
4	2002	Somerset County Employees Retirement (county pension)	\$ \$12,455.52
5			\$

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Kim R. Gibson	04/30/03

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			\$
4			\$

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	MBNA	Credit Card - Cash Advance	K
2	USAA	Credit Card	J
3			
4			
5			
6			

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	P1=\$1,000,001-\$5,000,000	P2=\$5,000,001-\$25,000,000		
	P3=\$25,000,001-\$50,000,000	P4=\$50,000,001 or more			

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Kim R. Gibson	04/30/03

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) Place (1) after each asset if exempt from prior disclosure.	B Income during reporting period		C Gross value at end of reporting period		D Transactions during reporting period				
	(1) Act. Code (A-F)	(2) Type (e.g., div., rent or int.)	(1) Value Code (L-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	(2) Date: Month Day	(3) Value Code (J-P)	(4) Gain Code (A-F)	(5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets.)					Exempt				
1 First National Bank	A	int.	K	T					
2 Somerset Trust Company	A	div./int.	L	T					
3 Nationwide Retirement Solutions	A	div./int.	M	T					
4 USAA Investments	A	div./int.	J	T					
5 Commonwealth of PA State Employees Retirement	B	int.	L	T					
6									
7									
8									
9									
10									
11									
12									
13									
14									
15									
16									

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 or more.

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; 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.

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Kim R. Gibson	Date of Report 04/30/03
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VII. Page 2 INVESTMENTS and TRUSTS – income, value, transactions (Includes those of spouse and dependent children. See pp. 14-17 of Instructions.)

A. Description of Assets (including trust assets) <i>Place "X" after each asset except 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)	If not exempt from disclosure:				
	Amc. Code (A-H)	Type Code (I-J)	Value Code (I-P)	Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	(2) Date: Month Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)									
17									
18									
19									
20									
21									
22									
23									
24									
25									
26									
27									
28									
29									
30									
31									
32									
33									
34									

1. Income/Gain Codes: A=\$1,000 or less (See Col. B1, D1); 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; HD=More than \$5,000,000

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; P1=\$1,000,001-\$3,000,000; P2=\$3,000,001-\$5,000,000; P3=\$5,000,001-\$50,000,000; P4=More than \$50,000,000 (See Col. C1, D3)

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Kim R. Gibson	Date of Report 04/30/03
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VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

IX. CERTIFICATION.

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

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

Signature Kim R. Gibson Date April 30, 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.)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

**FINANCIAL STATEMENT
NET WORTH
(KIM RICHARD GIBSON)**

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

ASSETS				LIABILITIES			
Cash on hand and in banks	5,	000	00	Notes payable to banks-secured			0
U.S. Government securities - add schedule			0	Notes payable to banks-unsecured			0
Listed securities-add schedule			0	Notes payable to relatives			0
Unlisted securities- -add schedule			0	Notes payable to others			0
Accounts and notes receivable:			0	Accounts and bills due	1,	000	00
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	202,	000	00
Real estate owned-add schedule	300,	000	00	Chattel mortgages and other liens payable			0
Real estate mortgages receivable			0	Other debts-itemize:			
Autos and other personal property	90,	000	00	Somerset Trust Bank	130,	000	00
Cash value-life insurance	20,	000	00	MBNA	48,	000	00
Other assets itemize:				(Car Loan) First National Bank	4,	000	00
Pension/Profit Sharing	46,	000	00	(Car Loan) USAA	19,	000	00
IRA's	33,	000	00				
Deferred Compensation	100,	000	00	Total liabilities	404,	000	00
State Retirement Cash Value	70,	000	00	Net Worth	260,	000	00
Total Assets	664,	000	00	Total liabilities and net worth	664,	000	00
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor (daughter's student loan)	21,	000	00	Are any assets pledged? (Add schedule)	Yes		
On leases or contracts			0	Are you [a] 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				

Financial Statement - Kim R. Gibson

Schedule

Real Estate:

Somerset, Pennsylvania - personal residence.

Assets Pledged:

AFBA Life Insurance Policy 146158 on life of Kim R. Gibson in the amount of \$150,000.00
(serves as security for Somerset Trust Company loan of \$130,000.00).

Mortgagee:

Somerset Trust Company, Somerset, Pennsylvania.

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 handled legal aid referrals on an as-needed or conflict basis. Also, where I practice a number of pro bono cases arise in private practice. Over the years I handled cases pro bono for the Childrens Aid Home and Society of Somerset County because I believe in that program which helps dependent children.

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, the Federal Judicial Nominating Commission of Pennsylvania (whose members are appointed by Senator Arlen Specter and Senator Rick Santorum) interviewed me in Pittsburgh, Pennsylvania.

I filed a Federal Judicial Application Packet and was interviewed by the Nominating Commission. I was recommended by the Commission and was then interviewed at the White House by representatives of the White House Counsel Office and Department of Justice. Both Senator Specter and Senator Santorum also interviewed me. The Federal Bureau of Investigation and the Department of Justice also 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.

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.

At the trial court level most cases involve two opposing parties who have been unable to resolve an existing dispute. The trial court, or a jury, is presented with the task of resolving that dispute. Thus, the federal trial court is essentially involved in grievance - resolution. Problem-solution of broad public policy issues is more appropriately a task for the legislative and executive branches of government. Proper jurisdiction is an essential prerequisite to action by a court. Without proper jurisdiction a court has no authority to act; “Loosening jurisdictional requirements” by a trial court is both inappropriate and improper. Jurisdictional requirements are set by the Constitution, statutes and appellate decisions, and trial courts must operate within those jurisdictional guidelines in order to act within its proper authority. A federal judge is not an elected legislator; rather, a federal judge is to apply the law to the existing facts of the case and render a proper decision. Separation of powers is an important foundation of our nation. A federal trial judge’s responsibility is to render decisions in accordance with the law and the specific facts of the case and to do justice to the greatest extent possible in a manner which is fair and respectful to all participants.

AFFIDAVIT

I, Kim R. Gibson, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

May 8, 2003
(DATE)

Kim R. Gibson
(NAME)

Mary K. Dinning
(NOTARY)
MARY K. Dinning
SOMERSET COUNTY CLERK OF COURTS
Common Pleas Criminal Division
My Commission Expires
First Monday in January 2004

Chairman HATCH. Well, thank you so much.
Mr. Mosman?

**STATEMENT OF MICHAEL W. MOSMAN, NOMINEE TO BE
DISTRICT JUDGE FOR THE DISTRICT OF OREGON**

Mr. MOSMAN. Thank you, Mr. Chairman. I also have no opening statement. I'm honored to be here and prepared to answer this Committee's questions.

[The biographical information follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)
Michael W. Mosman
2. Address: List current place of residence and office address(es).
Residence: West Linn, Oregon
Office: 1000 SW Third, Suite 600, Portland, Oregon
3. Date and place of birth.
December 23, 1956; Eugene, Lane County, Oregon
4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).
Suzanne Hogan; Registered Nurse
Employer: Dr. Lloyd Hale, 6464 SW Borland Road,
Tualatin, OR 97062;
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.
J. Reuben Clark Law School, Brigham Young University, 8/81-5/84 - J.D. 5/84;
Utah State University, 9/79-5/81; B.S., 5/81;
Ricks College, 9/75-5/76; 8/78-5/79; A.D., 5/79
6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.
United States Attorney for the District of Oregon, 2001 - present
1000 SW Third Avenue, Suite 600
Portland, OR 97204
Chief, Organized Crime Strike Force, District of Oregon
(Address same as above)
Assistant United States Attorney, District of Oregon, 1988 - 2001
(Address same as above)

1990-1993, Board of Directors, Janus Youth Programs

Associate: Miller, Nash, Portland, Oregon, 1986-88
111 SW Fifth Avenue
Portland, OR 97204

Judicial Clerk to Justice Lewis F. Powell, Supreme Court of
the United States, 1985-86
1 First St., NE
Washington, DC 20543

Associate; Shaw, Pittman, Potts & Trowbridge, 1985
2300 N. Street, NW
Washington, D.C. 20037

Judicial Clerk to Judge Malcolm Wilkey, D.C. Cir. '84-'85
3rd & Constitution Ave., NW
Washington, DC 20001

July-Aug/83, Summer law clerk, Davis, Graham & Stubbs,
370 17th Street, Suite 4700
Denver, CO 80201

5/83-7/83, Summer law clerk, Jennings, Strauss & Salmon,
111 W. Monroe St.
Phoenix, AZ 85003

6/82-8/82; and 6/84-8/84- Ray Quinney & Nebeker, Attorneys at
Law, Deseret Bldg., 79 S. Main St., Suite 400, Salt Lake City,
UT 84111 (801) 532-1500; Position: law clerk;

6/81-6/82, BYU Campus Housing, Provo, UT 84004

6/81-8/81, Instructor, Missionary Training Center, Provo, UT
84602

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 military service.

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

I received full tuition scholarships throughout college
and law school. 1981 - Valedictorian of College at Utah
State University; 1984 - Magna Cum Laude; Editor-in-
Chief, B.Y.U. Law Review. I have also received various

awards and commendations from law enforcement groups and the Department of Justice, including a Sustained Superior Performance Award in 1991; an Appreciation Award from the Warm Springs Tribal Police in 1994; and an award from FBI Director Louis J. Freeh in 2000.

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.
- Idaho State Bar - member since 1984; inactive since 1988
 - Oregon State Bar - member since 1987
 - Member/Vice-Chair, Oregon State Board of Bar Examiners, 1990-1993
 - Oregon State Bar and Oregon Supreme Court Task Force on Gender Fairness, 1994-95
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.
- National Association of Assistant United States Attorneys
 - J. Reuben Clark Law School Alumni Association
 - Honorary Member, Honorable Order of Kentucky Colonels
 - Public Safety Coordinating Council
 - Attorney General's Advisory Committee (2001-2002)
 - Native American Issues Subcommittee (2001-present)
 - Controlled Substances Subcommittee (2001-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.
- Idaho State Bar, 1984
 - U.S. Court of Appeals, Ninth Circuit, 1986
 - Oregon Supreme Court, 1987
 - U.S. District Court, District of Oregon, 1987
 - Oregon State Bar, 1987
 - U.S. Court of Appeals, Eighth Circuit, 1988
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.

- First Things First, Clark Memorandum, Fall 1999 (copies previously submitted)
- A Law Clerk's View of Judge Wilkey, BYU Law Review, Vol. 1985, Nov. 4
- Marshaling of Assets in Bankruptcy, BYU Law Review, Vol. 1983 (copies previously submitted)

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

Excellent. I have seen my doctor as recently as February 14, 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.

None.

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

None.

17. Legal Career:

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

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

Aug 1984 to Mar 1985 - Judge Malcolm R. Wilkey, U.S. Court of Appeals for the D.C. Circuit;

July 1985 - July 1986, Justice Lewis F. Powell, Supreme Court of the United States

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

I have never been a sole practitioner

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

June 1984 to August 1984 - Ray Quinney & Nebeker, Attorneys at Law, Deseret Bldg., 79 S. Main St., Suite 400, Salt Lake City, UT 84111 (801) 532-1500; Position: law clerk;

Mar 1985 to July 1985 - Shaw, Pittman, Potts & Trainbridge, Attorneys at Law, 2300 N. St., NW, Washington, D.C. 20037 (202) 663-8000; Position: Associate;

Sept 1986 to October 1988 - Miller, Nash, Attorneys at Law, 111 SW Fifth, Portland, OR 97204 (503) 224-5858; Position: Associate;

October 1988 to May 2001 - U.S. Attorney's Office, District of Oregon, 1000 SW Third, Suite 600, Portland, OR 97204-2902 (503) 727-1000; Position: Assistant United States Attorney;

May 2001 to present - United States Attorney, District of Oregon

- 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.

While at Miller, Nash I represented a variety of natural resources and banking clients including U.S. Bank and Louisiana Pacific. I also handled constitutional issues and several appeals. I represented a local youth services agency on a pro bono basis, which led to my service on their board of directors. I also volunteered to prosecute drunk driving cases in Multnomah County.

During my years in the U.S. Attorney's Office, I have prosecuted a wide variety of cases, including cases in each of the four prosecuting units: Narcotics, Violent Crimes, Organized Crime and Fraud. I have prosecuted large multi-defendant narcotics conspiracies; Hobbs Act conspiracies involving interstate robbery rings; international money laundering conspiracies, multi-million dollar counterfeiting and multi-district immigration fraud and bribery cases. For over ten years I also handled all the major crimes occurring on the three major Indian reservations in Oregon, including murder, child abuse and assault. Perhaps the most difficult of these cases involves what is called "shaken baby syndrome." These assault cases - usually involving infants - require an extraordinary degree of familiarity with neurological and biomechanical research in order to make effective use of expert witnesses and to cross-examine defense experts.

- 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.

Prior to taking the position as United States Attorney, I appeared in court several times a week. When in town I still make court appearances several times each month.

During my two years at Miller, Nash, I made many appearances in state court, including

several trials. I also appeared for a bench trial in federal district court, and a preliminary injunction hearing on a shareholder derivative suit before a federal magistrate.

During my 13 years as an Assistant United States Attorney, I appeared constantly in federal court, including numerous jury trials and bench trials in juvenile cases.

As the United States Attorney I have continued to appear in federal court, both in the district court and on appeals to the Ninth Circuit.

2. What percentage of these appearances was in:

- (a) federal courts; 95%
- (b) state courts of record; 5%
- (c) other courts.

3. What percentage of your litigation was:

- (a) civil; 5%
- (b) criminal 95%

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

I have tried about 50 cases. In all but four of those cases I was sole counsel. In two of the four cases I tried with another lawyer I was chief counsel. All but a handful were tried to a jury.

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.

United States v. Sherrett, et al, CR 92-298 (RE) United States District Court, District of Oregon, United States District Judge James M. Redden; Case indicted 9/23/92; Judgment & Conviction 3/11/98

I prosecuted Thomas Sherrett, an international marijuana smuggler and money launderer who had helped to establish a complex importation system of Thai marijuana from the growing fields of Southeast Asia to remote beaches of California and British Columbia. He then distributed the marijuana throughout the United States and Canada, and laundered the money through financial institutions and corporate holdings throughout the world. Each load contained many tons of marijuana, and produced millions of dollars of profit for Sherrett. He became a fugitive prior to being indicted for importation and distribution of marijuana, conspiracy and money laundering. After successfully extraditing him from Switzerland, I handled the numerous legal challenges to his case and those of his Vietnamese co-conspirators, as well as the successful forfeiture of real estate and millions of dollars in currency from seized bank accounts in Switzerland. Sherrett was sentenced on March 11, 1998 to 235 months imprisonment. Judge James Redden was the district judge on the case. Sherrett was represented by John S. Ransom, 1001 SW Fifth, Suite 1400, Portland, OR 97204 (503) 228-0487.

United States v. Terry Beydler, et al., CR 94-290 (JO) United States District Court, District of Oregon, United States District Judge Robert Jones; Case indicted 9/20/94; Judgment & Conviction 1/8/96

I prosecuted Terry Beydler, who was the leader of a very violent ring of armed robbers who targeted businesses operating in interstate commerce. Beydler and his group used guns, bombs and rape to rob victims and intimidate witnesses in a string of robberies. After three separate trials, including one retrial on appeal, Beydler was sentenced to over 25 years in prison. The trial and initial sentencing hearing were before Judge Robert Jones, with sentencing on October 10, 1995. Beydler was represented by James Lang, 1020 SW Taylor, Suite 375, Portland, OR 97205, (503) 227-4533.

United States v. Douglas Franklin Wright, CR 91-399(RE)United States District Court, District of Oregon, United States District Judge James M. Redden; Case indicted 11/14/91; Judgment & Conviction 9/22/92

I prosecuted Douglas Wright in connection with a string of murders in a remote area of the Warm Springs Indian reservation. I coordinated a massive multi-jurisdictional investigation to identify the killer, and then to arrest Wright, who was armed and extremely dangerous. Following his arrest, while the murder investigation proceeded, I prosecuted Wright as an Armed Career Criminal. We obtained a 327 month sentence rendered by Judge Redden on June 3, 1992. While the federal murder indictment was pending, Wright was transferred to the state system for a capital murder case. Based on the federal investigative efforts, Wright was convicted and subsequently executed. AUSA John Deits was my co-counsel, 1000 SW Third, Suite 600, Portland, OR 97204 (503) 727-1016, opposing counsel was Charles Wiseman, 473 S. First Avenue, Hillsboro, OR 97123, (503) 681-4626.

United States v. Tony Patterson, CR 91-73 (MA)United States District Court, District of Oregon, United States District Judge Malcolm Marsh; Case indicted 2/27/91; Judgment & Conviction 10/21/91

I prosecuted Tony Patterson as a part of a large-scale methamphetamine manufacturing conspiracy, which involved an Oregon State University chemistry professor as a "cook." The group was armed and produced huge amounts of methamphetamine. Patterson was convicted following a jury trial on July 18, 1991, and sentenced to 150 months. Trial and sentencing were before Judge Malcolm Marsh of the District of Oregon, opposing counsel was Andrew Bates, 715 SW Morrison, Suite 504, Portland, OR 97204, (503) 223-7786.

United States v. April Castro, et al, CR 98-508 (FR) United States District Court, District of Oregon, United States District Judge Helen Frye; Case indicted 11/18/98; Judgment & Conviction 6/28/99

I prosecuted a group involved in an armed takeover robbery of a commercial bank. There were six defendants, one of whom was a teller and one of whom worked with the gang response team of the Portland Police Bureau. All were convicted, either at trial or by plea, with sentences ranging from six to over 20 years. The case occurred in 1998 and 1999, before Judge Helen Frye (for most of the sentencings) and Judge Robert Jones (for the trial and subsequent sentencings). Opposing counsel at trial was Robert Goffredi, 520 SW Yamhill, Suite 414, Portland, OR 97204, (503) 241-9111.

United States v. James William Fry, CR 97-288 (PA)United States District Court, District of Oregon, United States District Judge Owen Panner; Case indicted 8/13/97; Judgment & Conviction 5/8/98

I prosecuted James Fry for the kidnap and rape of an 11-year old girl from a small town in Eastern Oregon. I also helped supervise the

multi-jurisdiction search and arrest effort. Defendant was sentenced on May 4, 1998 to 211 months in prison by Judge Owen Panter of the District of Oregon. Stephen Sady of the Federal Public Defender's Office was opposing counsel, 101 SW Main, Suite 1700, Portland, OR 97204, (503) 326-2123.

United States v. Stan Johnson, CR 94-31 (JO) United States District Court, District of Oregon, United States District Judge Robert Jones; Case indicted 2/9/94; Acquittal 1/17/95

I prosecuted Stan Johnson for child abuse on a diagnosis of shaken baby syndrome. It was an extremely difficult case involving extensive expert testimony on either side by neurosurgeons, pediatric trauma specialists, and researchers in the effects of shaking on the retina and the brain. Trial took place before Judge Ancer Haggerty of the District of Oregon, and the defendant was acquitted. Ellen Pitcher was opposing counsel, 101 SW Main, Suite 1700, Portland, OR 97204, (503) 326-2123.

United States v. Francis Spino, CR 99-113(FR) United States District Court, District of Oregon, United States District Judge Helen Frye; Case indicted 3/10/99; Judgment & Conviction 6/12/00

I prosecuted Francis Spino for murder. Spino, a juvenile, became the first defendant successfully transferred to adult status in the District of Oregon. After a transfer hearing that was more extensive than a trial, Spino pleaded guilty and was sentenced on June 12, 2000 to 121 months in prison. Judge Fry presided. Ellen Pitcher and Gerald Needham of the Federal Public Defender's Office represented Spino, 101 SW Main, Suite 1700, Portland, OR 97204, (503) 326-2123.

United States v. Christopher Ray Dennison, CR 97-43 (RE) United States District Court, District of Oregon, United States District Judge James M. Redden; Case indicted 2/12/97; Judgment & Conviction 6/22/98

I took the lead in prosecuting Dennison, who committed a string of armed robberies in Oregon, Idaho, Nevada, California and Arizona, and attempted to murder a policeman in California. After a lengthy investigation he was brought to the brink of trial in Oregon when it was discovered his attorney had assisted in an escape plot and Dennison had threatened me. Subsequently Dennison pleaded guilty and was sentenced to life in prison. Judge Redden presided. Steven Ungar represented Dennison after his initial lawyer was released. Ungar's address is 601 SW Second, Suite 2100, Portland, OR 97204, (503) 778-2064.

United States v. Luis Felipe Palacios-Amaya, et al, CR 93-327(RE) United States District Court, District of Oregon, United States District Judge James M. Redden; Case indicted 10/19/93; Judgment & Conviction 8/29/94

This was a three indictment, 27 defendant wiretap case involving a far-flung narcotics conspiracy operating in Eastern Oregon. I handled the trials and appeals, helped orchestrate the takedowns, searches and arrests, and assisted with the Title III pleadings. All defendants either pleaded guilty or were convicted at trial. The lead defendant was represented by Frank de la Puente Allen, 482 Suncrest Ave. NW, Salem, OR 97304 (503) 370-9385. The other main defendant was represented by Des Connall, 621 SW Morrison, Suite 140, Portland, OR 97205 (503) 227-2688

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 spent several years devoting a significant amount of time to the Oregon State Bar's Board of Bar Examiners. This volunteer group prepared and graded the essay portion of the Oregon State Bar Examination. We also performed a screening function for an applicant's character and fitness to practice law. I came away very impressed with the Board's relentless pursuit of fairness and with the care taken to be accurate in our work.

In a related vein, I worked on the Oregon Supreme Court's Task Force on Gender Fairness. Our mission was to investigate gender bias in the bar examination process.

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 participate in the Federal Government's Thrift Savings Plan.

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

I believe the only potential conflict would come from my service as United States Attorney. I expect there will be a short period of blanket recusal from cases out of the U.S. Attorney's Office, followed by selective recusal from cases where I had direct involvement.

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 hope to teach a law school class. Of course, I would seek approval of Chief Judge.

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 Financial Disclosure Report attached.

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

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.

No.

AO-10
Rev. 1/2002

**FINANCIAL DISCLOSURE REPORT
FOR CALENDAR YEAR 2002**

*Report Required by the Ethics
in Government Act of 1978,
(5 U.S.C. App. §§101-111)*

1. Person Reporting (Last name, first, middle initial) Mosman, Michael W.		2. Court or Organization U.S. District Court, Oregon	3. Date of Report 5/12/03
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) United States District Judge		5. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date <u>5/9/03</u> <input type="checkbox"/> Initial <input type="checkbox"/> Annual <input type="checkbox"/> Final	6. Reporting Period 2002-2003 (Present)
7. Chambers or Office Address U.S. Courthouse 1000 SW 3rd, Suite 600 Portland, OR 97204		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 _____	
<p>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.</p>			

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

	<u>POSITION</u>	<u>NAME OF ORGANIZATION/ENTITY</u>
<input checked="" type="checkbox"/>	NONE (No reportable positions.)	
1		
2		
3		

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

	<u>DATE</u>	<u>PARTIES AND TERMS</u>
<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.)

	<u>DATE</u>	<u>SOURCE AND TYPE</u>	<u>GROSS INCOME</u> (yours, not spouse's)
<input type="checkbox"/>	NONE (No reportable non-investment income.)		
1	2003	Dr. Lloyd Hale (Wife - Registered Nurse)	\$
2			\$
3			\$
4			\$
5			\$

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Mosman, Michael W.	5/12/03

IV. REIMBURSEMENTS - transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)

	SOURCE	DESCRIPTION
<input checked="" type="checkbox"/>	NONE (No such reportable reimbursements.)	
1		
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	Don Haskell (family friend)	2/14/03-2/16/03	\$ 300.00
2		Use of beach cabin at Cannon Beach, OR	\$
3			\$
4			\$

VI. LIABILITIES. *(Includes those of spouse and dependent children. See pp. 32-33 of Instructions.)*

	CREDITOR	DESCRIPTION	VALUE CODE*
<input checked="" type="checkbox"/>	NONE (No reportable liabilities.)		
1			
2			
3			
4			
5			



FINANCIAL DISCLOSURE REPORT

<small>Name of Person Reporting</small> Mosman, Michael W.	<small>Date of Report</small> 5/12/03
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VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

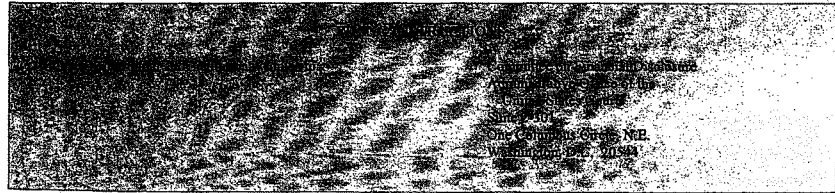
IX. CERTIFICATION.

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

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

Signature Michael W. Mosman Date May 12, 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.

ASSETS		LIABILITIES	
Cash on hand and in banks	40,000	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 tax and interest	
Doubtful		Real estate mortgages payable - add schedule	28,000
Real estate owned - add schedule	250,000	Chattel mortgages and other liens payable	
Real estate mortgages receivable		Other debts - Itemize:	
Autos and other personal property	75,000		
Cash value - life insurance			
Other assets - itemize:			
TSP	147,000		
IRAs	3,000		
Total assets	515,000	Total liabilities	28,000
		Net worth	487,000
		Total liabilities and net worth	515,000
CONTINGENT LIABILITIES	None	GENERAL INFORMATION	
As endorser, comaker or guarantor		Are any assets pledged? (Add schedule)	No
On leases or contracts		Are you a defendant in any suits or legal actions?	No
Legal Claims		Have you ever taken bankruptcy?	No
Provision for Federal Income Tax			
Other special debt			

* Residence valued at approximately \$250,000.00, located at 6519 Apollo Road, West Linn, OR
Mortgage held at Washington Mutual Savings Bank

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 done pro bono work and served on the board of Janus Youth Programs. I have been very actively involved in volunteer service through my church, on an average of five hours per week.

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?

None.

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. An ad hoc search committee was formed by Senator Gordon Smith.

I was interviewed by the search committee in January. Three names were forwarded by the search committee to Senator Gordon Smith, who recommended those names to the Office of White House Counsel. I was interviewed by the White House Counsel and one of his deputies on January 31, 2003. Subsequently, the FBI completed a background investigation. A similar investigation was done by the Department of Justice, and I was interviewed by the Office of Legal Policy.

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.

Yes. Senator Ron Wyden (D.Or.) asked whether I would use the district court position to try and erase Roe v. Wade. I responded that I felt Roe v. Wade was settled law, which I would follow.

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.

In our tripartite system of government, each branch is allocated certain powers. One of the linchpins of our system is that these powers are kept separate, so that one branch does not accrue power at the expense of others. Stated very broadly, it is the power of the

judicial branch to interpret laws - - not to enact them, nor to execute them. In addition, the principle of "cases and controversies" contains within it the idea that courts should decide the actual case before them, and not some broader philosophical formulation of the issue. It requires an awareness of who the parties are to the case, whether they have standing, and whether the dispute among them is real or moot.

Another important limiting principle involves paying attention to the text of the Constitution, rule or statute at issue. By taking the text seriously, and by applying its terms to the case before it, federal courts are anchored to something other than an individual judge's sense of what he or she would like the result to be.

In my experience, however, the most important limiting principle on the power of the judiciary lies in the character of the individual judge. If the judge approaches decision-making with a due regard for other branches of government, with an awareness of his or her own limitations and fallibility, and with a sense of humanity towards those who appear in court - - lawyers, clients and jurors - - such a judge will not stray far from the appropriate exercise of federal judicial power.

Chairman HATCH. Well, thank you so much.
Judge Sabraw?

STATEMENT OF DANA MAKOTO SABRAW, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Judge SABRAW. Thank you, Mr. Chairman. Like my colleagues, I do not have an opening statement, but I am honored and delighted to be here and happy to answer any questions.

[The biographical information follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

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

Residence: San Diego. Office address: 325 So. Melrose Drive, Vista, CA 92083.
3. Date and place of birth.

July 3, 1958. San Rafael, Marin County, CA.
4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Wife: Summer Sabraw Stephan. Maiden name: Summer Angela Stephan.
Occupation: Deputy District Attorney, Office of the District Attorney, County of San Diego, 325 So. Melrose Drive, Vista, CA 92083 (760) 806-4018. Assistant Chief, North County Division.
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

University of the Pacific, McGeorge School of Law. 1981-85. Juris Doctor, 1985.

San Diego State University. 1979-80. Bachelor of Science, Criminal Justice Administration, 1980.

Sacramento State University. 1978. Credits toward degree only.

American River Junior College. 1976-78. Associates of Arts, 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.

(a) San Diego Superior Court, 325 So. Melrose Drive, Vista, CA 92083. Judge, November 1998 to Present. Criminal Presiding Judge, North County Division, 2000.

(b) North County Municipal Court, San Diego County, 325 So. Melrose Drive, Vista, CA 92083. Judge, October 1995 to November 1998. Assistant Presiding Judge (1997). Presiding Judge (1998).

(c) Baker & McKenzie, 101 West Broadway, Suite 1200, San Diego, CA 92101. Partner, July 1992 to October 1995. Associate, January 1989 to July 1992.

(d) Price, Postel & Parma, 200 East Carrillo Street, Suite 400, Santa Barbara, CA 93101. Associate, September 1985 to January 1989.

(e) Judge Raul A. Ramirez, Ret'd., United States District Court, Eastern District of California, 501 "T" Street, Sacramento, CA 95814. Law Intern, September 1984 to May 1985.

(f) Pillsbury Winthrop, 50 Fremont Street, San Francisco, CA 94120. Summer Associate, 1984.

(g) Mackenroth Ryan & Fong (formerly Mackenroth, Seeley & Anwyl), 1331 Garden Hwy, Suite 300, Sacramento, CA 95833. Law Clerk, September 1983 to June 1984.

(f) University of the Pacific, McGeorge School of Law, 3200 Fifth Avenue, Sacramento, CA 95817. Lexis Computer Instructor, September 1982 to September 1983.

(g) Schooner Inn (Donut/Coffee Shop), no longer in business, Santa Barbara, CA. Cashier/Clerk, June 1981 to September 1981.

(h) J.C. Penney, 6051 Florin Road, Sacramento, CA 95823. Security, October 1980 to January 1981.

(i) Westmont College, 955 La Paz Road, Santa Barbara, CA 93108. Painter, June 1980 to October 1980.

(j) Defenders, Inc., no longer in business, El Cajon, CA. Student Investigator, September 1979 to June 1980.

(k) Libby, McNeill & Libby (Cannery), no longer in business, Sacramento, CA. Canning Inspection, June 1979 to September 1979.

(l) R.C. Cola, 2286 Stone Blvd., West Sacramento, CA 95691. Soda Sales/Distributor, June 1978 to September 1978.

(m) Handy Andy (Appliance/Audio Sales), no longer in business, Sacramento, CA. Cashier/Clerk, January 1977 to June 1978.

(n) San Juan Unified School District, 3738 Walnut Avenue, Carmichael, CA 95608. Lifeguard, June 1977 to September 1977. Wrestling Instructor and Conditioning Instructor, June 1976 to September 1977.

Board of Director Positions

- (a) American Inn of Courts, Oliver Wendell Holmes, Jr. Chapter, President, 2000-01.
- (b) Asian Business Association, Board of Directors, 1995.
- (c) Barristers Club of Santa Barbara, Board of Directors, 1986-88.
- (d) Ducks Unlimited, San Diego Chapter, President, 1993-94.
- (e) Falcons Youth Baseball, Inc., Board of Directors, 2001-Present.
- (f) Pan Asian Lawyers of San Diego, Board of Directors, 1994-95.
- (g) San Diego County Judges Association, Board of Directors, 1997-98.
- (h) Thomas More Society, Secretary and Board of Directors, 1994-95.

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.

As an attorney, I have received Certificates of Appreciation from Pan Asian Lawyers of San Diego (for service to the association and its community outreach programs), El Cajon Municipal Court (for service as a Judge *Pro Tempore*), and New Entra Casa (for *pro bono* work).

In law school, I received my Juris Doctor, *with Distinction*, and ranked in the top 10% of my class. I served on the Law Review, and I was member of the Traynor Honor Society, Dean's Honor Roll, Merit Scholarship, and Vern Adrian and Annabel McGeorge Scholarship.

In undergraduate studies, I received my Bachelor of Science, *with Distinction*, and I was a member of the President's Honor Role.

I also received a Distinguished Service Award from Ducks Unlimited, Inc. (for outstanding contribution to waterfowl conservation and vital wildlife habitat programs, as President of the San Diego Chapter of Ducks Unlimited), and I was selected as Grand Marshall for the Camellia Festival Parade, 1976, in Sacramento, California (for achievement in high school athletics).

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 Inns of Court
 Louis Welsh Chapter, Alumnus
 Oliver Wendell Holmes Chapter
 Founding Member, 1997
 Membership Chair, 1997-99
 President, 2000-01

Asian Pacific Bar of California
 Association of Business Trial Lawyers, San Diego Chapter
 Barrister's Club of Santa Barbara
 Board of Directors, 1986-88

California Judges Association
 California State Bar Association
 Federal Bar Association
 Program and Events Committee, 1994-95

Lawyers Club of San Diego
 Pan Asian Lawyers of San Diego
 Board of Directors, 1994-95

San Diego County Bar Association
 Ethnic Minority Relations Committee, 1993-95
 Insurance Bad Faith Section
 Vice-Chair and MCLE Program Coordinator, 1994

San Diego County Judges Association
 Board of Directors, 1997-98

San Diego Inns of Court
 San Diego Legal Education Committee, Litigation Section,
 The State Bar of California, Program Committee Member, 1992-95

SDSU Alumni Association
 Committee on Assisting Pre-Law Graduates, 1992-95

San Diego Superior Court Committees
 Ad hoc Criminal Practices, Policy & Procedures Committee
 Civil Oversight Committee
 Commissioner Committee
 Court Oversight Committee
 Education Committee

Facilities Committee
 Jury Committee
 Santa Barbara County Bar Association
 Thomas More Society
 Secretary and Board of Directors, 1994-95

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. All other organizations to which I belong include:

Ducks Unlimited, San Diego Chapter
 President, 1993-94
 Falcons Youth Baseball
 Board of Directors, 2001-present
 Japanese American Citizens League
 St. Gregory the Great, Catholic Church
 Union of Pan Asian Communities

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.

On October 2, 1995, I was sworn as a judge of the Municipal Court, North County Judicial District, and thereafter elevated to the San Diego Superior Court on November 12, 1998. I am therefore no longer admitted to practice law. Before my appointment, I was admitted to practice before the following Courts:

All California Courts: December 19, 1985
 Supreme Court of the United States: June 4, 1990
 United States Court of Appeals, Ninth Circuit: August 31, 1987
 United States District Court, Central and Southern Districts of California:
 June 21, 1986 and January 12, 1989, respectively.

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.

*Ex Parte Interviews with Present and Former Employees of a Corporate Adversary:
 The Ethical Parameters*, California Litigation, The Journal of the Litigation Section,

State Bar of California, Fall 1992, Vol. 1. The article discusses permissible and impermissible communication by an attorney with present and former employees of a corporate adversary once litigation has commenced.

I have not given any speeches on issues involving constitutional law or legal policy. I have spoken to various civic groups, schools and bar associations about the judiciary and the law, but I have given all such speeches extemporaneously.

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.

San Diego Superior Court, November 1998 to Present. Appointed. The Superior Court is a general jurisdiction state trial court that handles all civil disputes exceeding \$25,000 in controversy and all felony crimes punishable by prison or death.

North County Municipal Court, San Diego Judicial District, October 1995 to November 1998. Appointed. The Municipal Court is a limited jurisdiction state trial court that handles all civil disputes up to \$25,000 in controversy and all misdemeanor crimes punishable by not more than 1 year in county jail.

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 I Have Written

Since June 2001, I have presided over an independent civil calendar, where I manage civil cases from initial filing through trial and post-trial motions. I have tried 76 civil cases to conclusion, including 51 jury trials and 25 non-jury trials. My current inventory exceeds 800 cases, including medical and legal malpractice, insurance coverage and bad faith, employment and consumer law, product liability, intellectual property, real property, eminent domain, construction, business and debt collection torts, and personal injury cases.

Before my civil assignment, I served as Criminal Presiding Judge for the North County Division of the Superior Court. There, I handled all post-preliminary hearing plea bargain dispositions and sentencings, and I assigned all matters for trial. Before serving as criminal presiding judge, I presided over a felony trial and criminal law & motion department, handling murder, rape, kidnap, child molestation and other serious felony cases. I have tried 99 criminal cases to conclusion, including 87 jury trials and 12 non-jury trials. In my criminal assignments, written rulings were not customary; rather, rulings were made from the bench on the record.

Accordingly, the opinions summarized below represent a collection of rulings since June 2001, when the nature of my assignment in an independent civil calendar called for such written rulings. The following opinions consist of statements of decision after trial, and telephonic or tentative decisions on civil law & motion matters.

(a) *Burnet Wohlford v. Sierra Land Group, Sierra Del Oro Ranch*, San Diego Superior Court, Case No. GIN010738 (2002). This case involved a "controlled burn" of brush in an avocado grove, pursuant to a properly issued permit. On the day in question, the winds picked up, ignited embers from the controlled burn and a fire quickly spread to plaintiff's grove, where it consumed approximately three acres of mature, productive trees. The jury awarded \$180,000.00 in lost income, finding defendant liable under theories of negligence and trespass.

Thereafter, plaintiff filed a motion for double damages under Civil Code section 3346 (a), contending the statute authorized such damages for injury to trees "where the trespass was casual or involuntary." The motion was denied on grounds that (a) the statute does not provide double damages for a negligently controlled fire, and (b) in the absence of a clear, unambiguous statute, a penalty provision providing double damages ought not to be imposed for an activity as commonplace and necessary as controlled burns.

(b) *Edna Prigmore v. MiraCosta Community College District*, San Diego Superior Court, Case No. GIN004244 (2002). Plaintiff sued defendant for employment discrimination based on theories of disability discrimination and failure to accommodate. Plaintiff had been a part-time instructor for 16 years with defendant, in which her employment contract was renewed on a semester-by-semester basis. She suffered a knee injury involving tears to her meniscus and ligaments, and shortly thereafter her contract for an upcoming semester was not renewed.

Defendant contended her contract was not renewed because of substandard performance. Plaintiff claimed defendant's decision was based on discriminatory animus. In addition, she claimed defendant failed to provide reasonable accommodations, such as closer parking, a lab assistant, an office on campus, etc. The jury found no liability based on disability discrimination, but awarded \$75,000 for failure to accommodate.

Defendant filed motions for judgment notwithstanding the verdict and new trial. The motions were granted because no evidence of damages was presented under the failure to accommodate theory. In addition, plaintiff's novel argument the failure to renew her contract itself was a failure to accommodate was rejected as not embraced by Government Code section 12940(n)(2), the statute that specifies the types of "reasonable accommodation" employers must provide.

(c) *Cecelio Lugtu, et al. v. California Highway Patrol (State of California)*, Case No. 76651 (2002). Plaintiffs, all passengers in a motor vehicle, sued defendant CHP for negligence after the car they traveled in was pulled over by a motorcycle CHP officer for speeding on highway SR-78 and directed onto the center median instead of the right shoulder. The stop occurred during "rush" hour on a clear summer day. After the officer issued tickets for speeding and seat belt violations (the minor passengers were not belted), another motorist crashed into the rear of plaintiffs' vehicle at 65 miles per hour. Two plaintiffs, the daughter and niece of plaintiff Cecelio, suffered fractured bones and bruises. Plaintiff Cecelio suffered permanent brain damage and will reside at a brain injury facility for life.

Defendant CHP brought a motion for summary judgment contending no duty was owed as a matter of law. The original trial judge, Judge David B. Moon, granted summary judgment. The Court of Appeal reversed, and the California Supreme Court affirmed the appellate court, with two Justices dissenting, in *Lugtu, et al. v. California Highway Patrol* (2001) 26 Cal.4th 703 (finding a duty of care under "reasonable person" standard and material questions of fact). Thereafter, Judge Moon retired.

Before trial, plaintiffs settled for policy limits with both Michael Lugtu (the driver of their vehicle), and the motorist who struck them. Applications for "good faith" settlement were granted.

At trial, defendant's motion to bifurcate was granted and liability was tried first. In the liability phase, plaintiff brought a motion *in limine* to preclude defendant CHP from arguing Michael Lugtu was partially at fault for the accident due to his speeding and seat belt violations. The motion was granted on grounds that defendant's interpretation of "duty" was too expansive; *i.e.*, the accident was not a foreseeable risk of harm created by Michael Lugtu's conduct. Thereafter, the jury found liability and apportioned fault 45% to defendant and 55% to the motorist who collided with plaintiffs' vehicle. In the damages phase, the jury awarded plaintiff Cecelio \$5,881,787.00 economic damages, and \$7,500,000.00 non-economic damages.

Following trial, defendant requested periodic payments under Government Code section 984(d), which allows such payments if 50% of the judgment is paid

“immediately”. Because defendant could not fund 50% of the judgment for several months, if at all, the motion was denied under the plain language of the statute.

(d) *Lori Young, et al. v. Promax Plastic Machinery, Inc., Dongshin Hydraulics, Co., Ltd., et al.*, San Diego Superior Court, Case No. GIN078688 (2001). This was a wrongful death case based on strict products liability under theories of manufacturing defect, design defect and failure to warn. The deceased was killed in an industrial accident when a plastic injection-molding machine crushed his head. His wife and two minor children brought suit. Competing expert testimony was presented regarding the manufacturing and design of the machine, and failure to warn of crush hazards. The jury reached verdicts for the plaintiffs finding a defect in design and failure to warn. They apportioned no fault to the deceased, and awarded plaintiffs \$808,294.00 economic damages, and \$4,250,000.00 non-economic damages. Defendant’s motion for judgment notwithstanding the verdict was denied.

(e) *Richard Shatz v. Robert Crick, et al.*, San Diego Superior Court, Case No. GIN013641 (2002). Plaintiff brought suit for quiet title to a road shared by four owners of large lots in an exclusive residential community. Plaintiff’s claim was premised on an implied grant of, and prescriptive rights over, the road. Based upon the intent of the original parties to the deeds in question and the conduct of the parties’ predecessors-in-interest, I awarded judgment in favor of plaintiff finding an easement by both implication and prescription.

(f) *Helmi Abu-Hamid v. Ernest Hirayama*, San Diego Superior Court, Case No. GIN016964 (2002). Plaintiff, a prospective purchaser of a 5-unit apartment complex, brought suit for specific performance of a real estate purchase contract he entered into with the seller. The defendant seller argued strict adherence to the terms of the contract precluded specific enforcement because plaintiff failed to timely deposit his purchase price when time was made the essence. I agreed and entered judgment for defendant.

(g) *Nevada Lending Corp. v. Fallbrook Golf Club, Inc.*, San Diego Superior Court, Case No. GIN014922 (2002). Plaintiff brought suit for quiet title concerning the scope of an easement its predecessor-in-interest had granted to defendant “for golf course fairways and greens.” Plaintiff claimed the original grant of easement provided only for fairways and greens, and not for the driving range, tee box, cart barn and maintenance area defendant had constructed in the easement area. Plaintiff desired to eliminate such uses and place an access road over the easement through the golf course. Based upon extrinsic evidence and the intent of the original parties to the deed, I concluded the easement did provide for all the foregoing uses. I also determined plaintiff’s proposed road would unreasonably burden the easement, and therefore, denied the requested relief.

(h) *Elizabeth Hunt, et al. v. Mercedes Benz, USA, LLC*, San Diego Superior Court, Case No. GIN011721 (2002). Plaintiffs brought suit against Mercedes under California's "lemon law," contending their vehicle presumptively was a lemon given the large number of days it spent in defendant's service department for repair of a variety of problems. I concluded the defects in question were not "substantial" under the terms of the statute and were fixed within a reasonable number of attempts. Accordingly, judgment was entered for defendant.

(i) *Burtech Pipeline, Inc. v. Dudek & Associates, Inc., et al*, San Diego Superior Court, Case No. GIN005788 (2003), Fourth District Court of Appeal, Division One, D039023 (Unpublished). This lawsuit arose out of a dispute between plaintiff, an underground utility contractor, and defendant, an engineering consulting firm that was hired by a municipal water district to assist a developer build a retirement community within the district's boundaries. After plaintiff installed sewer lines at the project, defendant rejected portions of the lines as sagging and lacking continuous downward grade. Plaintiff sued, contending defendant conspired with the water district to insist that plaintiff comply with unnecessarily strict sewer line sag requirements.

Defendant moved to strike the lawsuit under California's "anti-SLAPP" statute (Strategic Lawsuit Against Public Participation), which protects individuals from lawsuits arising out of exercise of their free speech rights on a public issue. The statute is designed to "expos[e] and dismiss[] certain causes of action lacking merit." See *Burtech Pipeline, Inc., supra*, at p.5 (citing *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29Cal.4th 53, 64). The statute further provides: "The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly." Code Civ. Proc. section 425.16(a).

I struck the complaint under the foregoing statute, and the Court of Appeal affirmed. It concluded the "record indicated [defendant] made a prima facie case that its wrongful conduct as alleged in [plaintiff's] first amended complaint came within the protection of the anti-SLAPP statute as arising from acts in furtherance of [defendant's] free speech rights in connection with a public issue under consideration or review in [the water district's] official proceedings."

This decision also would apply to No. 15, subd. (3) below.

(j) *9262, Inc. v. H.R. Barros Family Trust*, San Diego Superior Court, Case No. GIN017752 (2003). Plaintiff brought suit for breach of contract alleging defendant unreasonably withheld consent under the terms of their commercial lease when it

refused plaintiff permission to sublet the premises to a topless dance bar. Defendant moved for summary judgment contending that as owner of the property it could withhold consent to an assignment of its property so long as its consent was commercially reasonable. I granted the motion on grounds defendant did not unreasonably withhold consent since consideration by a landlord of a "good tenant mix" is commercially reasonable as a matter of law.

(2) Rulings in Which I Have Been Reversed.

I have been reversed three times in over seven years on the bench involving 85 appeals. These three cases follow.

(a) *People v. Boden*, San Diego Superior Court, Case No. SCN067767 (1998), Fourth District Court of Appeal, Division One, State of California, No. D03347 (Unpublished Opinion). Defendant Boden entered a negotiated guilty plea to felony reckless driving while evading a police officer. I placed defendant on probation and sentenced him to 270 days custody. Although the offense did not involve drugs or alcohol, I imposed a waiver of defendant's Fourth Amendment rights and general drug and alcohol conditions as terms of his probation. Defendant had two prior drug convictions for felony possession of drugs for sale and misdemeanor possession of drugs.

On appeal, the Court struck the Fourth Amendment waiver and the drug and alcohol conditions, reasoning: "Certainly, rehabilitation is always a goal of probation. However, we have been unable to find any authority supporting the proposition that a generalized desire for rehabilitation alone can justify search and alcohol/drug-related probation conditions."

One year later, in 1999, the Fourth District Court of Appeal abandoned the above logic, holding "warrantless search conditions serve a valid rehabilitative purpose, and because such a search condition is necessarily justified by its rehabilitative purpose, it is of no moment whether the underlying offense is reasonably related to theft, narcotics, or firearms: 'The threat of a suspicionless search is fully consistent with the deterrent purposes of the search condition.'" *People v. Balestra* (1999) 76 Cal.App.4th 57, 67. The Court further held, "[w]hether the trial court determines to impose such a condition [*i.e.*, drug and alcohol] is thus within its sound discretion . . ." *Id.* at 69. Proper deference to the trial court's broad discretion in imposing terms of probation is particularly important "where those terms are intended to aid the probation officer in ensuring the probationer is complying with the fundamental probation condition, to obey all laws." *Id.*

(b) *People v. Marks*, San Diego Superior Court, Case No. SCN089869 (2002), Fourth District Court of Appeal, Division One, No. D037913 (Unpublished Opinion). Defendant was charged with several counts of child molestation and a special

allegation involving a prior child molestation conviction. On the eve of trial, defendant requested a continuance so he could retain new counsel because of an alleged disagreement with his current counsel over whether or not he would testify at trial. Defendant was out of custody on a bond. The motion was denied as a stalling tactic. Just before trial, defendant fled the jurisdiction and was a fugitive from justice for over eight months.

Upon apprehension out-of-state and return to California, defendant did not renew his motion to substitute his counsel, waived time so trial could proceed at a time convenient for all counsel, the court and victims, and proceeded to trial with his original counsel. At trial, he was convicted and sentenced to 109 years to life.

The Court of Appeal reversed, holding that “[r]eversal is automatic . . . when a defendant has been deprived of his right to defend with counsel of his choice” (citing *People v. Ortiz* (1990) 51 Cal.3d 975, 988), and that “[a]lthough the trial did not actually take place for a year after [defendant] brought his motion [to substitute counsel], he was not required to bring another motion requesting substitution of counsel or, in defiance of the court’s ruling, terminate the services of his retained counsel and substitute in newly-retained counsel.”

(c) *Murray v. Oceanside Unified School District* (2000) 79 Cal.App.4th 1338. Plaintiff, a high school teacher, filed a claim against her school district for discrimination based on hostile work environment stemming from her sexual orientation. Plaintiff’s claim was not premised on actual termination of employment, constructive discharge or demotion; rather, the claim was limited to hostile work environment caused by other employees of the District.

Plaintiff based her claim on Labor Code section 1102.1, which prohibited “employers” from engaging in “discrimination or different treatment in any aspect of employment or opportunity for employment based on actual or perceived sexual orientation.” Based on the existing statute and case law, I concluded only discriminatory conduct on the part of the employer was proscribed, such as hiring, firing, demoting and other adverse employment decisions. Plaintiff appealed.

After my ruling and pending appeal, the California Legislature repealed Labor Code section 1102.1 and instead enacted Government Code section 12940(h)(1) (now (j)(1)), which provides that it shall be an unlawful employment practice for “an employer . . . because of . . . sexual orientation, to harass an employee. . . . *Harassment of an employee . . . shall be unlawful if the entity . . . knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring.*” (Emphasis added). The Legislature further provided at section 12940(h)(2) that the “provisions of the this subdivision [*i.e.*, subdivision (h)] are declaratory of existing law except for the *new duties* imposed on employers with

regard to harassment.” (Emphasis added). The Court of Appeal reversed, concluding the statutory amendments clarified existing law. *Murray, supra*, 79 Cal.App.4th at 1344.

(3) Significant Opinions on Federal or State Constitutional Issues.

The following decisions were rendered from the bench on the record after briefing from counsel.

(a) *People v. Foster* (2002) 101 Cal.App.4th 247. Defendant repeatedly sexually abused his girlfriend’s 12-year-old daughter over a six-month period. He was charged with numerous counts of aggravated sexual assault and forcible lewd acts on a child. He entered a negotiated plea and stipulated to a 30-year sentence. Over defense objection, I imposed a 30-year sentence along with hormone suppression treatment upon defendant’s release from custody, noting: “Mr. Foster was in a position of trust. The acts were substantial. They are cruel and they are predatory in nature, and I do believe that this type of treatment is in the interest of justice under the circumstances.”

Defendant appealed contending the hormone suppression treatment was “grossly disproportionate and violate[d] state and federal constitutional prohibitions against cruel and unusual punishment.” The Court of Appeal affirmed, holding defendant had waived his right to appellate review under the terms of the plea bargain.

(b) *People v. Sinclair*, San Diego Superior Court, Case No. SCN111025 (2002), Fourth District Court of Appeal, Division One, D036966 (Unpublished). Defendant entered a no contest plea to commercial burglary, access card fraud and possessing a forged driver’s license. He also admitted two prior “strike” offenses for bank robbery and assault with a deadly weapon under California’s “three strike” law, thereby subjecting himself to a life sentence. At sentencing, I refused to exercise discretion and dismiss the “strike” offenses. I imposed a 25 year-to-life sentence.

Defendant appealed contending the sentence constituted cruel and unusual punishment because his current offense was non-violent and the three strikes law ought to apply only when the third offense is a violent or serious felony. The Court of Appeal affirmed, noting defendant was not convicted of misdemeanor petty theft but felony commercial burglary and access card fraud. The defendant also had amassed a 40-year history of crime, including auto theft, robbery, attempted escape from prison, bank robbery, assault with a deadly weapon and burglary. Thus, defendant was a recidivist criminal within the embrace of the three strikes statute.

The California three strikes statute, as applied to a defendant suffering a non-violent third offense, recently was addressed and affirmed by the United States Supreme Court in *Lockyer v. Andrade* (2003) 538 U.S. ___, 123 S.Ct. 1166, 155 L.Ed.2d 144.

(c) *People v. Romero*, San Diego Superior Court, Case No. SCN111297 (2002), Fourth District Court of Appeal, Division One, D036571 (Unpublished). Defendant, a 21-year-old with a minimal criminal record, became addicted to heroin after his health care provider prescribed morphine to him for a life-threatening injury he suffered several years earlier. Defendant robbed a store clerk with an unloaded handgun to obtain money for heroin. After he was apprehended, a search of his car revealed a loaded shotgun. Defendant entered a guilty plea to robbery and admitted personal use of a firearm. As part of the plea, I issued a certificate of probable cause allowing defendant to contest any sentence on appeal.

At sentencing, I imposed the lower term for robbery and a mandatory 10-year enhancement for personal use of a firearm, for a total term of 12-years. I found the enhancement did not violate the constitutional prohibitions against cruel and unusual punishment. I noted that "a firearm was used involving a situation where the victim could easily have been injured or killed because of the type of escalation that can occur with this type of encounter [a]nd the vehicle used to get away contained within it . . . a loaded shotgun."

The Court of Appeal affirmed, stating the "determination of the appropriate sentence is for the Legislature, not the courts." See *Romero, supra*, at pgs. 5-6. The Court concluded the punishment was not so disproportionate to the crime as to trigger the constitutional provisions barring cruel and unusual punishment. *Id.* at 6.

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 a public office other than a 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;
 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 practiced law as an associate attorney with Price, Postel & Parma, 200 E. Carrillo Street, Suite 400, Santa Barbara, CA 93101, from September 1985 until January 1989. Thereafter, I practiced with Baker & McKenzie, 101 W. Broadway, Suite 1200, San Diego, CA 92101, from January 1989 until October 1995. I was a litigation associate from January 1989 until July 1992, when I became a partner.

In October 1995, I was appointed as a judge of the Municipal Court, North County Judicial District, San Diego County. In November 1998, I was elevated to the Superior Court, where I currently serve.

- 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.

Typically, I represented insurance carriers and brokers, emphasizing insurance coverage and "bad faith" defense litigation. My practice, however, encompassed virtually all aspects of business and commercial 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.

Frequently.

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

Federal Courts – 25%
 State Court – 70%
 Arbitrations – 5%

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

Civil – 99%
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 have tried approximately 10 cases to verdict or judgment as lead counsel.

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

Jury – 60%
Non-jury – 40%

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.
- (a) *Philip Emrich, et al. v. Touche Ross & Co., et al.*, U.S.D.C., Central District of California, Case No. 86-3733-R; Ninth Circuit Court of Appeals, Case No. 86-6347; Trial Judge, Manuel L. Real; Appellate Panel, Justices Tang, Kozinski and Wiggins; Opposing counsel: Justice Richard M. Mosk (formerly with Sanders Barnett Goldman Simons & Mosk), California Courts of Appeal, Second Appellate District, 300 S. Spring Street, 2nd Floor, North Tower, Los Angeles, CA 90013 (213) 830-7000; Co-counsel: Gary R. Ricks, formerly with Price, Postel & Parma, 201 E. Figueroa Street, Santa Barbara, CA 93101 (805) 884-9538.

We defended the former directors of Sambo's Restaurant against a class action lawsuit brought by purchasers of Sambo's stock. Plaintiffs alleged claims for, *inter alia*, state and federal securities violations, RICO and common law fraud. We removed the action to federal court, and immediately filed a motion for summary judgment. The motion was granted, and an appeal followed.

My colleague Gary Ricks and I co-argued the case before the Ninth Circuit Court of Appeals. The appellate court affirmed most of the underlying judgment, and remanded a portion for further proceedings. See *Emrich v. Touche Ross & Co., et al.* (9th Cir. 1988) 846 F.2d 1190. The trial court conducted further proceedings as directed, and dismissed the remaining claims with prejudice.

- (b) *Smith v. Mulvaney, et al.*, U.S.D.C., Southern District Court, Case No. 85-0688-E(M) (1985); Trial Judge, William B. Enright; Magistrate Judge, Harry R. McCue (Ret'd); Opposing counsel: Judianne Jaffe, DeCastro West Chodorow, 10960 Wilshire Blvd., Suite 1400, Los Angeles, CA 90024 (310) 478-2541; Co-counsel, Mark W. Hansen, Luce Forward Hamilton & Scripps, 600 W. Broadway, Suite 2600, San Diego, CA 92101 (619) 699-2483; Nancy J. Skovholt, 6323 Mt. Aguilar Drive, San Diego, CA 92111 (858) 694-0231; Thomas W. Dominick, Fullerton Lemann Schaefer & Dominick, 215 N. D Street, 1st Floor, San Bernardino, CA 92401 (909) 889-3691; and Casandra Franklin, Howrey Simon Arnold & White, 550 South Hope Street, Suite 1400, Los Angeles, CA 90071 (213) 892-1800; Co-counsel: Charles H. Dick, Baker & McKenzie, 101 W. Broadway, Suite 1200, San Diego, CA 92101 (619) 236-1441.

This action stemmed from the collapse of the U.S. National Bank, which was controlled by C. Arnholt Smith. The shareholders of the Bank and the FDIC, among others, filed numerous lawsuits, one of which was against Helen Smith, the former wife of C. Arnholt Smith. She was found liable, and a jury awarded approximately \$7 million on theories of secondary violations of Rule 10b-5, common law fraud, conspiracy to defraud, and conspiracy to abuse control. *Harmsen v. Smith* (9th Cir. 1982) 693 F.2d 932, *cert. denied*, 464 U.S. 822 (1983).

Thereafter, Mrs. Smith filed an action for contribution and indemnity against the defendants who previously had settled in the *Harmsen* action. She named the Bank's former counsel, among others. We represented the Bank's former counsel. After substantial discovery, an appeal regarding disqualification of certain counsel on conflict of interest grounds, and countless settlement conferences before Magistrate McCue, we positioned the case for a favorable settlement of \$25,000, paid by the insurer.

A special depository was established by the Court to warehouse all the documents, and numerous reported decisions preceded and related to Mrs. Smith's contribution action, including: *Harmsen v. Smith, et al.* (9th Cir. 1982) 54 (9th Cir. 1982) 542 F.2d (National Bank Act created direct cause of action by shareholders against directors of bank); *Trone v. Smith, et al.* (9th Cir. 1977) 553 F.2d 1207 (disqualification of counsel on conflict of interest grounds); *Trone v. Smith, et al.* (9th Cir. 1981) 642 F.2d 1174 (subordination of Mrs. Smith's money claims against bankrupt Westgate Hotel reversed as punitive); *Smith v. Mulvaney* (9th Cir. 1987) 827 F.2d 558 (summary

judgment reversed whether settling defendants paid fair share, thus barring claims for contribution).

- (c) *Brunzell Construction Company, Inc. v. Jalama Valley Cattle Company, et al.*, Santa Barbara Superior Court, Case No. 15846; Second District Court of Appeal, Division Six, Case No. B-026133 (1988); Trial Judge, Thomas Adams; Appellate Panel, Justices Gilbert, Stone and Abbe; Opposing counsel: Gary G. Kuist, 1837 Kelton Avenue, Los Angeles, CA 90025 (310) 477-0702; Co-counsel: Jack Wilson, Price, Postel & Parma, 200 E. Carrillo Street, Suite 400, Santa Barbara, CA 92101 (805) 962-0011.

I represented the plaintiff judgment creditor, and renewed its judgment for \$384,000 over defense objection. Defendant appealed, arguing plaintiff satisfied its judgment by electing to retain two prize bulls, "Max" and "Bard." The appellate court issued an entertaining opinion affirming the judgment and creating new law regarding creditor's rights under the California Uniform Commercial Code. *Brunzell Construction Co. v. Keith Smith, et al.* (1988) 200 Cal.App.3d 617.

- (d) *Kaperonis v. Hume*, San Luis Obispo Superior Court, Case Nos. 60035 and 60584; Second District Court of Appeal, Division Six, Case No. B-035443 (1989); Trial Judge, William R. Fredman (deceased); Appellate Panel, Justices Gilbert, Stone and Abbe; Opposing counsel: Gerald Mason, 1163 Main Street, Suite D, Morro Bay, CA 93442 (805) 771-9600; Co-counsel: Gary R. Ricks, formerly with Price, Postel & Parma, 201 E. Figueroa Street, Santa Barbara, CA 92101 (805) 884-9538.

We represented defendants and appellants after a jury found them guilty of fraud, and awarded plaintiffs compensatory and punitive damages totaling \$497,104.50. Plaintiffs contended defendants defrauded them when they sold the renowned Brambles restaurant in Cambria, California, and subsequently opened up a competing restaurant across the street in violation of a covenant not to compete.

On appeal, we argued no substantial evidence supported the finding of fraud, jury misconduct, improper expert witness testimony regarding intent of the parties, the compensatory damages were based on speculative projections of lost profits, the punitive damages were based on emotion evoked by improper expert witness advice and bore no relation to net worth, and the trial court impermissibly granted both equitable and monetary relief. The Court of Appeal reversed, finding no substantial evidence supporting the judgment. *Kaperonis v. Hume*, No. B-035443 (January 19, 1990) (ordered not to be published). The result was to reverse plaintiffs' judgment, and affirm defendants' judgment for breach of contract in the sum of \$129,000.

- (e) *Richard W. Durham, et al. v. Cemen-Tech, Inc., et al.*, U.S.D.C., Southern District of California, Case No. 88-0916 (1988); Trial Judge, John S. Roades; Magistrate Judge,

Roger C. McKee (Ret'd); Opposing counsel: Earl T. Durham, 1163 Broadway, Suite 232, El Cajon, CA 92021 (telephone number unknown).

This case involved a contract to purchase a large, custom-made mobile cement dispenser designed for commercial purposes. Plaintiff demanded return of a substantial deposit after refusing to purchase the dispenser. I represented the defendant manufacturer and tried the case before Magistrate McKee, after removing the case to federal court based on diversity jurisdiction. The case involved application of foreign law (Iowa) and numerous legal issues concerning choice of law, agency and others. The Court issued a defense judgment.

- (f) *Golden Eagle Insurance Company v. Donald Gould, et al.*, San Diego Superior Court, Case No. 610288 (1989); Fourth District Court of Appeal, Case No. D011868 (appeal dismissed); Trial Judges, Jeffery T. Miller (now with United States District Court, Southern District) and Harrison R. Hollywood (Ret'd); Opposing counsel: Daniel Broderick (deceased); Charles F. Catterlin, 2109 Lazy Lake Drive, Harlingen, Texas 78550 (telephone number unknown; state bar membership inactive); Robert B. Coffin, 401 West A Street, Suite 1730, San Diego, CA 92101 (619) 239-1895; and Neal H. Rockwood, Rockwood & Noziska, 525 B Street, Suite 1500, San Diego, CA 92101 (619) 233-7778.

I represented the insurer in a declaratory relief action against the insured and other interested parties. A motion for summary judgment was granted in favor of my client, in which the Court held the insurer owed no duty under the policy to defend or indemnify the insured for his sexual molestation of a minor. The minor victim previously had obtained a \$1.3 million verdict against the insured and sought to enforce the judgment against the insurer. The case involved important public policy considerations, and preceded the seminal case of *J. C. Penney Casualty Ins. Co. v. M. K.* (1991) 52 Cal.3d 1009 (holding molestation to be an intentional act excluded from coverage under Ins. Code § 533).

- (g) *Olsen v. Philadelphia Life Ins. Co.*, U.S.D.C., Southern District of California, Case No. 90-1092-S (1990); Trial Judge, Edward J. Schwartz; Magistrate Judge, Harry R. McCue (Ret'd); Opposing counsel: Melvin D. Rich, 11665 Avena Place, Suite 209, San Diego, CA 92128 (858) 675-0507; Co-counsel: Donald McGrath, Hovey & Kirby, 402 W. Broadway, Suite 1500, San Diego, CA 92101 (619) 685-4000.

I represented Philadelphia Life Insurance Company as lead counsel in a "first party" bad faith lawsuit brought by the beneficiary under a life insurance policy, in which the beneficiary alleged Philadelphia Life unreasonably withheld death benefits. We removed the action to Federal Court based on diversity jurisdiction. Following extensive discovery, a settlement conference was conducted, at which plaintiff demanded over \$400,000. Thereafter, we filed a motion for summary judgment based upon failure of the insured to disclose material facts regarding his health, weight and

prior surgeries. We also filed a motion to strike plaintiff's untimely demand for jury trial. After filing the motions, the case settled for \$25,000.

- (h) *Brakke-Shafnitz v. Gow & Hanna, et al.*, Orange County Superior Court, Case No. 667293 (1991); Trial Judge, David C. Velasquez; Opposing counsel: James F. McGee, McGee & Associates, 23 Corporate Plaza, Suite 230, Newport Beach, CA 92660 (949) 640-0500.

I represented Gow & Hanna, an insurance broker, as its lead counsel in litigation brought by another broker, plaintiff Brakke-Shafnitz. Gow & Hanna placed insurance for a client of plaintiff, and thereafter a dispute arose over premiums owed and guaranteed by plaintiff. After the complaint was served, we cross-complained for commissions due. I tendered the defense under an errors and omissions policy, and the defense was accepted under a reservation of rights. After substantial discovery, a settlement conference, and several discovery motions, a settlement was reached with plaintiff and my client's insurer. Plaintiff paid nearly all the commissions due, and the carrier paid all defense costs and an additional sum toward the difference between my client's claim and plaintiff's payment.

- (i) *Painter, et al. v. Kahn, et al.*, San Diego Superior Court, Case No. 638155 (1992); Trial Judge, Vincent P. DiFiglia; Opposing counsel: Mark S. Lester, 3737 Main Street, Suite 800, Riverside, CA 92501 (909) 341-8300; Richard S. Trugman, 9200 Sunset Blvd., Suite 808, Los Angeles, CA 90069 (310) 273-8834; Robert D. Frank, Frank & Burke, 1104 Camino Del Mar, Suite 10, Del Mar, CA 92014 (858) 259-7900; Christopher K. Barnett, Luce Forward Hamilton & Scripps, 600 W. Broadway, Suite 2600, San Diego 92101 (619) 699-2550; John D. Hershberger, formerly with Seltzer Caplan McMahon Vitek, 13700 Sutton Park Drive No., Suite 321, Jacksonville, Florida, 32224 (telephone number unknown; state bar membership inactive); and Michael F. Armstrong, Armstrong & Armstrong, 1450 Frazee Road, Suite 505, San Diego, CA 92108 (619) 291-0850.

I represented plaintiffs as lead counsel in a real estate fraud case involving property worth several hundred thousand dollars. The case involved a series of complex fraudulent transactions, a forged grant deed, a notary public who was paid \$8,000 to notarize the forged deed, the hotel which hired the notary, and the title company which recorded the deed. Favorable settlements were reached with all parties, except the notary and the hotel, and few of the individual perpetrators. Judgments were obtained against the remaining individuals, and a settlement was reached with the notary during trial. The hotel, after a two-week jury trial, was held not to owe a duty. We concluded the litigation with title to the property, favorable settlements, and a judgment against certain parties exceeding \$500,000.

- (j) *Fred Gluckman, et al. v. Golden Eagle Insurance Company*, San Diego Superior Court, Case No. 677900 (1995); Trial Judge, Anthony C. Joseph (Ret'd); Opposing

counsel: Michael M. Angello, 402 W. Broadway, Suite 1550, San Diego, CA 92101 (619) 236-1836; Co-counsel: Steve Comer, Morrison & Foerster, 3811 Valley Center Drive, Suite 500, San Diego, CA 92130 (858) 720-5100, and Tom W. Ferrell, 1686 Bahia Vista Way, La Jolla, CA 92037 (858) 551-0098.

I represented Golden Eagle as lead counsel in a "third party" bad faith action, in which plaintiff claimed the carrier unreasonably withheld policy benefits for a fire loss. While roofing and "hot-mopping" plaintiff's home, the insured caused a fire that destroyed the home. The insured tendered the claim to the carrier. The claim was denied because the insured materially misrepresented its business as a "clean-up" company with none of the risks associated with roofing. The insured assigned its rights under the policy to the plaintiff homeowner, who then sued the carrier contending it knew or should have known of the insured's roofing activities.

Discovery was extensive including depositions of the carrier's president, officers, underwriters, claims personnel and brokers, the insured, plaintiffs and numerous percipient and expert witnesses. Plaintiff's pretrial settlement offer of \$350,000 was rejected. Two months before trial, I was appointed to the bench and turned the case over to my former partner, Tom Farrell. He tried the case before a jury, and received a defense verdict.

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.)

As a judge, I was appointed by the California Supreme Court to serve as a Special Master in a disciplinary proceeding involving a state court judge. I also was elected assistant presiding judge and presiding judge of the North County Municipal Court, and I have served as criminal presiding judge of the Superior Court, North County Division. I have served on numerous committees for the Court, including the Court Oversight Committee, Civil Oversight Committee and Ad Hoc Criminal Practices, Policy and Procedure Committee, all of which were responsible for coordinating and unifying the four Municipal Courts in San Diego County into the San Diego Superior Court. I also was elected and served as President of the American Inn of Court, Oliver Wendell Holmes, Jr. Chapter.

Chairman HATCH. Well, let me tell you how honored we are to have all of you here. It is a terrific thing for us, and, frankly, I feel very, very good about all of your willingness to serve. It seems to me that we are blessed to have people of your quality willing to give up what really is a lucrative profession to serve at the level that you are willing to serve. It is not easy in this day and age, and we are finding that there are some people who will not accept these positions because of the low pay in comparison to what they make as lawyers. But there are many, many others who really want to give service to our country, and I don't know of any entity that is more important than the third separated branch of Government, the Federal court system. So it is very, very important what you are doing, and we are very grateful to have all of you here.

Let me start with you, Judge Burns. Before becoming a magistrate judge, you spent your career as a prosecuting attorney, primarily handling criminal cases. As a judge, the majority of the cases you have handled are civil in nature. How did you prepare yourself to make this transition from being a prosecutor, from litigating primarily criminal cases, to deciding primarily civil cases given your background?

Judge BURNS. Thank you, Senator, for giving me the opportunity to explain that.

I had some experience in the business community. I served on a board of directors for a local bank in San Diego. I was the only lawyer on the bank for about 3-1/2 years and, as such, I managed our civil litigation. I didn't personally handle the cases, but I hired our outside counsel, and I monitored all of our legal activity.

Aside from that, I found that the number of cases I tried as a prosecutor prepared me quite well to understand issues, to get to the important issues in a case, and to focus parties' attention on issues. And I found that the dichotomy between civil and criminal law in that regard wasn't as great as it seemed.

Chairman HATCH. Okay. Thank you.

As a former prosecutor, what assurances can you give to criminal defendants who appear before you that they will receive fair treatment in your courtroom?

Judge BURNS. Well, I can give them the assurance of a track record. I have been endorsed, as the Chair probably knows, by the criminal defense organizations in San Diego. There was that concern, of course, anytime a prosecutor takes the bench, but I think my record over the last 6 years has been one of being a balanced person who listens carefully to both sides and hits the ball right down the middle.

Chairman HATCH. That is my belief.

Mr. Conrad, Judge Conrad, you have spent practically your entire career as a United States magistrate judge. You are now being nominated for a lifetime position as a Federal judge in the District Court for the Western District of Virginia. In what ways has this prepared you? And I am also impressed by your desire that you have shown, which to me is a passionate interest, in educating future lawyers about Federal court civil procedure and practice and legal practice in the Western District of Virginia. Could you please talk a little bit about your longstanding involvement in continuing legal education as well?

Judge CONRAD. Thank you, Senator, for the opportunity to address those subjects.

Yes, I have been a United States magistrate judge for many years, and public service was the field which I always wanted to enter. As for the question concerning preparation to serve as United States district judge, as you know, Senator, the function of the magistrate judge and United States district judge overlap to a very great extent, and I think it's a very good training field, a very good basis for preparation to serve in that higher office.

We are committed in the Western District of Virginia to educating the younger lawyers about the Federal court, encouraging both litigants and attorneys to use the forum provided by the Federal court, not to be afraid of the rules and not to be afraid of the procedures, but to embrace those and use them to their clients' benefit. And I believe that we've been successful in making the Western District of Virginia a comfortable place and a user-friendly place to practice law.

Chairman HATCH. Great.

Judge FLOYD, tell the Committee about your work on the Board of Commissioners on Grievances and Discipline, which, as I understand it, is empowered to deal with complaints against members of the bar and, of course, has a concomitant duty to make recommendations for disciplinary conduct and how this experience may have helped you to become a judge?

Judge FLOYD. Thank you, Mr. Chairman. I've had the opportunity to serve both on the Lawyers' Grievance Committee as well as the Commission on Judicial Conduct where we investigate and conduct hearings and make recommendations for disciplinary actions against attorneys as well as judges. That early on prepared me to become a circuit judge, because that is pretty much what I would do after I was sworn in as a circuit judge. It's a process of being open-minded and doing a thorough investigation and trying to be fair to all sides and reach a proper result.

Chairman HATCH. Thank you.

Judge GIBSON, you have had a long and successful career in the United States Army, particularly as a Judge Advocate General. How has that prepared you for this current calling that you now receive from the President?

Judge GIBSON. Well, thank you for that question, Mr. Chairman. As well as many other life experiences that I've had—

Chairman HATCH. One other aspect of that, too, though, just one other question so you can answer both at the same time. During your tenure on the bench, you have been instrumental in initiating the victim impact panels and the juvenile drug court, which is only the second court of its kind in Pennsylvania on which you serve as a judge. So I would like you to also include that in your explanation as to how that may have helped you and your reasons for starting those initiatives.

Judge GIBSON. Well, thank you very much, Mr. Chairman. With regard to your first inquiry about my experience in the Army, I think it helped me develop a sense of fairness and an ability to work with people and the ability also to make decisions when they need to be made and weigh all the factors and treat people with respect when you are doing that. And I try to do that with all the

litigants and the counsel and witnesses who come into my courtroom.

With regard to the juvenile drug court program that we initiated, you're correct that it was the second such court in Pennsylvania, and it has given me one of my most memorable experiences in the judiciary because we've been able to get kids to go back to school, complete grades, whereas, before, they had been failing. We've been able to keep them drug-free with the work of the whole Committee that we work with, working with their parents. And we do that by bringing them into court frequently and supervising and encouraging.

As far as the victim impact panel, Mr. Chairman, before I took the bench, I went and sat and listened to a victim impact panel where the mother of someone who had been killed in a drunk-driving incident testified and stated what had happened to her. And I was so moved by it that I thought that anyone who came before the court for a drunk-driving type offense would benefit from hearing the terrible consequences that can occur from that. So we did initiate that, and we now require that as part of the probation and the diversionary programs that we do have.

So I think both those programs have worked well.

Chairman HATCH. Well, thank you.

Mr. Mosman, you have spent quite a bit of time in your professional career in the U.S. Attorney's Office for the District of Oregon. I would like you to expand on how your experience there has prepared you to be a Federal judge, and let me just add another question so you can answer both at the same time.

Having appeared before judges on many occasions during the course of your distinguished legal career—and you have a distinguished academic background as well, as do all of you—I am sure you have had ample opportunity to reflect on the quality of judge that you would like to become. And I would not mind hearing you describe briefly for the Committee what you think the proper role of a judge in our constitutional system is and what qualities you believe are necessary for a judge to fulfill a Federal judgeship role.

Mr. MOSMAN. Thank you, Mr. Chairman. I think the principal thing about my career in the U.S. Attorney's Office that has helped me prepare for this nomination is my experience with many different criminal trials. I've had the opportunity perhaps in this kind of career to try more cases than I might otherwise have done. And so seeing those trials, participating in them, watching how that unfolds in Federal court has been very beneficial to me.

I think also it's given me an opportunity to watch Federal judges in action and, as you have said, to ponder what it means to be a Federal judge, what those qualities are that make for a good Federal judge. I think I would go back to the time I had with Justice Lewis Powell, where I first really saw in action the kind of civility and decency and respect that he manifested constantly to litigants that really for me are the primary hallmarks of a great judge.

Chairman HATCH. The reason I ask these questions in a very real sense is, having practiced in federal courts myself, and having had at least two major curmudgeon judges, trial judges, during my tenure, both very brilliant people—Wallace Gorley in the Western District of Pennsylvania and none other than the heralded and fa-

bled Judge Ritter in Utah—we sometimes get the attitude around here that once you get to these lifetime appointments, the whole demeanor changes and it goes to some of the judges' heads where they think they—you know, they will acknowledge that they are the closest thing to godhood in this life, but some of them think they have actually achieved godhood. So we have to continually talk in those terms, that the service you give is service that should be fair to everybody—litigants, attorneys, people in the courtroom, witnesses, et cetera. And some judges go way beyond where they should go, in my opinion. And I just want to kind of hope you will always remember this discussion here in this hearing room today.

Judge Sabraw, you have been recognized for your pro bono efforts by various Committee organizations in San Diego and surrounding areas. Now, would you agree that the most effective means for a judge to implement change in the Committee is not simply from behind the bench but, instead, must include direct interaction with the members of the community over whom he presides? And as an attorney, your litigation experience focused predominantly on civil matters, yet since your appointment to the bench, you have handled a varied docket. As a matter of fact, in 2000, you were named the Criminal Presiding Judge of the North County Division of the San Diego Superior Court.

How do you think your litigation and judicial experience will best aid you in the challenges that await your confirmation on the bench for the Southern District of California?

Judge SABRAW. Yes, thank you, Mr. Chairman. I think the opportunity I've had on the State bench is a wonderful platform for the Federal bench. I served on the State court for 8 years. Equally divided in those years, I've handled both civil and criminal cases. Prior to becoming the criminal supervising judge for the North County, I handled felonies exclusively, serious felony crimes of all sorts, and then 1 year as criminal supervising judge assigning out cases and handling all of the plea dispositions.

Thereafter, and to date, I've served exclusively in a civil direct calendar department covering general jurisdiction, multi-party litigation cases. So I'm hopeful that that experience will feed directly into a smooth transition onto the Federal bench.

Chairman HATCH. Well, thank you so much. I really appreciate it.

I have looked over your careers and your resumes and your work that you have done, both outside the bench and on the bench. And I am really impressed with all of you, and I think everybody on this Committee should be impressed with all of you. And I hope that we can get you through. It is apparent we cannot get you through before the August recess. I would have to put you on tomorrow's markup, and I think that would be difficult to do under the current circumstances. But I will do everything in my power to put you on the markup when we get back and get you through as soon as possible, because every one of you will be filling seats that are drastically needed. And I have seen a lot of panels in my day and an awful lot of good people who are serving in the Federal judicial system, but I don't know that I have ever seen a better panel than this one.

So I just want to compliment each and every one of you for being willing to participate, being willing to interrupt your careers, being willing to go on these lifetime, very lonely positions, because once you go on the bench it is pretty tough to really do a lot of things that you have been used to doing without serious criticism. So you do kind of go into a cloister, to a degree—not nearly as bad as the Supreme Court. I will never forget I went over there not too long ago, and one of the Justices came running up to me and said, “Oh, a real human being.”

[Laughter.]

Chairman HATCH. He said, “We never see any real human beings over here.” I think he was excluding his clerks and secretaries, but the point is that it is a cloister and it is a difficult place.

Now, Senator Edwards is here. I am through with my questions. I am through with my questions of this district panel, but we can come back to Judge Saad anytime you want to if you care to ask any questions of these folks.

Senator EDWARDS. I don’t, Mr. Chairman. Could I just make—in fact, I don’t need more than 60 seconds. I just wanted to make a quick point, and if you want to conclude with—

Chairman HATCH. Well, why don’t I release them, then, and tell you that we will do our best to get your through right after we get back from the recess. We will do everything in our power to do this for you, and I believe we will get you through.

So, with that, we are going to release you and allow you to go. I just feel fortunate we were able to get this done, so thanks so much for being here. We appreciate your service. We appreciate your willingness to serve our country. Thanks so much.

Judge BURNS. Thank you, Mr. Chairman.

Judge CONRAD. Thank you, Mr. Chairman.

Judge FLOYD. Thank you, Mr. Chairman.

Judge GIBSON. Thank you, Mr. Chairman.

Mr. MOSMAN. Thank you, Mr. Chairman.

Judge SABRAW. Thank you, Mr. Chairman.

Chairman HATCH. All right. Let’s have Judge Saad come back up to the witness table. Senator Edwards would like to make a statement, and then we will go from there.

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

Mr. Chairman, as you know, you and I and the White House worked very closely together to reach a consensus on Judge Allyson Duncan and her nomination to the Fourth Circuit Court of Appeals, which moved through the Committee quickly and moved through the United States Senate with strong support. I think it is an example of what can be constructively accomplished when we go about this process the right way, in a constructive way, and reach consensus about these nominees.

My concern about Judge Saad is going forward with the nomination of a judge over the objection of both home State Senators. I think it is important not just for those Senators but for the process, for us to go about this in exactly the way we did with Judge Duncan, which I think is the process that works and the process that we should adopt as a model. And I just wanted to come for the purpose of—I don’t have questions for the judge. I wanted to come for the purpose of expressing that, with all respect to the Chairman,

who has worked with me on any number of issues. But on this particular issue, I think it is of great concern to me to go forward with Judge Saad over the objection of both of his home State Senators, particularly when we have a model like Allyson Duncan, which I think represents what we should be doing.

And I would just ask the Chairman if I could put my full statement in the record.

Chairman HATCH. Without objection, we will do that.

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

Chairman HATCH. I agree with you, it is wonderful when we can have cooperation and everybody is working closely together.

I think we have made a case that Judge Saad, in his third nomination and waiting 11 years, deserves to be considered and have a vote up and down. But there is a difference in feeling on this, and I acknowledge my colleagues and respect my colleagues in that regard.

By the way, for the district court nominees, we are going to keep the record open, as we will with you, Judge Saad, if nobody else comes, we will keep the record open for written questions, and any Senator on this Committee can ask any questions they want, and we will keep the record open until next Monday. And hopefully the Senators will put their questions in writing, and that will give all of you a month to answer the questions, which is usually enough time.

So, thank you, Senator.

Senator EDWARDS. Thank you, Senator.

Chairman HATCH. I think what we will do is just wait for a few more minutes and see if there are any other Democrats who would care to ask any questions.

Sorry to do this to you, but I want to give my colleagues every chance to come and ask any questions they care to.

Judge SAAD. I understand the professional courtesy, Mr. Chairman. Thank you.

Chairman HATCH. We will release the district court judges. I don't think there is anybody who is going to come and ask any questions. So if you would care to go, you have got our approval. But please answer your written questions as soon as you can.

[Pause.]

Chairman HATCH. I have been informed that there are no other Democrats who are planning on coming, but let the record show that we have been here for 3 hours, most all of which has been spent on Judge Saad. I am willing to spend all day, if necessary, to allow any Democrat the opportunity to question. This is the time to do so. But in the event none are going to come—and I have been informed they will not—we will keep the record open for them to file written questions.

I don't see any reason for a further hearing. You have presented yourself. You have been here long enough, and everybody has really had an opportunity, and an ample opportunity, to come and ask you any questions they would care to ask. And I am hopeful that we can—I hope I can find some Solomonic way of resolving this impasse because the four circuit court of appeals judgeship nominees by this administration all appear to be excellent to me, and I think

to the people of Michigan. And for the people of Michigan, this is not fair to have this impasse because the people of Michigan are not getting the judicial representation that they deserve, and ultimately if this continues on, I think it is going to be much to the detriment of the State. And I think we have made a pretty ample case that because of the lack of consultation, that is why the two judges did not get through, although nine did. And I was one of those who saw that they got through. And I would have seen that the other two got through had it not been for that type of inappropriate impasse.

The administration, whichever it is, has an obligation to consult. I admit some of our Democrat friends think that consultation means approving whoever they want to approve, not the administration. Unfortunately, the Constitution doesn't back them up. The Constitution says the President has the power of nomination.

Now, we do have the power of advise and consent, but that means a vote up and down. It means holding hearings and asking good questions, and maybe sending interrogatories or written questions. But it ultimately means a vote up and down. That is what the advise and consent process should be, especially where there has been consultation. And in your case, Judge Saad, there has been ample consultation, more than ample. In the case of Kuhl, overwhelming consultation with both California Senators, but especially Senator Boxer, who was the first one to withhold her blue slip or to send in a negative blue slip. And I think in every instance this administration has made an effort to consult with Senators up here of both parties. And in your case, they certainly have done so, and it isn't fair for good nominees like you and the others to be held up under these circumstances, and to be held up crying foul over Helene White and Kathleen McCree Lewis, both of whom are nice people. And I know of both of them. I knew Ms. Lewis' father, Wade McCree, and thought the world of him and would like to have helped her. But under the circumstances, I have to—there is only so much I can do, also.

With regard to never having brought up a judge with two negative blue slips, it is basically true with regard to district court nominees. But I can remember when Ronnie White was brought up and both negative blue slips were there. I could have refused to go to a vote, but we went to a vote, and he at least got a vote up and down, which is something that is not being accorded the Bush nominees. And I might add—the Bush II nominees, we will put it that way, and many of the 54 holdovers that were left at the end of the Bush I administration, including you, Mr. Saad—Judge Saad, I should say.

So I don't think there is a very good argument against voting up and down on your and the other three nominees, including the two district court nominees. There is a difference between withholding blue slips on district court nominees, I agree, when both Senators were against a district court nominee because those nominees are right in the State. They don't represent a multiple-State situation. So there is a difference between withholding blue slips on district court nominees than there is in withholding blue slips on circuit court of appeals nominees.

Now, I would just point out with regard to Ronnie White, there were two negative blue slips by Republican Senators. I was the Chairman. And I could have taken the position that we shouldn't go to a vote. But we did. And he had a vote up and down. Now, admittedly, the second negative blue slip occurred shortly before that vote, but, nevertheless, it was negative. But the Republicans did vote up and down. He was the only one that I recall voted down by the Republicans in the Senate in the Clinton years. Everybody else who was brought up had a vote up and down and passed. And most of them passed by unanimous consent.

But, to make a long story short, you deserve better treatment than this. We are going to do everything in our power to see that you get that vote up and down, and I believe that if it is the vote up and down, you will win because I think people of fairness will appreciate the fact that you have a tremendous reputation in the law. And I want to make sure that you are treated fairly.

Now, with regard to Ronnie White, just to correct the record, there was one positive blue slip, one negative blue slip. The negative blue slip was by a member of this Committee, and I asked the member, I said, "Do you have any objection to me bringing Judge White up?" And the member said, "No, but just make sure that I'm listed as a no vote," which I did.

But by the time he came to the floor, there were two negative blue slips in the sense that both Senators had decided to oppose Ronnie White. So I treated that as a negative blue slip.

To their credit, we went ahead with a vote. They could have stopped the vote, but we went ahead with the vote. And it was to my credit, too, because I wanted to go ahead. I think he deserved a vote. And I believe you do, and I believe the ones that are being filibustered do, the ones that are being filibustered for the first time in history. I think we have got to break through this type of maltreatment of Bush nominees and consider treating them in a fair and balanced manner and give them votes up and down, especially when they come to the floor.

So, with that, we will recess this Committee. As far as I am concerned, you have had your hearing. But the record will be open for any questions that they want to ask in writing, and we would appreciate it if you would get the answers back as soon as you can.

Judge SAAD. I most certainly will, and I thank you for the hearing, Mr. Chairman.

Chairman HATCH. Well, thanks, Judge. It is great to have you here, and I admire you and I admire what you have been able to do.

With that, we will recess until further notice.

[Whereupon, at 1:24 p.m., the Committee was adjourned.]

Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

**Responses of Judge Henry Saad to the Written
Follow-up Questions of
Senator Richard J. Durbin**

You may be aware from press accounts that the Senate Sergeant at Arms is currently conducting an investigation of the Senate Committee on the Judiciary and the wide-scale incidents of theft of memorandums and other work products drafted by Democratic staff members of the Committee. It has been reported in the press and confirmed by the Sergeant-At-Arms that thousands of staff documents were stolen by Republican staff, and that the illegal activities took place over the past several months and perhaps years.

Additionally, at least one of the alleged perpetrators, a former Republican staff member on the Judiciary Committee, has publicly admitted that many of the documents he stole and/or read related to judicial nominations. The former staff member was one of many Republican staff members who worked on judicial nominations matters for Committee Chairman Hatch and subsequently for Majority Leader Frist.

Because of your current status before the Judiciary Committee, I would like to ask you a series of questions concerning these unfortunate criminal incidents.

1. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the Senate Judiciary Committee? If so, during those meetings, did any staff of the Senate Judiciary Committee share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources? Did any staff of the Senate Judiciary Committee provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Response: I had the pleasure of being introduced to and talking to a variety of staffers of the Senate Judiciary Committee, both Democrat and Republican, while in Washington, D.C. for my hearing, but not for the purpose of preparing for my hearing. I was never provided any information or indication that anything said related to "Democratic sources" nor was I provided with any documents.

2. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the U.S. Department of Justice? If so, during those meetings, did any staff of the Justice Department share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources? Did any staff of the Justice Department provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented

with such information or documents.

Response: I have had the pleasure of meeting with staff of the U.S. Department of Justice in preparation for my hearing. There was never any suggestion of any kind made to me by any staff member that anything provided to me, orally or in writing, related to "Democratic sources," or appeared to have been drafted or prepared by Democratic staff.

3. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the White House? If so, during those meetings, did any staff of the White House share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources? Did any staff of the White House provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Response: I have had the pleasure of meeting with staff of the White House Counsel's Office in preparation for my hearing. There was never any suggestion of any kind made to me by any staff member that anything provided to me orally or in writing, related to "Democratic sources," or appeared to have been drafted or prepared by Democratic staff.

4. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with anyone associated with individuals, groups, or organizations outside of government that support, endorse, or advocate in any way on behalf of the confirmation of President Bush's judicial nominees? If so, during those meetings, did any of these individuals, groups, or organizations share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources? Did any of these individuals, groups, or organizations provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Response: I have had the pleasure of talking to a variety of people over the course of the last several years who have supported my nomination to the federal appeals bench. At no time, did anyone that I talked to ever mention or suggest any information of any kind that relates to "Democratic sources."

**Questions from Senator Edward M. Kennedy
to Henry W. Saad, Nominee to the U.S. Court of Appeals for the Sixth Circuit**

1. You are a member of the Federalist Society. According to the Federalist Society's mission statement:

"Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law. The Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians interested in the current state of the legal order."

Do you agree that "[l]aw schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology"? Why or why not?

Answer:

I do not agree with the quoted statement in this question. I place little or no value on labels and generalizations about people or institutions, like law schools and the legal profession, because they are too complex to be neatly categorized. Accordingly, although I have been an officer, board member or volunteer in a variety of law-related organizations (by way of example: American Bar Association, Michigan Bar Association, Detroit Bar Association, Oakland County Bar Association, Arab-American Bar Association, Wayne County Neighborhood Legal Services, Common Ground, Michigan Department of Civil Rights, Federal Mediation Conciliation Service and Michigan Employment Relations Commission), I do not necessarily adopt as my own (1) policy statements made by these organizations, (2) statements attributed to them, or, (3) characterizations made about them. Further, with respect to law schools, since 1976, I have been privileged to teach at Wayne State University Law School and University of Detroit/Mercy School of Law and my personal experience at these law schools suggests that they emphasize academic excellence and academic freedom, not political ideology.

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

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Answer:

I do not believe that certain priorities need to be reordered within the legal system. If I am privileged to be confirmed to the Court of Appeals for the Sixth Circuit, my goal would be to honor my oath as an Article III judge, consistent with my philosophy as stated in response to Question No. 3, *infra*.

3. **President Bush has repeatedly pledged to 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?**

Answer:

Because I believe the law is too complex and nuanced to be reduced to labels, I would not attempt to describe the judicial philosophy of Justice Scalia, Justice Thomas or any Justice of the United States Supreme Court.

b. **How would you describe your own judicial philosophy? Do you believe that you are a "strict constructionist?" Do you believe that your philosophy is similar to that of Justices Scalia and Thomas?**

Answer:

If confirmed, I would continue to do on the federal appellate bench what I have done on the Michigan Court of Appeals: I would interpret legislation with proper deference to the legislature, follow precedent, and provide a fair and impartial forum for litigants and their lawyers and treat them with respect and dignity. This is my judicial philosophy.

c. **Do you think that the Supreme Court's decisions in Brown v. Board of Education and in Roe v. Wade are consistent with strict constructionism? Why or why not?**

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Answer:

Consistent with my answers to 3(a) and 3(b), I would not label *Roe v Wade* and *Brown v Board of Education*. These cases are well-settled, have been reaffirmed over the years, and lower courts are bound to follow these decisions.

4. Your opinion in *Lagalo v Allied Corp*, 554 N.W.2d 352 (Mich. Ct. App.) was reversed by the Michigan Supreme Court. In that case, you reversed a jury verdict in favor of a motorist who were injured when the brakes on his car failed, on the ground that the jury's findings were inconsistent. In reversing your decision, the Michigan Supreme Court held that the jury's findings were not incompatible and stated that in attempting to harmonize the verdicts, you should have grounded your "analysis in the articular factual context of the case at bar."
- a. Do you believe that the Michigan Supreme Court's criticism of your decision in *Lagalo* was fair? Please explain.

Answer:

In *Lagalo v Allied Corporation*, consistent with Michigan law, our unanimous panel tried to harmonize what we ultimately judged to be inconsistent verdicts. The law regarding jury verdicts required us to attempt to harmonize these verdicts, but the law regarding negligence and implied warranty appeared to preclude harmonization in this case. We believed that had the jury reversed its formulation and found liability on implied warranty, but not on negligence, then the verdicts could have been harmonized. Nonetheless, as you note, the Michigan Supreme Court disagreed. Though our Supreme Court characterized our analysis as a "thoughtful look at the difficult distinction between negligence and breach of warranty. . ." it concluded, "in the unique circumstances of the present case" that our panel misapplied the law to the facts. The Michigan Code of Judicial Conduct precludes my commenting upon any decision of our Supreme Court (or any court of last resort) and my oath of office simply obliges me to follow the directions and precedent of our Supreme Court. As an example, I have subsequently applied the Michigan Supreme Court's decision in *Lagalo*. The defendant in an employment discrimination case challenged what it claimed were inconsistent jury verdicts for the plaintiff. Citing *Lagalo*, we declined to overturn the verdict in favor of the employment discrimination plaintiff. *Black v King of Long Lake, Inc*, unpublished opinion per curiam of the Court of Appeals, issued May 26, 2000 (Docket No. 211891).

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- b. In reversing your decision in this case, the Michigan Supreme Court stressed the deferential role of the appellate court in reviewing jury claims, stating that the circuit court must make every obligation to reconcile inconsistent verdicts. What do you understand to be the role of an appellate court in reviewing jury verdicts? How does the federal standard of review of jury verdicts differ from the state standard of review?

Answer:

Appellate courts should grant substantial deference to jury verdicts, consistent with the applicable law of judicial review. I am very reluctant to set aside a jury verdict and do so only when I believe it is clearly mandated by Michigan or federal law. Federal and state appellate courts uniformly express reluctance to overturn jury verdicts, but use many and varying standards of review depending upon the type of case on appeal and the type of error asserted. For example, evidentiary errors, as one category, can raise three standards of review to determine error (clearly erroneous, abuse of discretion and de novo) and require a harmless error analysis in civil cases and criminal cases. This one category of error (evidentiary) is further complicated in criminal cases because the evidentiary analysis must distinguish between constitutional and nonconstitutional error. Differing standards of review (and many of the aforementioned complications) also arise when the appellate court is asked to review other allegations of error such as instructional errors, juror misconduct, sufficiency or weight of the evidence, or procedural mistakes.

Nonetheless, appellate courts are required to grant due deference and therefore, should be reluctant to overturn jury verdicts.

5. In Arnson v. County of Muskegon, 1997 WL 33330701 (Mich. Ct. App. 1997), the plaintiff was granted benefits for mental disability because the exceptional tumult and stress in the office caused such anxiety and depression that it was impossible for her continue to work. You dissented from this per curiam opinion, arguing that "workplace stress, no matter how significant, ought not to create a cognizable claim under Michigan law." What is the basis for your view? Why did you believe that the majority's opinion was incorrect?

Answer:

My dissent in *Arnson v County of Muskegon*, unpublished opinion per curiam of the Court of Appeals, issued December 19, 1997 (Docket No. 197721), was premised on several considerations: (1) in 1980, Michigan's legislature enacted the statutory

provision at issue in response to its dissatisfaction with earlier judicial pronouncements regarding mental disabilities; (2) according to the Worker's Compensation Appellate Commission (WCAC), plaintiff's case did not appear to satisfy the significant manner causation requirement, rather than the actual events requirement of MCL 418.301(2), [*Robertson v DaimlerChrysler Corp.*, 465 Mich 732, 753 n 9; 641 NW2d 567 (2002)], and (3) Michigan law recognizes the expertise of administrative agencies in interpreting and applying statutes to specific cases. Here, the agency invested with this authority, the WCAC ruled on two occasions that the claimant did not satisfy, factually or legally, the demands of section 301(2), *Robertson, supra*. In its first decision, the WCAC found that the record showed that plaintiff's perception of harassment was unfounded. Also, in its second decision, the WCAC found that the presence of general stress and anxiety is insufficient to establish a claim for mental disability.

I read *Robertson* as stating, *sub silentio*, that the majority on our panel interpreted *Gardner* too expansively regarding the "significant manner" causation requirement interpretation of section 301(2), as fully explained by our Supreme Court in *Robertson, supra* at 753, n. 9.

6. In *Helder v. Sruba*, you held that an insurance company was not liable for payment to a woman who had been physically abused by her ex-boyfriend. In the case, plaintiff Linda Helder sued her ex-boyfriend, Sruba, and the bar he owned, alleging that employees of the bar served Sruba alcohol when he was visibly intoxicated, following which he would beat her. Default judgement was entered against Sruba and the insurer, and the insurer refused to pay arguing that Sruba had not informed it of the suit.

The trial court ruled that Ms. Helder could recover, but you reversed. You rejected Ms. Helder's argument that the Michigan statute precluded the insurance company's lack-of-notice defense. You held that Ms. Helder's interpretation of the statute would create an absurd result because it might lead to collusion between a plaintiff and defendant. Your opinion was reversed unanimously by the Michigan Supreme Court. The Court held that the statute was "clear and unambiguous" and that it did not permit the insurance company to "assert a lack-of-notice" defense.

- a. Do you agree that the statute is clear and unambiguous? Why or why not? Why did you think it was appropriate to consider the policy impact of the statute rather than applying the plain language?

Answer:

The Court of Appeals majority opinion in *Helder v Sruba* relied on the 1984 decision of our Court in *Henderson v Biron*, 138 Mich App 503; 360 NW2d 230 (1984), abrogated by *Helder v Sruba*, 462 Mich 92; 611 NW2d 309 (2000), to interpret the

statutory provision at issue. In *Helder*, the defendant relied on *Henderson* and the plaintiff asserted that *Henderson* had been overruled, by implication, by our Supreme Court in *Coburn v Fox*, 425 Mich 300; 389 NW2d 424 (1986). Because *Coburn v Fox* involved an interpretation of Michigan's no-fault law and the cooperation clause of the contract, we viewed *Coburn v Fox* as clearly distinguishable from *Henderson*. Indeed, *Henderson* addressed the precise issue before our Court and described this legal issue as one of first impression. *Henderson* held that the statute at issue does not preclude a dramshop-liability insurer from asserting a lack of notice defense, as opposed to a lack of cooperation defense (*Coburn*). Our Court in *Henderson* said,

Similarly, notice provisions in casualty insurance policies are enforced by the courts because these provisions allow an insurer to make a timely investigation in order to evaluate claims and to defend against fraudulent, invalid or excessive claims. [Emphasis added.] *Henderson* at 507.

The *Henderson* Court went on to note that:

We can think of no reason why a dramshop liability insurer should not be accorded the same protection from stale claims given dramshop bondsman and casualty liability insurers. Nor is such protection unfair to plaintiff, since the insurance company still would have the burden of proving it was prejudiced by the insured's failure to notify it of the lawsuit. *Henderson, supra*.

In light of this Michigan case law interpreting the precise statute in issue, *Henderson*, our majority opinion concluded that the insurance company would not be liable, so long as it could prove that it was prejudiced by the lack of notice. The prejudice requirement is consistent with Michigan law and accordingly, we remanded to the trial court to give the garnishee-defendant the opportunity to demonstrate that it was prejudiced.

- b. The Supreme Court also disagreed with your view that applying the statute as written would lead to absurd or unjust results. In particular, the Court found that there was not "one shred of evidence of fraud or collusion in this case." Indeed, the Court quoted from Ms. Helder's brief that because Sruba had twice been convicted of assaulting and stalking her, any claim of collusion was "false, outrageous and insulting." Why did you find the risk of fraud or collusion persuasive in this case?

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Answer:

The Supreme Court disagreed with the majority's interpretation in *Helder* and, by implication, abrogated *Henderson*. Though the Michigan Code of Judicial Conduct precludes my commenting upon any decision of our Supreme Court (or any court of last resort), at the time our majority ruled in *Helder v. Sruba*, we believed the statute to be clear for the reasons stated in our opinion. Regarding the risk of fraud or collusion, our Court in *Henderson* stated in its rationale that the notice provisions are enforced by courts to defend against fraudulent lawsuits. The defendant in *Helder* raised the issue that the plaintiff's interpretation of the statute could encourage fraudulent and collusive lawsuits. The majority opinion agreed that such an interpretation could encourage collusive lawsuits. The majority opinion made no comment about or came to any conclusion about fraud or collusion on the part of the plaintiff in *Helder*.

7. In *Clegg v. Crown Equipment*, 1997 WL 33349431 (Mich. Ct. App. 1997), the Court held that a warehouse employee who was severely injured while operating a faulty forklift was entitled to go to trial on his claims against the manufacturer/seller. The person in charge of operating the forklift had testified that while testing the forklift after the plaintiff's accident, he had found it defective. The trial court however, granted summary judgment for the manufacturer/seller. On appeal, the Court of Appeals reversed, holding that the plaintiff had presented sufficient evidence to warrant a trial. You dissented from this ruling. According to you dissent, the plaintiff had a motive to blame the manufacturer and the plaintiff's behavior on the forklift was "reckless."

Why do you believe that the question of the plaintiff's motives and the cause of the accident are not properly left for the jury?

Answer:

I appreciate the opportunity to respond to your question and clarify that my dissent was based on the fact that, in my opinion, the plaintiff failed to establish any defect in the product and failed to raise a triable issue on causation, as required by Michigan law. In my dissent, I do not suggest that the plaintiff had a motive to blame the manufacturer, and thus, I do not suggest that the court examine plaintiff's motivation. Instead, I commented that the employer - Miesel-Sysco, speaking through its agent, Kuczynski (maintenance man) had reason to accuse the manufacturer. The employer had strong motivation to place blame on the manufacturer. To deflect any culpability from its own maintenance department (plaintiff testified under oath that all repairs on the forklift were done in-house by Kuczynski), the employer blame the manufacturer for its own employee's injuries. However, this point is not central to the reasons for my dissent.

Plaintiff sued under a products liability theory for injuries he sustained while operating a forklift at work. The trial court granted summary disposition to the forklift manufacturer because it held that plaintiff failed to produce sufficient evidence that the forward-reverse switch on the forklift was defective. The majority disagreed and relied, in large part, on deposition testimony filed after the motion was decided. The testimony was from a repair and maintenance worker (Kuczynski) at the employee company who stated that, when he inspected the machine after the accident, he concluded that the forklift had a defective forward-reverse switch.

Under Michigan law, plaintiff was required to present sufficient evidence to support a reasonable inference that the forklift was defective and that the alleged defect caused plaintiff's injuries. I dissented in *Clegg* because plaintiff failed to present any evidence that a defect existed at the time the product left the manufacturer. Further, plaintiff failed to present sufficient evidence of causation to survive a motion for summary disposition under Michigan law. On the issue of causation, our Supreme Court explained in *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994) that "a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." To that end, "the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Id.* at 164-165. Also, "[t]he mere possibility that a defendant's negligence may have been the cause, either theoretical or conjectural, of an accident is not sufficient to establish a causal link between the two." *Id.* at 165-166, quoting *Jordan v Whiting Corp*, 396 Mich 145, 151; 240 NW2d 468 (1976).

In my opinion, "the circumstantial evidence here did not afford a reliable basis from which reasonable minds could infer that more probably than not, but for the defect," the plaintiff would not have been injured. *Id.* at 171. Undisputed evidence established that plaintiff operated the forklift in a smaller space than recommended by the forklift training guide and that plaintiff jumped off the machine while it was still moving (contrary to a clear warning on the forklift not to do so). As established by our Supreme Court, "causation theories that are mere possibilities, or, at most, equally as probable as other theories do not justify denying defendant's motion for summary judgment." *Id.* at 172-173. Here, given the lack of evidence regarding a defect that originated from the manufacturer and the insufficient evidence to establish causation, I concluded that plaintiff's proofs failed to adequately support a reasonable inference that plaintiff's injury was probably caused by a defect attributable to the manufacturer. Therefore, in my opinion, the trial court correctly ruled that plaintiff failed to provide sufficient proofs for the case to go to the jury.

Henry Saad, Nominee to the United States Court of Appeals for the Sixth Circuit
Answers to Questions from Senator Patrick Leahy

1. In the 1997 case Haberl v. Rose, the appeals court ruled to reinstate a jury verdict for an injured plaintiff. You dissented from the majority's opinion because you concluded that the applicable civil liability statute did not entitle the plaintiff to recovery. In reference to your dissent, the other two judges on your court majority essentially called you an activist judge when they noted that your dissent "urges 're-writing' the statutes in question and advocates overstepping the bounds of proper judicial authority."

More recently, in a medical malpractice case, Eggleston v. Bio-Medical Applications of Detroit, the Michigan Supreme Court reversed your opinion affirming the trial court's grant of summary judgment for the defendant. The Supreme Court found that your opinion did not follow the plain language of a wrongful death statute. They held that you had inserted a word into the statutory language to support your conclusion that the statute of limitations expired before the plaintiff brought suit. This Supreme Court finding is a serious allegation because it in effect alleges that you reached to change the statute to erroneously bar the plaintiff's wrongful death case from going forward.

What can you say to assure this Committee and prospective parties that, if confirmed to the federal bench, you will not rewrite congressional enactments, and that you will be a fair judge and an impartial adjudicator, who will not use the federal bench to pursue your own legal, political or philosophical goals?

Answer:

I appreciate this opportunity to respond to the Committee's questions because I believe that it is a judge's duty to interpret statutes with due deference to the Legislature. Consistent with the judge's limited constitutional role, a judge must not rewrite congressional enactments based on the judge's personal policy preferences. As an appeals court judge for nine years, I have demonstrated a strong commitment to the rule of law and the constitutional limits on the role of the judiciary.

Because the law raises complex issues, I recognize that judges may sometimes disagree, in good faith, on the interpretation of a statute or other provision. In particular, you mentioned Haberl v Rose, 225 Mich App 254; 570 NW2d 664 (1997), and I would respectfully respond that in Alex v Wildfong, 460 Mich 10; 594 NW2d 469 (1999), the Michigan Supreme Court adopted my dissent and overturned the statutory interpretation advanced by the majority of the Court of Appeals. The Michigan Supreme Court quoted from my dissent saying:

Explaining the context in which recent immunity reforms were enacted, Judge Saad concluded that the Legislature knew exactly what it was doing, as it provided immunity for negligent acts of government employees driving their own vehicles in the course of employment. He said that "the Legislature made a

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policy choice with which we may disagree, but which we are not free to undo." [Alex, *supra* at 19, quoting Haberl, *supra* at 273 (emphasis added).]

The Michigan Supreme Court further cited my opinion, saying:

As Judge Saad explained, the Legislature has formulated a clear statutory framework for determining the extent of governmental immunity in a case arising from a motor vehicle accident. These provisions outline the immunity of government agencies and of individuals, as well as the extent of liability for harm caused by negligent operation of government-owned vehicles or failure to maintain the roadway. It is not for the courts to add or subtract from the balance struck by citizens of this state, as expressed by their elected representatives in the Legislature. [Alex, *supra* at 21-22 (emphasis added).]

Regarding your inquiry about *Eggleston v Bio-Medical Applications of Detroit, Inc*, 248 Mich App 640; 645 NW2d 279 (2002), please note that the insertion of the word "the" into a portion of the statute was a mistake, for which I take responsibility; it was most certainly not intentional. After the Michigan Supreme Court's decision in this case, I asked about the error and was advised of the genesis of the mistake. Apparently, according to our central research department, at the time that the research report was drafted by our central staff in this matter (a time well before our panel had been assigned to the case), our Court had been using West CD-ROMs to research statutes. It was the practice of our research staff to essentially copy and paste the text of the statute directly from the CD-ROM. Though the particular CD-ROM used by our research staff is no longer available, it is our suspicion that the mistake was on the CD-ROM and was carried over to our opinion. Unfortunately, the mistake was not noted by our panel, our staffs, or our Michigan Supreme Court staff that reviews our opinions prior to publication. However, as I stated above, the mistake was certainly inadvertent and, regardless of the genesis of the error, I take responsibility for any opinion, including this one, that contains a mistake where I am on the panel. Also, please note that we unanimously reaffirmed our decision after the error was pointed out in a motion for rehearing because the word "the" was not the primary basis of our holding.

2. In ***Ford v. Wyre***, an employee of the Detroit Public Schools reported to federal authorities that he had been instructed to misappropriate school funds and resources for the personal benefit of his supervisor and others. This whistleblower alleged that his supervisor improperly retaliated against and defamed him as a result of his reporting. The trial court granted default judgment for the whistleblower when the school district failed to properly respond to the complaint and cooperate with scheduled discovery. The Michigan Court of Appeals affirmed. You dissented. The Detroit Free Press later concluded that this whistleblower's report of impropriety was correct: taxpayer funds had been misappropriated and a report detailing these activities was suppressed by the school board.

In another case, ***Keller v. City of Grand Rapids***, a city employee contended that he was harassed out of his job by his supervisor after he filed a report with the police department alleging that his employer, the City of Grand Rapids, had failed to comply with and enforce the prohibition on smoking in public buildings provided for under state law. Evidence

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showed that, after the employee made his report, he was singled out and treated more harshly than other employees for minor rule violations. For example, he received an "incident notice," for failing to initial an employee bulletin. This form of reprimand was generally reserved for infractions as severe as coming to work drunk. The employee was also disciplined for allegedly failing to sign out to attend a mandatory physical examination, although other employees who had failed to sign out had not been punished at all. A jury found in favor of the whistleblower but the trial judge vacated the jury's verdict. The Michigan Court of Appeals held that there was competent evidence to support the jury's verdict for the plaintiff and that the trial judge abused his discretion by granting a new trial.

In a separate opinion, you expressed your "reluctant" concurrence to uphold this whistleblower's jury verdict because of your personal belief that "what plaintiff regards as harassment appears to be little more than a personality tug-of-war with his division head."

What are your thoughts on the status of whistleblower protections under current law, especially as they relate to recent corporate and governmental investigations? Can you recall instances in which you have authored an opinion in favor of a whistleblower? Please provide the Committee with all such opinions.

Answer:

As an appellate jurist, it is my limited role to determine, along with my fellow judges, our scope of review and, within that scope, whether the law was properly applied at the trial court level. Before I respond to your general question about the whistleblower cases, let me say, respectfully and briefly, that neither *Ford v Wyre*, unpublished opinion per curiam of the Court of Appeals, issued August 18, 2000 (Docket No. 209140) nor *Keller v City of Grand Rapids*, unpublished per opinion per curiam of the Court of Appeals, issued August 7, 2001 (Docket No. 223083), reflect a bias against whistleblowers, a bias, I assure you, I do not have. In *Wyre*, I dissented for several reasons unrelated to the merits of the case: (1) Our Court never had the opportunity to address the merits of the whistleblower case because the trial court entered a default judgment prior to a hearing on the merits; (2) Under Michigan law, I believed that a \$1.7 million default judgment against an individual was a drastic remedy for procedural and discovery abuse; (3) My dissent indicates that a long history of Michigan case law supports the view that a default judgment should rarely be granted because it is a particularly harsh remedy for procedural or discovery abuses; (4) Further, the individual defendant in this case was denied his right to a jury trial, which I also judged to be contrary to Michigan law. The Michigan Supreme Court agreed with my dissent on the issue of a jury trial and, accordingly, remanded the case to the trial court for a jury trial on damages. *Ford v Wyre*, 464 Mich 874; 628 NW2d 50 (2001). Thus, I would reiterate that my dissent in *Wyre* was not based on the merits or lack of merit of the whistleblower action.

With respect to *Keller*, I ruled in favor of the whistleblower plaintiff. As I stated in my concurrence, I believed it was for the jury to make the ultimate judgment and I therefore upheld the verdict. I indicated that I was "reluctant" because the evidence in favor of plaintiff was not

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particularly strong. Nevertheless, I believed that I could not substitute my judgment for that of the jury.

The Michigan Court of Appeals does not keep track of categories of cases; however, I have ruled on some whistleblower matters. In *Belowski v Sandusky Heritage Inn*, unpublished opinion per curiam of the Court of Appeals, issued August 2, 1996 (Docket No. 173378), I was on a panel that affirmed a judgment in favor of a whistleblower and in *Lynd v Adapt, Inc.*, unpublished opinion per curiam of the Court of Appeals, issued August 6, 1996 (Docket No. 178294), we reversed the trial court's dismissal of a whistleblower claim. Also, significantly, in *Badalucco v City of Auburn Hills*, unpublished opinion per curiam of the Court of Appeals, issued December 28, 2001 (Docket No. 222113), we affirmed a jury verdict of \$1.3 million in favor of a whistleblower. Though the trial court reduced this award to present value (close to \$1 million), this is one of the largest Whistleblower Protection Act verdicts in recent memory.

Whistleblower protection has been a feature of Michigan and federal law for many years and the principles of law are essentially well-settled. An employer may not, in any way, retaliate against an employee who reports or threatens to report corporate illegality. I am committed to enforcing the law in this area in accordance with the legislative mandate and would be equally committed to upholding federal whistleblower laws.

3. Judge Saad, in your 20 years as an attorney, your practice primarily consisted of defending large corporations in numerous employment-related suits, including claims by employees or former employees of race discrimination, age discrimination, sexual harassment and wrongful termination. A review of your opinions as a judge on the Michigan Court of Appeals demonstrates that you have frequently favored employers in complaints brought by workers, even in the face of extremely sympathetic facts. I am concerned that you may have brought your advocate's viewpoint with you to the bench.

For example, in *Coleman v. Michigan*, a female corrections officer brought a sexual harassment suit against her employer, the State of Michigan. This officer was assaulted and nearly raped by an armed prisoner. According to the officer's complaint, after this terrible attack, her supervisor insinuated that she provoked the attack because of her attire. The supervisor made the officer come to his office on a regular basis to check the appropriateness of her clothing and he frequently called her to discuss personal matters, such as her relationship with her boyfriend. Despite these serious allegations, the trial court granted summary disposition in favor of the state of Michigan. You joined in the Michigan Court of Appeals' *per curiam* opinion affirming the trial court's grant of summary disposition. The corrections officer appealed your decision to the Michigan Supreme Court, which held that her claims constituted sufficient evidence to go to trial. This reversal is but one example underlying my concern that you are dismissive of suits brought by workers against their employers.

In another case, *Fuller v. McPherson Hospital*, a jury who heard live testimony was persuaded to conclude that a woman had endured sexual harassment from her immediate supervisor and other superiors. The trial court vacated the jury findings because it found

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that the plaintiff had not complained of the harassment while working at the hospital. On appeal, the panel reinstated the jury's finding of sexual harassment but you dissented. Unfortunately, your dissent in this case was only two sentences and failed to address your colleagues' legal conclusions.

Can you recall instances in which you authored an opinion in favor of an employee bringing an action against his or her employer? Have you ever dissented in favor of an employee who filed a discrimination or sexual harassment suit? What can you say to assure this Committee that, if confirmed to the Sixth Circuit, you will give fair treatment to plaintiffs who come before you in employment-related actions?

Answer:

As a lawyer and as an active member of the community and bar associations, I have been an advocate for equal rights and civil rights. Furthermore, as an appeals judge in Michigan for nine years, I have been a fair and balanced judge who keeps an open mind on all matters, including civil rights and workers' rights. This can be seen by letters of support from my colleagues, both Republicans and Democrats, advocates for the ACLU, and by endorsements throughout my judicial career by workers' organizations such as the Michigan Education Association, the AFL-CIO, and the United Automobile Workers, among others. I believe that these endorsements and letters of support demonstrate that the diverse people and groups in my community consider me to be a fair and impartial judge.

In the 1970's, as a member of the Detroit Bar Association, I was a board member of Wayne County Neighborhood Legal Services, an organization that advocated civil rights for minorities and rendered free legal services to financially disadvantaged members of the Detroit metropolitan community. I also served on the board of many non-profit organizations, such as Operation Able, that assisted older workers and particularly elderly, displaced homemakers, in obtaining employment. I also volunteered one night per week, for years, as a lawyer for Common Ground, an organization that provided legal services for the economically disadvantaged. Further, as a member of the Roundtable of Christians and Jews and the National Conference of Christians and Jews, we worked with organizations to help employers and corporations throughout the Detroit metropolitan area adopt and promulgate affirmative action programs. Moreover, as a lawyer for many employers, I helped employers draft Equal Employment Opportunity policies and affirmative action programs.

In the mid-1980's, I wrote articles (which have been supplied to the Committee) that encouraged employers not to discriminate against people with AIDS and not to discriminate against gays, long before AIDS was a protected category under relevant handicap or disability discrimination laws and long before sexual preference was a protected category under discrimination laws.

In the late 1980's, I represented the University of Michigan in defending a policy that prohibited racist, sexist, and other discriminatory speech against students in the classroom. In 1991, I wrote an article for the *Wayne Law Review* (which I previously provided to the Committee), in which I urged that universities should not be silent in the face of verbal attacks against students on the basis of race, sex, ethnicity and religion. In this article, I asserted that

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universities should, in furtherance of their educational mission, take a stand to prohibit racist (including sexist and ethnocentric) behavior that inhibits educational opportunities for students. I concluded by saying that:

Such a policy should be held constitutional and if made part of a comprehensive program to discourage racism on campus, should serve the civil liberties and civil rights of all students.

In 1992, in an article in the Oakland County Bar Association magazine (also, provided to the Committee), I urged employers not to discriminate against people with disabilities or handicaps saying, "The fundamental public policy underlying both federal and Michigan statutes is that individuals with defined disabilities or handicaps should not be further impaired in their employment opportunities by discriminatory decisions that adversely affect the ability to earn a living. In other words, as with Title VII, the statutes require that the employment community make decisions regarding the disabled or handicapped on the basis of merit -- not on the basis of presumption, stereotypes or bias."

My regard for workers' rights and civil rights that was exhibited in my practice, in my writings and in my community service is also reflected in a fair and open-minded approach to all employment-related litigation.

For example, in *Adair v State of Michigan*, several hundred school districts sued the State of Michigan and argued that the State violated its Constitution by mandating additional services to students without proper funding. The Michigan Education Association sought to file an amicus brief and argued that it represented over 1,120 bargaining units and roughly 18,000 workers in these school districts that would be adversely affected by under funding. Though the majority refused to allow the MEA to file an amicus brief, I respectfully disagreed with the majority's decision to deny the MEA the right to file an amicus brief, which in my view unwisely precluded the MEA from presenting its view to the Court: Because the MEA represented 1,120 bargaining units of public school employees in the State of Michigan and tens of thousands of employees who have a vital interest in the outcome of this case, I was of the firm conviction that the MEA should have been granted the opportunity to present its views in this matter prior to the Court ruling on any dispositive motion. Also, in April of 2002, I dissented from our Court's summary dismissal of this case and, in the dissent, I argued that the matter should have been referred to a Special Master for review and recommendations as other major school finance litigation had done over the years. *Adair v State of Michigan*, 250 Mich App 691; 651 NW2d 393 (2002). This is an important case of major significance for all public schools and teachers in the State of Michigan.

Further, in *Burns v City of Detroit (On Remand)*, 253 Mich App 608; 660 NW2d 85 (2003), I sat on a panel of the Michigan Court of Appeals which upheld the constitutionality of Michigan's employment discrimination law in the face of a major free speech challenge. This was an extremely significant case that challenged the constitutionality of the "hostile environment" part of our sexual harassment laws on the grounds that the employees who engaged in sexually offensive ad hominem attacks on female workers were engaged in free speech. The *Burns* decision is important because it protects the interests of women in the workplace from outrageous sexual harassment and is one of many examples of why my record

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cannot be read as one that is hostile to employment discrimination suits or workers' rights. There are many other cases wherein I approved decisions on behalf of plaintiffs/workers in employment-related and employment discrimination litigation. *Rabedeau v General Motors Corp*, unpublished opinion per curiam of the Court of Appeals, issued September 18, 1998 (Docket No. 189347), rev'd in part on other grounds 461 Mich 957 (2000); *Hayes v Metro-Detroit Pizza*, unpublished opinion per curiam of the Court of Appeals, issued September 13, 1996 (Docket No. 180177); *Haynie v State*, unpublished opinion per curiam of the Court of Appeals, issued September 28, 2001 (Docket No. 221535), rev'd 468 Mich 302 (2003).

Moreover, I have ruled in cases upholding union workers' rights involving collective bargaining and the integrity of the collective bargaining agreement, *Michigan State Employees Ass'n v Civil Service Com'n*, 220 Mich App 220; 559 NW2d 65 (1997); upheld employment discrimination claims in the face of arguments of preemption by federal law, *Thomas v United Parcel Service*, 241 Mich App 171; 614 NW2d 707 (2000); and have also ruled on behalf of injured workers in workers compensation cases establishing rules of law that have a broad impact for employees throughout the State of Michigan. *Hill v Faircloth Mfg Co*, 245 Mich App 710; 630 NW2d 640 (2001).

In *Bertrand v City of Mackinac Island*, 256 Mich App 13; 662 NW2d 77 (2003), I upheld an injunction against the City of Mackinac Island in favor of a disabled plaintiff who desired to use a motorized scooter on the public streets despite a local ordinance (the prohibition against motorized vehicles had been in place since 1898).

I believe that a review of my record as a lawyer, member of the community, professor, writer and judge demonstrates that I approach issues in a fair-minded manner and that I respect the rule of law and apply the law impartially to all people who come before our bench.

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United States Senate

COMMITTEE ON THE JUDICIARY
 WASHINGTON, DC 20510-6275

June 6, 1989

The President
 The White House
 Washington, D.C. 20500

Dear Mr. President:

As you know, Senate procedure provides for the sending of a "blue slip" to each Senator in the state in which a person has been nominated to be a federal judge. There have been occasions, albeit quite infrequent, when home state Senators have returned a "negative" blue slip to express their opposition to the nomination. I am writing today to apprise you of the blue slip policy I recently announced, which will be followed by the Judiciary Committee for all nominations from this point forward.

By way of brief background, the practice of the Judiciary Committee with respect to a negative blue slip has varied historically. For many years -- under both Democratic and Republican chairmanships -- the return of a negative blue slip meant that the nomination simply would not be considered. That policy was modified under Senator Kennedy's chairmanship, so that the return of a negative blue slip would not preclude consideration of the nomination. A hearing and vote would be held, although the return of a negative blue slip would be given substantial weight.

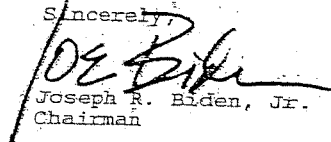
At the Judiciary Committee's business meeting on May 18, I articulated the blue slip policy that the committee will follow under my chairmanship. The return of a negative blue slip will be a significant factor to be weighed by the committee in its evaluation of a judicial nominee, but it will not preclude consideration of that nominee unless the Administration has not consulted with both home state Senators prior to submitting the nomination to the Senate. If such good faith consultation has not taken place, the Judiciary Committee will treat the return of a negative blue slip by a home state Senator as dispositive and the nominee will not be considered. In cases in which there are no home state Senators, such as Puerto Rico, the sitting governor should be consulted.

The President
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I have long emphasized the need for consultation, which, in my view, is part of the "advice" component of the Senate's advice and consent responsibility under the Constitution. I believe that the nominations process will function more effectively if consultation is taken seriously.

I look forward to continuing to work with you in the judicial nominations process.

Sincerely,



Joseph R. Biden, Jr.
Chairman

**Statement of
Sen. Richard J. Durbin
Nominations Hearing
July 30, 2003**

Today's hearing is historic in 2 respects. First, it is the only time in recent history that a nominee has been granted a hearing when both home-state Senators returned negative Blue Slips. When President Clinton was in office, a negative Blue Slip by even one Senator was the kiss of death. Clinton nominated 65 judges who either never received a hearing, never received a vote, or both.

And second, one of the 6th Circuit's current vacancies was created when President Clinton's nominee Helene White was blocked by this Committee after waiting over 4 years – longer than any appellate nominee in recent history.

As Senators Levin and Stabenow have told this Committee, they bent over backward to try and find a solution for a problem of the Republicans' making.

I agree with them that until such a fair and just compromise is reached, there should be no hearings for the 6th Circuit nominees.

The Republicans are ignoring the Blue Slip process today, but they honored the Blue Slip policy in the 1990s as if it were the gospel. Not once did a Clinton judicial nominee get confirmed if their Blue Slips were not returned. Here is what the Judiciary Committee Chair, Senator Hatch, said on the Senate Floor in October 1999:

“After a fair and thorough review in committee and after paying the deference to the President to obtain a vote on the floor, I

consider the position of a nominee's home State Senators. These Senators are in a unique position to evaluate whether a nominee instills the confidence in the people of a State necessary to be a successful Federal judge in that State. . . . Thus, there has developed a general custom and practice of my giving weight to the Senators from a nominee's home State. . . . When the President has not adequately consulted with the Senate, it takes longer to gain the consensus necessary to move the nominee. And when both home State Senators of a nominee oppose a nominee on the floor of the Senate, it is almost impossible to vote for the confirmation of that nominee."

Senator Hatch summed it all up in an interview he gave with NPR in 1997. He said: "The policy is that if a Senator returns a negative Blue Slip, that person's gonna be dead."

One final note – the debate over the Michigan nominees should not overshadow the fact that the Senate has confirmed the vast majority of President Bush's nominees. To date, we have confirmed 146 of his judicial appointments – 140 to Article III courts, and 6 to the Article I Court of Federal Claims. We have held up just 2 nominees.

So the score is 146-2.

Democrats are accused of being obstructionist, yet we have confirmed so many of President Bush's judges that we now have the lowest judicial vacancy rate in 13 years.

**STATEMENT BY SENATOR JOHN EDWARDS
ON THE NOMINATION OF
HENRY W. SAAD TO THE
SIXTH CIRCUIT COURT OF APPEALS
Wednesday, July 30, 2003**

Mr. Chairman, we are at a critical crossroads and can go one of two ways. We can either choose the path of working together to do what the American people sent us here to do. Or we can take the low road, engaging in a fight over the use of raw political power to drown out diverse views. Unfortunately, this unprecedented hearing - which is being held over the objections of *both* home state senators - is the latest in a series of detours toward the low road. We can and must do better than this.

We've taken the high road in the past and know that it gets us -- all of us - where we need to go. For example, less than two weeks ago the full Senate unanimously confirmed Allyson Duncan, an outstanding nominee from my state of North Carolina, to the Fourth Circuit Court of Appeals. Before Judge Duncan was nominated, President Bush reached out to both Senator Dole and me -- 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. The president honored the bipartisan consultative process and as a result, we got a consensus nominee.

That's why I can't understand why this committee is ignoring the views of our distinguished colleagues from Michigan and moving forward on this nominee over their strenuous objections. It just doesn't make any sense.

Does anyone really think that by unilaterally changing the rules, shutting Democrats out of the process, and forcing nominees through this Committee, we will get you better results than a fair consultation would achieve? If the consultative process can give us Allyson Duncan in North Carolina, it can give us outstanding consensus nominees in every other state.

But instead of welcoming cooperation, this committee has embarked on a mission to shut Democrats out of the process altogether. The clear violations of Rule IV and the attack on the filibuster rule were bad enough. But this latest action is beyond the pale.

I've heard some claim that these drastic measures are necessary to keep Democrats from "obstructing" President Bush's nominees. But we all know better. We have *not* obstructed the president's nominees. We have confirmed 140 of President Bush's judicial nominees. I have personally opposed only six in the last two and a half years.

I worked hard to get Allyson Duncan confirmed quickly. I did the same for Louise Flanagan, who was just confirmed to the U.S. District Court for the Eastern District of North Carolina and Brent McKnight, whom we passed out of Committee unanimously.

last week and who I hope will be confirmed by the full Senate this week. I'm sure each one of my Democratic colleagues would do the exact same thing for fine nominees like these, if their views are taken into consideration before the nominations are made.

And consultation means more than a call from the White House telling us that the President is about to announce a nomination. Consultation is not just a formality nor is it some antiquated senatorial privilege. It is a proactive, interactive, and enormously valuable process that helps the president find the best people for the federal bench. We can be very helpful in identifying and advising about potential nominees. We know these folks, they are our constituents. We know their friends, neighbors and colleagues, we are familiar with their reputations in the legal community. But even more important, consultation gives the American people a full voice in the nomination process. It makes no sense NOT to consult with us. Meaningful consultation in advance means smooth confirmations, as we saw with Allyson Duncan.

But I don't believe this is really about any concern about obstruction since anybody can see that we have been very cooperative – we've certainly been much fairer toward President Bush's nominees than the Republicans *ever* were toward President Clinton's nominees, who were treated disgracefully. I think this is about something much more troubling. The President wants to fill our federal courts with extreme, out-of-the-mainstream judges who will shift the courts so far to the right that it will take decades to recover the balance that truly reflects where the American people are. And, because Senate rules are structured to protect against this kind of power grab by one party or one branch of government, the majority now wants to change the rules so this President's doesn't have to be troubled with *any* dissent. Plain and simple.

In light of this history, I was enormously pleased that President Bush nominated Allyson Duncan and I was hopeful that her nomination and confirmation represented a new day for the nomination process.

Sadly, it appears that Judge Duncan's situation was the exception, not the rule. By ignoring the views of the home state senators in this instance, this committee is thwarting the process, making a mockery of the important constitutional notion of advice and consent. But you're not just ignoring the views of a couple of minority senators. You are turning your backs on the millions of people they represent, people who deserve to have their voices heard and should not be shut up and shut down because Republicans hold the narrowest of majorities in the Senate.

Mr. Chairman, you have said that you have not changed the blue slip policy, that it has always worked this way. But the facts contradict that argument. Not once has this committee EVER considered a nominee over the objection of both home state senators. In fact, until just a couple of months ago, Mr. Chairman, you never once allowed a hearing for any nominee over the objection of even one home state senator. But now, according to CRS, your new policy is that "only one of the home-state senators must return a positive blue slip before the Judiciary Committee will move forward with a nomination."

All we have to do is look at the blue slips themselves to see that this is what happened. Under a Democratic president, the blue slip you circulated said, in plain English "Please return this form as soon as possible to the nominations office in Dirksen G-66. *No further proceedings on this nominee will be scheduled until both blue slips have been returned by the nominee's home state senators.*"

No blue slip, no further proceedings. No conditions, no exceptions.

But now we have a new blue slip. It just says, "Please return this form as soon as possible to the Committee office."

There's an old saying that the law does not require a futile act. If the blue slip policy hasn't changed, why did the blue slip *form* change?

With all due respect, Mr. Chairman, you *have* changed the blue slip policy. You would never have scheduled this hearing under the policy you applied to President Clinton's nominees. What is happening here is wrong and it's short-sighted.

To anyone who doesn't believe this, I ask these questions: If the shoe were on the other foot, if this committee were controlled by Democrats, would you support the new policy you are now trying to impose? If the president were a Democrat, would you insist that every one of their nominees must have an up or down vote and that Republican senators need not have any real say in the process? I think we all know the answer to those questions. You would say "no way!" if the roles were reversed. And, if such a policy would be unacceptable under a Democratic majority and Democratic president, it is unacceptable now. This new rule permutation may play well for you now, but I'll guarantee you that the first time a Democratic president nominates a judge you don't like, you will be begging to go back to the old rule. Senate rules may not be written in stone, but they aren't written on an Etch-a-Sketch either.

Mr. Chairman, it is not too late to change course and get back on the right road. The road that led us to Allyson Duncan will also lead us to countless other highly qualified, diverse, consensus nominees throughout the country. I urge the President to reach out to us as we have reached out to him, to take this opportunity to find common ground in the search for excellence on the federal bench.

Senator Dianne Feinstein

Statement of Introduction for Larry Burns and Dana Sabraw,
Nominees for the Southern District of California
Judicial Nominations Hearing
226 Dirksen SOB, Wednesday, July 30th, 10:00 A.M.

Mr. Chairman. I am pleased to introduce Southern District of California nominees Larry Burns and Dana Sabraw.

These nominees will fill two of the five new Southern District judgeships created by the Department of Justice Reauthorization legislation enacted last year.

Their presence today reflects the successful conclusion of a multi-year campaign to address the tremendous caseload crisis in the Southern District of California.

I would like to again thank the Chairman and the Ranking Member for their support of my efforts to create these slots.

As the Committee is well-aware, nowhere are judges needed more than the Southern District of California. It is the most-overworked, understaffed court in the country.

Until these new judgeship were authorized, the Southern District of California had a weighted caseload average of approximately 1000 cases per judge. This is the highest in the country and more than twice the national average.

I hope we can confirm Judge Sabraw and Judge Burns as quickly as possible – because their district truly needs them.

I am pleased to report that both Judges come unanimously endorsed by California's bipartisan judicial selection committee. They are two more examples of how well the nominations process can work if Democrats and Republicans approach the issue collaboratively.

I would now briefly like to introduce the two nominees.

Judge Burns:

Judge Burns is joined at today's hearing by his wife Kristi, and his two sons Andrew, 17, and Adam, 15. Could you all stand up, so the committee can recognize you?

Judge Burns is a life-time California resident, who graduated from the University of San Diego law school in 1979.

The American Bar Association unanimously rated Judge Burns "**well qualified**", its highest rating. Since 1997, he has served as a magistrate in the Southern District, where he has garnered rave reviews. Notably, he received the judge of the Year award from the Consumer Trial Lawyers of San Diego.

Prior to his service on the bench, Judge Burns worked as an Assistant U.S. Attorney in the Southern District of California from 1985 to 1997, and as a Deputy District attorney from 1979 to 1985. **He has tried over 150 criminal cases to verdict.**

During his time in the U.S. Attorney's office, Judge Burns enjoyed one of the most distinguished careers of any U.S. Attorney in the Southern District's history. His career reflects increasing levels of responsibility including positions as Chief of the Violent Crimes Section and as Deputy U.S. Attorney (3rd ranking position in the office). Judge Burns received superior performance awards from the Department of Justice in 1989, 1990, 1991, and 1992.

He was also only the second prosecutor from San Diego to be inducted into the American Academy of Trial Lawyers, which is an invitational organization limited to the best trial lawyers on both the criminal and civil defense side in the United States.

His professional peers also give him the highest marks:

- **Peter Doody**, Vice President of the San Diego Defense Lawyers calls him *“the most effective mediator on the Federal bench.”*
- **Mario Conte**, Executive Director of Federal Defenders of San Diego, said of Judge Burns that *“as an advocate, [he] was the most formidable and talented opponent I ever faced.”*
- **Ron Cottingham**, President of the Deputy Sheriff’s Association of San Diego County, said Burns’ *“judgment is measured and fair, and he has demonstrated the ability to protect the interests of victims and the public while retaining sensitivity for the rights of those accused.”*
- **Mark Pettine**, President of the Deputy District Attorneys Association, says Judge Burns has *“always displayed the highest ethics of the profession.”*

Dana Sabraw:

I am equally pleased to introduce Southern District of California nominee, Dana Sabraw, to the Judiciary Committee.

Judge Sabraw is joined today by his wife Summer Sabraw Stephan (Steph - awn), his son Jack, aged 12, and his twin daughters, Stephanie and Kimberly, aged 10. I also understand that John Yang, President of the National Asian-Pacific American Bar Association (NAPABA) is in attendance as well. Could you all please rise so the Committee can recognize you?

Judge Sabraw is another exemplary candidate. Like Judge Burns, he received an unanimous **“well-qualified”** rating from the American Bar Association.

He earned his undergraduate degree from San Diego State University, and his law degree from the University of the Pacific in 1985. He was a member of the law review and

school honor society, graduating in the top 10 percent of his class.

After law school, he worked for the oldest law firm in Santa Barbara called Price, Postel & Parma. He then became associate and partner in the firm of Baker & McKenzie, one of the largest law firms in the world.

Judge Sabraw was appointed by California Governor Pete Wilson to Municipal Court in 1995 and then to the Superior Court in 1998. As a judge, he has tried nearly 200 cases, ranging from serious felonies to multi-party complex civil litigation.

Judge Sabraw has remained active in the community despite his daunting workload. He is a past President of the Oliver Wendell Holmes Jr., Inn of Court. He also has been on the Board of Directors of the Asian Business Association, Falcons Youth Baseball, the San Diego County Judges Association, and the Pan Asian Lawyers of San Diego.

In 1998, Judge Sabraw founded the Positive Impact Program. Through this program, judges, attorneys, and community volunteers have educated over 6,000 5th graders about the justice system.

He has the endorsement of **the Mayor of San Diego, Dick Murphy**, who says that Judge Magraw's "*skill, judgment and integrity would bring honor to the federal bench.*"

The San Diego Alliance for Pacific Islander Americans praise his "*judicial temperament and intelligence*" and describe him as "*an exemplary leader who personifies honesty, integrity, loyalty, and honor.*"

If appointed to the bench, Judge Magraw would be the first person of Asian Pacific Islander descent to serve on the Southern District court in its history.

I once again offer my strong support for both nominees, and request that the Committee quickly consider and approve their nominations. The Southern District desperately needs them.

Statement
United States Senate Committee on the Judiciary
Judicial Nominations
July 30, 2003

The Honorable Orrin Hatch
United States Senator, Utah

Statement of Chairman Senator Orrin G. Hatch

Before the United States Senate Committee on the Judiciary

Hearing on the Nomination of

Henry W. Saad

to be U.S. Circuit Judge for the Sixth Circuit

Today the Committee has the privilege of considering the nominations of seven outstanding lawyers to be federal judges. I commend President Bush for nominating each of them, and I look forward to their testimony.

The first nominee from whom we will hear is Henry W. Saad, who has been nominated for a position on the United States Court of Appeals for the Sixth Circuit. This is an historic appointment. Upon his confirmation, Judge Saad will become the first Arab-American to sit on the Sixth Circuit, which covers the states of Kentucky, Ohio, Tennessee, and Michigan.

It is long past time for this Committee to consider Judge Saad's nomination. He was first nominated to fill a federal judgeship in 1992, when the first President Bush nominated him for a seat on the United States District Court for the Eastern District of Michigan. The fact that he did not get a hearing may have worked to his benefit, since he was appointed in 1994 by Governor Engler to a seat on the Michigan Court of Appeals. He was elected to retain his seat in 1996 and again in 2002, receiving broad bipartisan support in each election.

On November 8, 2001, President Bush nominated Judge Saad for a seat on the Sixth Circuit, the position for which we are considering him today. When no action was taken on his nomination during the 107th Congress, President Bush renominated him to the Sixth Circuit on January 7, 2003. All told, Judge Saad has been nominated for a seat on the federal bench three separate times. It is high time this Committee considered his nomination.

Judge Saad's credentials for this position are impeccable. He graduated with distinction from Wayne State University in 1971 and magna cum laude from Wayne State University Law School in 1974. He then spent 20 years in the private practice of law with one of Michigan's leading firms, Dickinson, Wright, specializing in product liability, commercial litigation, employment law, labor law, school law and libel law. In addition, he has served as an Adjunct Professor at both the University of Detroit Mercy School of Law and at Wayne State University Law School.

Judge Saad is active in legal and community affairs. Some of the organizations he has been involved with include educational television, where he serves as a trustee, the American Heart Association, Mothers Against Drunk Driving, and other nonprofit organizations that serve the elderly and impaired. As a leader in the Arab-American community, Judge Saad has worked with a variety of organizations in promoting understanding and good relations throughout all ethnic, racial, and religious communities. He is an outstanding role model.

Judge Saad enjoys broad bipartisan support throughout his state, as evidenced by endorsements in his last election by the Michigan State AFL-CIO and the United Auto Workers of Michigan. He has received dozens of letters of support from leading political figures, fellow judges, law professors, private attorneys, the Michigan Chamber of Commerce, and a variety of other groups.

Let me quote from just a few of the letters received in support of Judge Saad's nomination. Maura D. Corrigan, Chief Justice of the Michigan Supreme Court, wrote: "Henry Saad has distinguished himself as a fair-minded and independent jurist who respects the rule of law, the independence of the judiciary, and the constitutional role of the judiciary in our tripartite form of government. ... Judge Saad is a public servant of exceptional intelligence and integrity. He has the respect of the bench and the bar." Other judges have written that he is "a hard-working and honorable individual" and that he is "an outstanding appellate jurist with a strong work ethic." Roman Gribbs, a lifelong Democrat and retired judge, wrote, "Henry Saad is a man of personal and professional integrity, is fair-minded, very conscientious and is above all, an outstanding jurist." Judge Saad has clearly earned the respect and admiration of his colleagues on the Michigan state court bench. His nomination deserves consideration by this Committee.

I hope that our consideration of Judge Saad's nomination is not overshadowed by collateral arguments about the propriety of holding this hearing. Let me make this absolutely clear: Holding this hearing today is entirely consistent with the longstanding blue slip policy of this Committee.

Since I first became chairman of this Committee in 1995, I have followed the same blue slip policy crafted by two former Democratic chairmen of this Committee, Senator Kennedy and Senator Biden.

Here's the Committee's blue slip policy as explained in a letter by former Chairman Joe Biden to the first President Bush dated June 6, 1989:

"For many years – under both Democratic and Republican chairmanships – the return of a negative blue slip meant that the nomination simply would not be considered. That policy was modified under Senator Kennedy's chairmanship, so that the return of a negative blue slip would not preclude consideration of the nomination. A hearing and vote would be held, although the return of a negative blue slip would be given substantial weight."

Chairman Biden continued to explain the blue slip policy that the Committee would follow under his chairmanship as follows: "The return of a negative blue slip will be a significant factor to be weighed by the committee in its evaluation of a judicial nominee, but it will not preclude consideration of that nominee unless the Administration has not consulted with both home state Senators prior to submitting the nomination to the Senate. If such good faith consultation has not taken place, the Judiciary Committee will treat the return of a negative blue slip by a home state Senator as dispositive and the nominee will not be considered."

I will submit a copy of this letter for the record.

In the case of Judge Saad, as with the other Michigan nominees, there is a clear record of consultation by the Bush White House with the Michigan Senators. White House records indicate that beginning on April 10, 2001, White House Counsel Alberto Gonzales began discussions with the offices of the Michigan senators regarding the vacancies on the Sixth Circuit and in the Eastern District of Michigan.

On May 17, 2001, Judge Gonzales provided the names of the individuals being considered for the Michigan vacancies, and invited both Senators to provide feedback. The record is clear that over the next year through subsequent telephone conversations, as well as written correspondence, there was extensive consultation and repeated invitations to the Michigan Senators to provide their input into the nomination process. In fact, I understand the White House offered to consider nominating both of the individuals championed by the Michigan Senators to federal judgeships.

Although President Bush ultimately did not nominate those individuals, the consultation requirement was undeniably fulfilled in the case of Judge Saad and the other Michigan nominees. I will continue to work with my friends and colleagues from Michigan – Senators Levin and Stabenow – the White House, Senator Leahy, and others on the Committee to reach an acceptable resolution in filling judicial vacancies in Michigan and the Sixth Circuit.

And while the Michigan senators' negative blue slips have been and will continue to be accorded substantial weight – indeed, I delayed scheduling a hearing on ANY of the Michigan nominees because of the Michigan senators' views – their negative blue slips are not dispositive under the Committee's Kennedy-Biden-Hatch blue slip policy.

Again, I fervently hope that the debate that I anticipate will occur on my decision to schedule this hearing will neither distract nor detract from the historic significance of Judge Saad's nomination, which was noted by Judge George Steeh III, a distinguished Arab-American appointed by President Clinton to the Eastern District of Michigan. He said, as quoted in the Detroit Free Press on November 9, 2001, that President Bush's nomination of Judge Saad in the wake of the September 11 attacks "conveys an important message to all the citizens and residents of this country that we embrace and welcome diversity and that we are extending the American dream to anyone who is prepared to work hard."

I could not agree more. Judge Saad is a fine jurist who will make an outstanding addition to the Sixth Circuit, and I look forward to hearing from him this morning.

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Statement of Chairman Orrin G. Hatch

Before the United States Senate Committee on the Judiciary

Hearing on the Nominations of

Larry Alan Burns to be U.S. District Judge, Southern District of California;

Glen E. Conrad to be U.S. District Judge, Western District of Virginia;

Henry F. Floyd to be U.S. District Judge, District of South Carolina;

Kim R. Gibson to be U.S. District Judge, Western District of Pennsylvania;

Michael W. Mosman to be U.S. District Judge, District of Oregon; and

Dana Makoto Sabraw to be U.S. District Judge, Southern District of California

In addition to Judge Saad, I am pleased to have six nominees for the federal trial court bench before the Committee today. We welcome each of you, your family members and your friends who might be present today.

The first of our six district court nominees is Larry Burns, who has been nominated for the Southern District of California. Judge Burns sits before us with 24 years of legal experience, including 6 years as a Deputy District Attorney in San Diego and 12 years as an Assistant U.S. Attorney. While at the U.S. Attorney's Office Judge Burns successfully prosecuted the first federal carjacking case in California and the first case under the Armed Career Criminal Act in the Southern District of California. For the past six years, Judge Burns has been serving as a magistrate judge in the same district to which he has been nominated.

Our nominee for the District of South Carolina, Henry Floyd, has enjoyed a stellar legal career on both sides of the bench. Judge Floyd served as a private practice litigator for nineteen years before assuming judicial duty on the Thirteenth Judicial Circuit of South Carolina in 1992. Judge Floyd also served for six years as a member of the South Carolina House of Representatives.

Glen Conrad is our nominee for the Western District of Virginia. Judge Conrad is no stranger to the Western District or its federal court. He has served there as a magistrate judge for 27 years, where he has handled a wide range of legal issues and proved beyond doubt his fitness for the federal bench. Judge Conrad has contributed to continuing legal education efforts over the course of his career, in addition to serving as a member of the Civil Justice Reform Act Advisory Committee, where he has helped recommend measures to improve the efficiency of the Western District court system and reduce the costs of civil litigation.

Our nominee for the Western District of Pennsylvania, Kim Richard Gibson, is another remarkable candidate. Judge Gibson began his legal career in the Judge Advocate General Office. Coupled with his JAG duties, Judge Gibson practiced law as a solo practitioner. During the same period, he served as the solicitor for various municipalities, a school district, and Somerset County, Pennsylvania. Within Somerset County, he served in several capacities consecutively: public defender, attorney for the county's youth and children's services, assistant solicitor, and solicitor. In 1997, he was elected to a judgeship for the Court of Common Pleas for the 16th Judicial District, where he currently serves.

Michael Mosman is our nominee for the District of Oregon. After graduating magna cum laude from the J. Reuben Clark Law School at Brigham Young University, Mr. Mosman clerked first for the Honorable Malcolm Wilkey of the D.C. Circuit, and then for Justice Lewis F. Powell of the Supreme Court. He then worked as an associate for the prestigious Portland firm of Miller, Nash, where he represented various natural resources and banking clients. As an Assistant U.S. Attorney and U.S. Attorney for the District of Oregon, Mr. Mosman has a wealth of litigation experience that will serve him well on the federal bench.

Dana Makoto Sabraw, the final district court nominee we will consider today, has been nominated for the Southern District of California. Judge Sabraw has ten years of private litigation experience in business and commercial litigation. He served as a Municipal Court Judge for three years before ascending to the San Diego Superior Court where he has served for the past five years. His combined 18 years of legal experience are further bolstered by his extensive pro bono community involvement, for which he has received numerous awards and accolades.

I am pleased to have these nominees before the Committee today, and I look forward to hearing from them.

###

U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693

VERMONT

**Opening Statement of Senator Patrick Leahy
Judicial Nominations Hearing
July 30, 2003**

Today is the first time that our Chairman will ever have convened a hearing for a judicial nominee with two negative blue slips returned to the Committee — the first time ever. I believe it may be the first time any Chairman and any Senate Judiciary Committee proceeded with a hearing on a judicial nominee over the objection of both home-state Senators. It is certainly the only time in the last 50 years, and I know it to be the only time during my 29 years in the Senate.

Today will be long remembered in the annals of the Senate and of our Committee for the precedent set by this hearing, for the hubris behind it, and for the brazenness of the double standard it sets. In collusion with a White House of the same party, the Senate's majority this year has launched a lengthening series of changed practices and broken rules on this Committee. The White House and some in the Senate have even suggested changing the Senate's rules to consolidate the White House's control over the judicial nominations process. Over the last three years, time and again the good faith efforts of Senate Democrats to repair the damage done to the judicial confirmation process over the previous six years has been met with nothing but more hubris — the kind of hubris that now is also having corrosive effects in the other body, as we have seen in recent weeks.

When Chairman Hatch chaired this Committee and we were considering the nominations of a Democratic President, one negative blue slip from one home-state Senator was enough to doom a nomination and prevent a hearing on that nomination. Indeed, among the more than 60 Clinton judicial nominees who this Committee did not consider there were several who were blocked in spite of the positive blue slips from both home-state Senators. So long as a Republican Senator had an objection, it appeared to be honored, whether that was Senator Helms objecting to an African-American nominee from Virginia or Senator Gorton objecting to nominees from California.

Earlier this year this Committee under this Chairman took the unprecedented action of proceeding to a hearing on the nomination of Carolyn Kuhl to the Ninth Circuit over the objection of Senator Boxer. When the senior Senator from California announced her opposition to the nomination, as well, at the beginning of a Judiciary business meeting, I suggested to the Chairman that further proceedings on that nomination ought to be carefully considered and that he had never proceeded on a nomination opposed by both home-state Senators once their opposition was known. Senator Feinstein has likewise reminded the Chairman of his statements in connection with the nomination of Ronnie White that had he known both home-state Senators were opposed, he would never have

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<http://leahy.senate.gov/>

1

proceeded. Nonetheless, in one in a continuing series of changes of practice and position this year, this Committee was required to proceed with the Kuhl nomination, and a party-line vote was the result.

Now this Committee is making a further profound change in its practices. When a Democratic President was doing the nominating and Republican Senators were objecting, a single objection from a single home-state Senator stalled the nomination. The Chairman cannot cite a single example of a single time that he went forward with a hearing over the objection or negative blue slip of a single Republican home-state Senator. Now that a Republican President is doing the nominating, no amount of objecting by Democratic Senators is sufficient. The Chairman overrode the objection of one home-state Senator with the Kuhl nomination. The Chairman overrides the objections of both home-state Senators with a Michigan nomination today.

What I doubt we will hear from the other side of the aisle is the plain and simple truth of the two policies the Chairman has followed. While it is true that various Chairmen of the Judiciary Committee have used the blue-slip in different ways, some to work unfairness, and others to attempt to remedy it, it is also true that each of those Chairmen was consistent in his application of his own policy -- that is, until now.

The double standards that the Republican majority has adopted obviously depend upon the occupant of the White House. This change in practice marks another example of their double standards. Last week, the Republican majority chose to abandon our historic practice of bipartisan investigation and to abandon the meaning and consistent practice of protecting minority rights through a longstanding Committee rule that required a member of the minority to vote to cut off debate in order to bring a matter to a vote. This week, the Committee takes another giant step in the direction of unprincipled partisanship through this hearing. Republican Senators will apparently stop at nothing in their efforts to aid and abet this White House, with a Republican President, in their efforts to politicize the federal judiciary.

Both of the Senators from Michigan are respected Members of the Senate. Both are fair-minded. Both of these home-state Senators have attempted to work with the White House to offer their advice, but their input was rejected. They have now suggested another way to end the impasse on judicial nominations for Michigan. Their suggestion that a bipartisan commission along the lines of a similar commission in Wisconsin is a good one. I am familiar with the work of bipartisan screening commissions. Vermont and its Republican, Democratic and Independent Senators have used such a commission for more than 25 years with great success. I commend the Senators representing Michigan for their constructive suggestion and for their good faith efforts to work with this White House in spite of the Administration's refusal to work with them.

So today this Committee is faced with a nomination from Michigan to the United States Court of Appeals for the Sixth Circuit opposed by both Michigan Senators. Republicans are picking another fight over judicial nominations.

In addition, if we have time, we may get to review the nominations of Michael Mosman for the District of Oregon, Judge Kim Gibson to the Western District of Pennsylvania, Glen Conrad to the Western District of Virginia, Judge Henry Floyd to the District of South Carolina and Magistrate Judge Larry Burns and Judge Dana Makoto Sabraw, both nominated to the Southern District of California. All of the District Court nominees before us today have the support of both of their home-state Senators. Two of these District Court nominations are the product of a bipartisan selection commission that has worked extremely well for the citizens of California. I congratulate the Senators from the State of California for their efforts to maintain this important mechanism that ensures experienced and consensus candidates are recommended for district court nominations. Had such a bipartisan commission been allowed to include California's circuit court nominees, the Senate might not be faced with the divisive nomination of Carolyn Kuhl.

Although President Bush promised on the campaign trail to be a uniter and not a divider, his practice once in office with respect to judicial nominees has been most divisive. Citing the remarks of a White House official, The Lansing State Journal recently reported, for example, that the President is simply not interested in compromise on the existing vacancies in the State of Michigan. It is unfortunate that the White House is not willing to work toward consensus with all Senators.

Under our Constitution, the Senate has an important role in the selection of our judiciary. The brilliant design of our Founding Fathers established that the first two branches of government would work together to equip the third branch to serve as an independent arbiter of justice. As columnist George Will wrote this past weekend, "A proper constitution distributes power among legislative, executive and judicial institutions so that the will of the majority can be measured, expressed in policy and, for the protection of minorities, somewhat limited." The structure of our Constitution and our own Senate rules of self-governance are designed to protect minority rights and to encourage consensus. Despite the razor-thin margin of recent elections, the majority party is not acting in a measured way but in complete disregard for the traditions of bipartisanship that are the hallmark of the Senate.

When there was a Democratic president in the White House, circuit court nominees were delayed and deferred, and vacancies on the Courts of Appeals more than doubled under Republican leadership from 16 in January 1995 to 33, when the Democratic majority took over part way through 2001.

Under Democratic leadership we held hearings on 20 circuit court nominees in 17 months. Indeed, while Republicans averaged 7 confirmations to the circuit court every 12 months, the Senate under Democratic leadership confirmed 17 in its 17 months in the majority with an historically uncooperative White House.

This year with a Republican in the White House, the Republican majority has shifted from the restrained pace it had said was required for Clinton nominees into overdrive for the most controversial of President Bush's nominees. We have already confirmed 10 circuit court judges in the first seven months of this year. By contrast, when a

Democratic president occupied the White House, the Republican majority averaged fewer than 4 circuit court confirmation by late July. This is another example of Republican Senators' double standards.

Without going through a lengthy discussion of blue slips and practices and policies let me illustrate the double standards Republicans use by asking that examples of two of this Chairman's blue slips be included in the record. These pieces of blue paper are what the Chairman uses to solicit the opinion of home-state Senators about the President's nominees. Simply stated, the blue slip practice is the enforcement mechanism for the consultation that the Constitution calls for. When President Clinton was in office, here was the blue slip sent to Senators, asking their consent. On the face of the form is written the following:

"Please return this form as soon as possible to the nominations office. No further proceedings on this nominee will be scheduled until both blue slips have been returned by the nominee's home state senators."

When President Bush began his term, and Senator Hatch took over the chairmanship of this Committee with a Republican President he changed his blue slip to drop the assurance he had always provided Republican Senators who had an objection and eliminated the statement of his consistent practice in the past by striking the sentence that provided: "No further proceedings on this nominee will be scheduled until both blue slips have been returned by the nominee's home state senators." Of course what that had meant in practice in the years 1995-2000 was that no hearings would take place on a judicial nominee unless both home-state Senators returned blue slips indicating that they did not object to proceeding with a hearing on the nominee.

I know Republican partisans hate being reminded of the double standards by which they operated when asked to consider so many of President Clinton's nominees. I know that they would rather exist in a state of "confirmation amnesia," but that is not fair and not right. The blue slip policy in effect, and enforced strictly, by the Chairman during the Clinton Administration operated as an absolute bar to the consideration of any nominee to any court unless both home-state Senators had returned positive blue slips. No time limit was set, no reason had to be articulated. Remember, before I became Chairman in June of 2001, all of these decisions were being made in secret. Blue slips were not public, and they were allowed to operate as an anonymous hold on otherwise qualified nominees.

A few examples of the operation of the blue slip, and how it was scrupulously honored by the Committee during the Clinton Presidency are worth remembering. Remember, in the 106th Congress alone, more than half of President Clinton's circuit court nominees were defeated through the operation of the blue slip or other such partisan obstruction.

Perhaps the most vivid is the story of the United States Court of Appeals for the Fourth Circuit, where Senator Helms was permitted by this Committee to resist President Clinton's nominees for six years. Judge James Beaty, was first nominated to the Fourth

Circuit from North Carolina by President Clinton in 1995, but no action was taken on his nomination in 1995, 1996, 1997, or 1998. Another Fourth Circuit nominee from North Carolina, Rich Leonard, was nominated in 1995, but no action was taken on his nomination either in 1995 or 1996. Judge James Wynn, again a North Carolina nominee to the Fourth Circuit, sent to the Senate by President Clinton in 1999, sat without action in 1999, 2000, and early 2001 until President Bush withdrew his nomination.

A similar tale exists in connection with the Fifth Circuit where Enrique Moreno, Jorge Rangel and Alston Johnson were nominated but never included in a confirmation hearing.

Perhaps the best documented abuses are those that stopped the nominations of Judge Helene White, Kathleen McCree Lewis and Professor Kent Markus to the Sixth Circuit. Judge White and Ms. Lewis were themselves Michigan nominees. Republicans in the Senate prevented consideration of any of President Clinton's nominees to the Sixth Circuit for years. When I became Chairman in 2001, I ended that impasse. Under Democratic leadership, in spite of the abuses by Republicans, we proceeded to consider and confirm two nominees to the Sixth Circuit among the 17 circuit judges we were able to confirm in our 17 months. We have proceeded to confirm two more this year. The vacancies that once plagued the Sixth Circuit have been cut in half. Where Republican obstruction had led to eight vacancies on that 16-judge court, Democratic cooperation has allowed four of those vacancies to be filled over the past few months. The Sixth Circuit currently has more judges and fewer vacancies than it has had in years.

Those of us who were involved in this process in the years 1995-2000 know that the Clinton White House bent over backwards to work with Republican Senators and seek their advice on appointments to both circuit and district court vacancies. There were many times when the White House made nominations at the direct suggestion of Republican Senators, and there are judges sitting today on the Ninth Circuit and the Fourth Circuit, in the district courts in Arizona, Utah, Mississippi, and many other places only because the recommendations and demands of Republican Senators were honored.

In contrast, since the beginning of its time in the White House, this Bush Administration has sought to overturn traditions of bipartisan nominating commissions and to run roughshod over the advice of Democratic Senators. They attempted to change the exemplary systems in Wisconsin, Washington, and Florida that had worked so well for so many years. They ignored the protests of Senators like Barbara Boxer who not only objected to the nominee proposed by the White House, but who, in an attempt to reach a true compromise, also suggested Republican alternatives. And today, despite the best efforts of the well-respected Senators from Michigan, who have proposed a bipartisan commission similar to their sister state of Wisconsin, the Administration has flatly rejected any sort of compromise.

Although I object to this reversal of position for partisan gain and the unprecedented hearing being held, I will participate in the questioning of Judge Saad, whose nomination raises concerns. His judicial opinions against whistleblowers and other victims of

discrimination, as well as his opinions on cases involving workers rights give me great concern about his willingness to follow the law.

With respect to the other nominees, I look forward to their testimony and to Committee and Senate consideration of their nominations in due course. I am sorry that they were chosen to be appended to what will be a long and difficult hearing.

#####

CARL LEVIN
MICHIGAN



United States Senate

WASHINGTON, DC 20510-2202

February 22, 1999

Honorable Orrin Hatch, Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Honorable Spencer Abraham
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Orrin and Spence:

Helene White has been renominated to the Sixth Circuit Court of Appeals. She was nominated early in the last Congress but did not receive a hearing from the Judiciary Committee.

I would hope that such a hearing can be arranged for this highly respected State Court of Appeals Judge. I believe that fundamental fairness suggests that she receive an early hearing.

Best wishes.

Sincerely,

Carl Levin

cl/hg

CARL LEVIN
MICHIGAN

United States Senate

WASHINGTON, DC 20510

November 18, 1999

The Honorable Orrin Hatch, Chairman
United States Senate
Washington, D.C. 20510

The Honorable Spencer Abraham
United States Senate
Washington, D.C. 20510

Dear Orrin and Spence:

I hope that hearings will be scheduled now, for January, for the four exceptional judicial nominees from Michigan. One of the Michigan nominees for the Sixth Circuit U.S. Court of Appeals, Helene White, has been waiting for a hearing for nearly three years, longer than any of the other pending nominees. In addition, there are two nominees, Marianne Battani and David Lawson, who were nominated to the U.S. District Court for the Eastern District of Michigan on August 5, 1999 and Kathleen McCree Lewis, who was nominated on September 16, 1999 to the Sixth Circuit U.S. Court of Appeals.

The confirmation of each of these nominees is essential to the administration of justice in Michigan and the Sixth Circuit, and is also essential for fundamental fairness to these nominees.

Sincerely,


Carl Levin

CL/vrc

cc: The Honorable Patrick Leahy, Ranking Member

CARL LEVIN
MICHIGAN

United States Senate
WASHINGTON, DC 20510

February 22, 2000

Honorable Orrin Hatch, Chairman
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Honorable Spencer Abraham
United States Senate
Washington, D.C. 20510

Dear Orrin and Spence:

A personal plea: four Michigan judicial nominees are awaiting hearings at the Judiciary Committee. Fairness to them and to Michigan requires prompt hearings.

The nominees to the Sixth Circuit U.S. Court of Appeals from Michigan are Helene White and Kathleen McCree Lewis. The nominees to the U.S. District Court for the Eastern District of Michigan are Marianne Battani and David Lawson.

Sincerely,



Carl Levin

CL\irc

CARL LEVIN
MICHIGAN

United States Senate
WASHINGTON, DC 20510

April 13, 2000

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

*Orrin - this is
what I spoke
to you about on the
floor. The blue slips
are in. Please
schedule these
two for 4/25.
Thanks*

Dear Orrin:

There are now three Michigan vacancies on the Sixth Circuit U.S. Court of Appeals. One of the three candidates is Helene White, who was nominated more than three years ago, and is still awaiting a hearing. Kathleen McCree Lewis has been pending at the Committee awaiting a hearing for almost seven months. The third candidate for a Michigan seat has not yet been nominated but presumably will be at any time.

In a March 20, 2000 letter to you, Judge Merritt, Chief Judge of the U.S. Court of Appeals for the Sixth Circuit, notes that these vacancies have hampered the Court's ability to complete the public's business. The Court, in his words, is deteriorating rapidly due to the high number of judicial vacancies.

In addition to the concern about the number of vacancies on the Court, I am deeply concerned about the length of time these nominees have been pending at the Committee. To keep them in limbo for so long is unfair to these nominees, the state of Michigan, and the country.

The blue slips have now been returned for White and Lewis. I would appreciate your scheduling these nominees for the April 25th Judiciary Committee confirmation hearing. Thank you for your consideration.

Sincerely

Carl
Carl Levin

Thanks

[5/2/2000]

CARL LEVIN
MICHIGANUnited States Senate
WASHINGTON, DC 20510

5/2

Dear Ann -

I would greatly appreciate
your scheduling the following
two Michigan candidates for
the 6th Circuit at your
next hearing.

Both their blue slips
were returned.

Both have waited a
long time.

The 6th Circuit has
too many vacancies & too long.

Helene White

Kathleen McCree Lewis

Thanks

Carl

CARL LEVIN
MICHIGAN

United States Senate

WASHINGTON, DC 20510

September 12, 2000

The Honorable Trent Lott
Majority Leader
United States Senate
S-230
Washington, D.C. 20510

Dear Trent:

Thank you for meeting with me last week to discuss the vacancy crisis on the U.S. Court of Appeals for the Sixth Circuit which serves Michigan and three other states.

As we discussed then and on numerous other occasions, Judge Helene White and Kathleen McCree Lewis – two nominees from Michigan for seats on the Sixth Circuit Court of Appeals – have been pending in the Senate without even a hearing for an unconscionable amount of time. The nomination of Judge White has been pending without Senate action for three years and eight months, and the nomination of Kathleen McCree Lewis has been pending without action for a year. In the history of the Senate, no nominee has waited longer than Judge White for a Senate confirmation hearing.

The biographies of Judge White and Ms. McCree Lewis reveal talented, hardworking, and well-qualified nominees. They are both known and respected for their records, which show them to be thoughtful and independent. In 1982 Judge White was elected to the Wayne County Circuit Court, where she served for nearly ten years as a trial judge handling a wide range of civil and criminal cases. In 1992 she was elected to the Michigan Court of Appeals and has served on that court since January 1993. Judge White has also served on the Board of Directors of Michigan Legal Services and the Board of Governors of the American Jewish Committee.

Kathleen McCree Lewis is a distinguished appellate practitioner at the Detroit law firm of Dykema Gossett PLLC. She is known for her public service contributions to the bench and bar. She is the daughter of the late Wade McCree, a well respected judge on the Sixth Circuit Court of Appeals and a former Solicitor General of the United States. Ms. McCree Lewis would be the first African American woman to serve on the Sixth Circuit Court of Appeals.

The current vacancies on the Sixth Circuit Court of Appeals have created a backlog of cases that are seriously hampering the court's ability to conduct the people's business. Judge Gilbert Merritt, former Chief Judge of the U.S. Court of Appeals for the Sixth Circuit who is still active on the court, wrote in a March 20, 2000, letter to Senate Judiciary Committee Chairman Orrin Hatch that the court is "rapidly deteriorating" due to the high number of vacancies, leaving the court "understaffed and unable to properly carry out their responsibilities." Judge Merritt added:

"Our Court should not be treated in this fashion. The public's business should not be treated this way. The litigants in the federal courts should not be treated in this way. The remaining judges on a court should not be treated this way."

The nominees from Michigan are women of integrity and fairness. They are unquestionably qualified for the federal bench but have been stalled in this Senate for an unconscionable amount of time without any stated reason. If Senators have concerns about something in the records of these Michigan candidates - and I haven't heard anything to that effect - they should air those concerns in a committee hearing and let the Senate vote. But it is unfair to Michigan and to all those who depend on this court to keep these judicial nominees in limbo any longer. A committee hearing and a Senate vote on their nominations is essential to the administration of justice for the citizens of the Sixth Circuit.

I am determined to do all I can to ensure that the people of Michigan and the Sixth Circuit nominees from Michigan are treated fairly by the Senate. Following our meeting of last Friday, when I informed you about my intent to object to unanimous consent requests for committees to meet more than two hours after the Senate convenes each day, I have given much thought to your words and I also read your comments on the Senate floor. I have taken them to heart. To facilitate further efforts you might make to obtain hearings for these two nominees, I have decided to hold off until next Monday objecting to Senate Committee meetings and hearings being held after the first two hours of each day's session.

Enclosed are materials for your consideration (the Judge Merritt letter, a letter from 14 Michigan Bar Presidents, and 5 newspaper editorials) which are in addition to the Detroit News article and editorial I left with you last week.

Thanks.

Sincerely,



Carl Levin

Enclosures

cc: Honorable Tom Daschle
Honorable Orrin Hatch
Honorable Pat Leahy

AB MONDAY, OCTOBER 24, 1994

The State

A KNIGHT-RIDDER NEWSPAPER

Frank McCormas, PUBLISHER

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G. Kent Krell, Katherine W. Gray, ASSOCIATE EDITORS Paula Ellis, MANAGING EDITOR

Not all bench performances measure up to benchmark

Genuine change in the way South Carolina chooses judges remains a major oversight in the reform movement that has revitalized the other two branches of government.

We were reminded of that when the S.C. Bar released its latest score card on judges who are either up for re-election next year or who have completed one-half of their current six-year terms.

The survey rates the jurists on a scale of 1 to 4, with 4 being excellent; 3, good; 2, satisfactory; and 1, deficient. The evaluations are based on four criteria: legal skills; impartiality; judicial temperament; industry and promptness.

Scoring the poorest among circuit judges were Daniel Martin of Charleston and Rodney Peoples of Barnwell. Martin was judged low in all areas, Peoples in the areas of impartiality and temperament.

Most damning was the opinion of 74 percent of lawyers responding to the Bar survey who said Judge Martin was deficient in knowledge and application of the law. Among the family court judges, Abigail Rogers of Columbia also fared poorly, but not by so much: more than 40 percent said she was deficient in legal skills; another 29 percent conceded only a satisfactory rating.

Judge Martin, who like Judge Rogers is black, said he "wouldn't be surprised" if racism were a factor in his low scores.

That response smacks of a red herring. It begs the real issue of his legal competence and personal demeanor in running a courtroom. And it rings hollow in the face of the high marks in all categories for another African-American cited in the survey, Family Court Judge Ruben Gray of Sumter.

In addition to Judge Gray, the South Carolina bench is served with distinction by other blacks: Ernest Finney, soon-to-be chief justice of the state Supreme Court; Appeals Court Judge Jasper Cureton; and Circuit Judge Joseph A. Wilson have earned broad respect in the legal community.

Overall, the Bar report suggests justice is well-served by the jurists included in the survey. The vast majority scored either a 3 or 4 in all four categories. Salutes are due Circuit Judges Thomas W. Cooper of Manning, Henry F. Floyd of Pickens and John C. Hayes III of Rock Hill who received especially high marks.

The survey speaks only to the qualifications and integrity — or lack thereof — of individuals. It does not directly address the cozy process by which judges are elected in this state. As long as the General Assembly remains sole arbiter over who is chosen, members and former members will continue to have the inside track on judgeships. Politics, not judicial competence, will remain the dominant factor in the final decision.

For years, the Bar has pushed hard but gotten nowhere with its campaign for merit selection of judges. Most proposals involve an independent commission, composed of lawyers and laymen, to examine candidates and make recommendations to the General Assembly or the governor. The legislators have improved their screening procedures but refused to go as far as the Bar wanted.

The latest survey may not jar the lawmakers into the systemic reform that is sought by the Bar and is so badly needed. At the very least, it should force them to scrutinize more avidly the records of judges and, where dictated, reject their bids for re-election.

Bar survey rates Richland family court judge highest

The state Bar's highest rating of Family Court judges went to one of the newest members of the Richland County bench.

Judge Bruce Williams, who took office in 1998, was ranked highest by other Family Court judges who evaluated on their knowledge of the law, their temperament and fairness as part of the Bar's annual survey of judges.

Other Family Court judges who were ranked on their performance. The Bar received 1,708 responses from judges who were to face re-election in 1998.

"All of us need input on how we're doing our jobs," said Henry B. Smythe Jr., president of the Bar. The survey, released this week, compared ratings by the State's highest of all the Family Court judges who have been evaluated.

Nearly 66 percent of those who filled out surveys ranked Williams as the best judge. More than 70 percent said he was impartial and courteous to lawyers and those they represent.

One of the judges facing opposition in next year's elections, Circuit Judge Thomas Hughton Jr., ranked 29th on the list of other circuit judges.

Hughton is being challenged by Greenwood attorney John R. McCarty III.

The other judge who faces opposition, Family Court Judge Robert Curston, ranked 24th to last in The State's analysis, which condenses scores from 15 questions into a composite score for each judge.

Nearly a quarter of those who filled out the surveys said Hughton's knowledge of the law is deficient. Hughton is being challenged by Nera B. Lewis of Union.

BY MICHELLE DAVIS
and CHRISTI ROSS SCOPPE
Staff Writers

Most judges rated by Bar members got high marks. But two scored low in several areas.

"I don't go around asking certain people to endorse me or kissing their rings for their approval. They come to me with some ashine stuff and I want me to do it and I say no."

DANNY MARTIN, CIRCUIT JUDGE

Justice Jean Tait won the seat this year.

Of Supreme Court justices who have been rated, Justice James Moore, evaluated this year, ranked highest, scoring top marks in knowledge of the law and impartiality.

Thomas Cooper, of the 13d Circuit, ranked first and was the most highly rated this year among S.C. circuit court judges.

Of appeals court judges who have been evaluated, Ralph King ranked highest in The State's comparison of judges.

Michelle R. Davis covers the state judicial system. She can be reached at 771-8464. Christi Ross Scoppe covers legal news and opinion. In her spare time, she writes for the state's 771-8571 or e-mail her at scoppe@cylinder.ole.com.

The State used responses to the S.C. Bar's survey to rank judges. Responses to questions on judges' skills - "1" is excellent; "7" is poor. "X" means not evaluated.

Some rankings come from past surveys and some judges have not been evaluated.

Rank	Name	Score	Rank	Name	Score
1	James E. Moore	3.61	34	Hicks Howell	2.67
2	Ken Tosi	3.44	35	Rainey Peoples	2.56
3	John Walker	3.09	36	Danny Martin	2.25
Supreme Court					
1	John King Anderson	3.52			
2	Talbert Coody	3.43			
3	Hicks Howell	3.43			
4	James Curston	3.36			
5	Koye Hearn	3.27			
6	Carol Connor	3.27			
Circuit Court					
1	Bruce Williams	3.63			
2	Roger Henderson	3.63			
3	Went Saunders	3.62			
4	Adam Myers	3.62			
5	John Rucker	3.55			
6	Franklin McChain	3.55			
7	James Lee Merdock Jr.	3.54			
8	Walter Brown	3.54			
9	Andy Rogers	3.53			
10	Walter R. Jr.	3.53			
11	Thomas Foster	3.52			
12	Wright Tuneville	3.51			
13	Mickey Webson	3.51			
14	James Fowles	3.5			
15	James Johnson	3.49			
16	David Sawyer	3.49			
17	Grand Smoak	3.48			
18	Ruben Gray	3.48			
19	Mary Duhan	3.48			
20	Wayne Couch	3.47			
21	Robert Curston	3.45			
22	Arthur Murchison	3.45			
23	Robert Curston	3.45			
24	F. Sigfus Andrews	3.44			
25	Harold Johnson	3.43			
26	Henry Fowles	3.41			
27	Walter Rucker	3.41			
28	Walter Rucker Jr.	3.39			
29	Stuart Hill	3.39			
30	Lee Abbot	3.31			
31	Frank Rogers	3.31			
32	Lisa Kruen	3.28			
33	Greg Sloom	3.26			
34	Walter R. Jr.	3.26			
35	Paul Garfield	3.23			
36	Ann Johnson	3.18			
37	Berry Mobley	3.13			
38	Richard Chiswring	3.05			
39	John Fowles	2.95			
40	Patricia Sikes	2.94			
41	John Flynn	2.89			
42	Andy Sutherland	2.66			

SOURCE: The State's comparison of judges of S.C. Bar ratings of judges.



STATEMENT TO THE JUDICIARY COMMITTEE ON THE NOMINATION OF GLEN
CONRAD TO SERVE AS A JUDGE FOR THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF VIRGINIA
JULY 30, 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. Today, I am pleased to introduce Glen Conrad, who has been nominated to serve as a judge on the United States District Court for the Western District of Virginia. Glen is joined today by his wife Mary Ann.

Judge Conrad has been nominated to fill the vacancy of Judge James Turk who began his service on this court in 1972 and recently took senior status. After Judge Turk informed Senator Allen and I about his intent to take senior status, Senator Allen and I began our search to find the most qualified and well-respected individual to fill Judge Turk's seat on the bench. During that process one name repeatedly was brought up - that name was Glen Conrad.

After interviewing Judge Conrad personally, Senator Allen and I were pleased to send this fine nominee's name to President Bush for consideration. President Bush promptly thereafter nominated Judge Conrad on April 28, 2003.

Judge Conrad's background makes him highly qualified for this position, and I strongly support his nomination. His experience with the law is extensive. His temperament, integrity and judicial demeanor is consistent with the highest standards of the Federal Bench and Bar.

After graduating from the Marshall Wythe School of Law at the College of William and Mary, Mr. Conrad served as a probation officer in the Western District of Virginia. A little more than a year later, Mr. Conrad was selected to serve as a United States Magistrate Judge in the Western District. And, for the last 27 years, Judge Conrad has served as a Magistrate Judge in the Western District.

During his over a quarter of a century as a Magistrate Judge in the Western District of Virginia, Judge Conrad has earned a stellar reputation. From the many letters that I have received in support of his nomination, there is unanimity in describing Judge Conrad as intelligent, courteous, hard working and having an excellent judicial temperament.

I am confident that Judge Conrad will continue his service on the Western District of Virginia bench consistent with this reputation.

I look forward to this Committee reporting his nomination favorably and look forward to Senate confirmation.

NOMINATIONS OF CARLOS T. BEA, OF CALIFORNIA, NOMINEE TO BE CIRCUIT JUDGE FOR THE NINTH CIRCUIT; MARCIA A. CRONE, OF TEXAS, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TEXAS; PHILLIP S. FIGA, OF COLORADO, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF COLORADO; WILLIAM Q. HAYES, OF CALIFORNIA, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF CALIFORNIA; JOHN A. HOUSTON, OF CALIFORNIA, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF CALIFORNIA; ROBERT CLIVE JONES, OF NEVADA, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF NEVADA; AND RONALD A. WHITE, OF OKLAHOMA, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF OKLAHOMA

WEDNESDAY, SEPTEMBER 3, 2003

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

The Committee met, pursuant to notice, at 10:06 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch and Cornyn.

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

Chairman HATCH. Today, the Committee has the privilege of considering the nominations of seven outstanding lawyers to be federal judges. I want to commend President Bush for nominating each of them, and I look forward to hearing each of your testimonies.

Since there are so many Senators here this morning waiting to speak on behalf of the nominees, I will keep my opening remarks quite brief.

The first nominee from whom we will hear is Judge Carlos Bea, our nominee for the Ninth Circuit Court of Appeals. He has had an exemplary legal career in California as a successful attorney and as an impartial jurist. During his 32-year career in private practice, Judge Bea appeared in court on a regular basis and was the lead counsel in approximately 125 jury trials.

In 1990, Judge Bea was appointed and subsequently elected to his current position as a judge on the San Francisco Superior Court. He was re-elected, without opposition, to the superior court in 1996 and again in 2002. In this capacity, he has literally handled thousands of cases and presided over hundreds of trials. President George H.W. Bush nominated Judge Bea for a federal district judgeship in 1991; however, no hearing was held on his nomination during the 102nd Congress. His long wait for a fair and well-deserved hearing before the Senate Judiciary Committee ends today.

As with other nominees to the Ninth Circuit that this Committee has considered this year, Judge Bea's colleagues overwhelmingly support his confirmation to the Federal appellate bench. Thirty-seven judges of the San Francisco Superior Court, who serve with Judge Bea and work with him every day, sent a letter to the Committee praising his skills as a jurist. They wrote, "Judge Bea has distinguished himself in presiding over ground-breaking complex litigation in the insurance coverage and environmental areas, as well as handling many asbestos trials." The letter also recognizes his service on many of the superior court's management committees and the fact that before becoming one of their colleagues, "Judge Bea was considered by the legal community to be one of the finest civil trial lawyers in San Francisco." So I will submit a copy of this letter for the record.

In addition to his Superior Court colleagues, California Supreme Court Justice Carlos Moreno, San Francisco Mayor Willie Brown, and representatives of the San Francisco Bay Area's Hispanic community have all written to this Committee expressing enthusiastic support for the judge and for his confirmation to the Ninth Circuit. I hope my colleagues will join me in supporting him as well, and I look forward to hearing his testimony this morning.

In addition to Judge Bea, the Committee will hear testimony from six well-qualified district court nominees. In the interest of time, I will reserve my remarks on the district court nominees until after we have heard from Judge Bea.

We will turn to the Ranking Member upon arrival.

We have a number of Senators who care to testify on behalf of various nominees this morning, and we will start with Hon. Don Nickles from Oklahoma.

PRESENTATION OF RONALD A. WHITE, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF OKLAHOMA, BY HON. DON NICKLES, A U.S. SENATOR FROM OKLAHOMA

Senator NICKLES. Mr. Chairman, thank you very much, and I want to thank you for scheduling this hearing on several outstanding nominees to the Federal bench, one of whom is from my home State of Oklahoma, a friend of mine, Ron White. His wife, Lisa, is with him as well. He is well qualified to be a Federal district judge. Senator Inhofe and I both interviewed several people

and came to the conclusion that Ron White would be an outstanding addition to the Federal court.

He has been an attorney with the very prestigious Tulsa firm of Hall Estill for 17 years. He has been a partner since 1992. His practice has covered a variety of areas. As an attorney, 60 percent of his court appearances were in Federal court. He is admitted to practice before the Oklahoma Supreme Court, the U.S. Court of Appeals for the Tenth Circuit, and the U.S. District Court in the Northern, Eastern, and Western Districts of Oklahoma.

He received his law degree from the University of Oklahoma in 1986. He has been involved in numerous organizations and charities in the State. He has received the ABA rating unanimously qualified. I am very happy to strongly support his nomination and urge the Senate to move quickly with his confirmation.

I thank you, Mr. Chairman, for allowing me to speak, and I have a Budget Committee hearing so I need to run. So thank you, Mr. Chairman.

Chairman HATCH. We understand. Thank you so much, Senator Nickles. We appreciate you taking the time to be here.

If I can, I will just go across the table, so we will go to you, Senator Ensign. We were going to have Senator Reid. When he arrives, we will talk to him.

PRESENTATION OF ROBERT CLIVE JONES, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF NEVADA, BY HON. JOHN ENSIGN, A U.S. SENATOR FROM THE STATE OF NEVADA

Senator ENSIGN. Thank you, Mr. Chairman. It is an honor for me to be here today before the Senate Judiciary Committee to introduce a great bankruptcy judge from my State of Nevada, Mr. Robert Clive Jones. Since taking the bench, Judge Jones has heard thousands of bankruptcy cases. He has overseen many of Nevada's most complex and controversial bankruptcy cases since taking the bench and has done so with great care, fairness, and prudence.

He is respected and admired throughout the legal community for his belief and his dedication to the rule of law. Judge Jones has served on the Federal bankruptcy bench in my home State of Nevada for the past two decades.

Additionally, in 1986, Judge Jones was appointed to the Bankruptcy Appellate Panel, U.S. Court of Appeals of the Ninth Circuit, and has served with distinction as a member of this panel for consecutive 7-year terms. This is the only active Bankruptcy Appellate Panel in the United States, and it has settled substantial questions of bankruptcy law and interpretation of the bankruptcy statute.

Judge Jones also served on the U.S. Conference Committee on Codes and Conduct from 1989 to 1995. This Committee is responsible for drafting, adoption, and interpretation of codes of conduct for U.S. judges and judicial employees.

A long-time resident of Nevada, Judge Jones began his education not in my State of Nevada but in the Chairman's home State of Utah at Brigham Young University. He later earned his law degree at the University of California, graduating in the Order of the Coif, indicating a place in the top 10 percent of his graduating class.

Upon graduation, Judge Jones served as a clerk for Judge J. Clifford Wallace on the U.S. Ninth Circuit Court of Appeals and then began a career in Nevada in the private sector until his appointment to the bankruptcy court in 1983.

Judge Jones' extensive legal background and his commitment to public service make him an excellent choice as U.S. District Court Judge for the District of Nevada.

Mr. Chairman, I know his wife, Anita Michele, is proud of him for being here today, and the State of Nevada is proud of Robert and all that he represents for our great State. And I appreciate you expeditiously considering his nomination, and I join with Senator Reid in a bipartisan way to forward his nomination today.

Chairman HATCH. Well, thank you so much, Senator Ensign. We appreciate you being here, and we will allow you to go. We know how busy all of you are.

We will turn to Senator Boxer at this point, and we look forward to hearing your testimony, Senator.

PRESENTATION OF CARLOS T. BEA, NOMINEE TO BE CIRCUIT JUDGE FOR THE NINTH CIRCUIT, WILLIAM Q. HAYES, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF CALIFORNIA, AND JOHN A. HOUSTON, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF CALIFORNIA, BY HON. BARBARA BOXER, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator BOXER. Chairman Hatch, thank you very much. I am very pleased today to introduce to you Judge Carlos Bea, the nominee for the Ninth Circuit Court of Appeals. And I wonder if it would be all right with you if we could ask his family to stand, and perhaps he could just give you the names of this beautiful family he has brought with him.

Chairman HATCH. Of course it would be. That is quite a family. I really enjoyed meeting them.

Senator BOXER. Judge, do you want to introduce them?

Judge BEA. Yes, Senator Boxer, Chairman Hatch. My wife and the mother of these four strapping lads: Dominic, Nicholas, Alex, and Sebastian. And my father-in-law, Albert Reed Rubey; and over here, Reed Rubey, Jr., and his two children, Dina and Henry. And we are also honored to have from San Francisco Richard Wall, my law school classmate, and from New York, Lou Guzzo of the New York Fire Department, a veteran of 9/11.

Chairman HATCH. Well, you know how to influence this Committee, is all I can say.

[Laughter.]

Chairman HATCH. We are delighted to have all of you here. It is wonderful to have you here, and we look forward to getting this hearing over and getting Judge Bea confirmed.

Senator BOXER. Thank you so much. I will be brief and ask unanimous consent that my entire statement be placed in the record.

Chairman HATCH. Without objection, we will put all entire statements in the record.

Senator BOXER. Mr. Chairman, I am also very proud to introduce two nominees for the Southern District Court of California: William

Hayes and John Houston. And if it is okay with you, I know they would be proud to show you their families as well. So let's start with Mr. Hayes, and we will go to John.

Mr. HAYES. I would like to introduce my wife, Julia Jauregui; my father, Robert Hayes; and my mother, Margaret Hayes.

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

Senator BOXER. Mr. Houston?

Judge HOUSTON. Good morning, Senator.

Chairman HATCH. Good morning.

Judge HOUSTON. It is my pleasure to introduce my wife, Charlotte Houston; my son, John Allen; my mother and father, John and Charlotte Houston; my sister, Vera; my sister, Rita; my sister, Sharon; my niece, Michelle; my niece, Alex; my brother-in-law, Dr. Rev. Tommie London; my sister-in-law, Shandra Houston; and my brother, Gregory Houston.

Chairman HATCH. Well, we are delighted to have all of you here. We appreciate you coming and supporting the nominee.

Senator BOXER. Mr. Chairman, I know you can tell the excitement in the room because these nominees have worked so hard and so long, and these are good nominees.

Let me just begin by discussing for a moment Judge Bea. He was born in Spain and has lived in California for most of his life. He received both his undergraduate and law degrees from Stanford, and he has an impressive legal career. And you have cited some of the things, so I won't cite all of them, but just to say that he practiced law in San Francisco for 30 years before he was appointed a judge on the San Francisco Superior Court. And he was elected to the seat in 1990, has been re-elected twice by the voters of San Francisco. He has taught at Stanford and Hastings Law School.

I will just skip over a lot of his qualifications and just read you a couple of comments.

One reporter wrote of him, "He has received high marks for his specialty, handling complex civil litigation disputes."

Another reporter, who spoke with numerous lawyers, wrote that, "He is at his best handling monstrous size cases that pose difficult legal questions presented by sophisticated lawyers."

So this just gives you a sense of this man because this is obviously a difficult time in our society, and we are going to have complex issues, and they are going to be gray areas. So I think that this is an excellent choice.

Judge Bea has been endorsed by the San Francisco La Raza Lawyers Association, the Mexican American Legal Defense Fund, and I am very happy that they have lent their support.

Turning to the district court nominees, I want to comment on the process that brought these two wonderful people to you today. In a truly bipartisan fashion, Mr. Chairman, the White House Counsel, Senator Feinstein, and I have worked together to create a judicial advisory Committee for our State, one in each Federal judicial district in the State. And I have to tell you, it is balanced. Each Committee has a membership of six: three appointed by the White House, three appointed jointly by Senator Feinstein and myself.

Each member's vote counts equally, and a majority is necessary for the recommendation. So both Judge Houston and Mr. Hayes

were reviewed by the Southern District Committee and strongly recommended for these positions. Judge Houston had extensive experience as a Federal prosecutor before his appointment as a magistrate judge. Mr. Hayes has extensive civil experience as a private attorney before becoming a Federal prosecutor, rising to the position of head of the Criminal Division in the U.S. Attorney's Office.

So, again, I am just so pleased to be here today, and I am delighted with these three nominees, and I do hope that we will see them move forward quickly.

Thank you very much.

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

Chairman HATCH. Thank you, Senator Boxer. Thanks for taking the time.

Mr. KARIM-PANAHI. Mr. Chairman, my name is Parviz Karim-Panahi from Southern California. This Senator and Senator Feinstein, and previous Senators, they have created the most corrupt judiciary, Federal judiciary in Southern California—

Chairman HATCH. We are going to have to ask—we are going to have to ask for order. We are going to have to ask for order. The Committee will be—

Mr. KARIM-PANAHI. I wanted to put this matter before you—

Chairman HATCH. We understand but—

Mr. KARIM-PANAHI. —and before this Judiciary Committee to know what is happening. I have nothing to do against these nominees, but what has been happening in the past 20 years or 30 years, I am talking about not—

Chairman HATCH. All right, sir. I have got to ask you to refrain because we are going to continue this hearing, and we appreciate your strong feeling—we appreciate your strong feelings, but we are not going to allow disruptions in the Committee.

We are going to turn to our Minority Whip next and accommodate Senator Reid, and then we will finish with the two of you, and then we will come back to Senator Hutchison.

PRESENTATION ROBERT CLIVE JONES, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF NEVADA, BY HON. HARRY REID, A U.S. SENATOR FROM THE STATE OF NEVADA

Senator REID. Mr. Chairman, I appreciate it very much. I left Senator Specter on the floor, and he asked if I could get back as quickly as I can.

Chairman HATCH. We understand.

Senator REID. So I very much appreciate this.

Mr. Chairman, Clive Jones has a great pedigree. He is a fine man. He graduated from an outstanding law school, UCLA. He has worked in the private sector where he was a partner in a law firm for a number of years, prior to being chosen to be a United States bankruptcy judge in the District of Nevada. He has worked in this capacity now for more than two decades. He has served as a chief judge for about 10 years. He was appointed to the only active Bankruptcy Appellate Panel in the country for more than a dozen years.

Mr. Chairman, I notice that our esteemed nominee is joined today by his family. I have to remark that my admiration for this

nominee is matched by my admiration for his wife. She comes from a wonderful family. Her father, a man by the name of Wayne Bunker, has had an outstanding career in accounting in the State of Nevada and in public service generally. I had the good fortune of being able to attend a meeting with him this past Sunday. Of course, recognizing the modest and really the humble man that he is, he would never, ever talk to me about the fact that his son-in-law was about to get this most important job. And I knew that his pride was significant in the fact that his son-in-law may be able to be a judge and of the caliber that he feels he deserves, that is, a Federal district judge.

So I have the greatest respect for Clive, and also for his wife, Michele, who is an outstanding musician. They have four wonderful children. Their youngest boy is in law and accounting. He is a grandfather. He has worked in the scouting program. Both Clive and Michele can sing. They have been part of a very important choral group in Las Vegas called the Bluth Chorale, which is well known in Nevada and parts of the Western United States.

So, Mr. Chairman, it is with pleasure that I recommend to this Committee Clive Jones to be a Federal district judge.

Chairman HATCH. Well, thank you so much, Senator. We appreciate your testimony. We know you are busy, and we appreciate you taking the time from your busy schedule.

Senator Campbell, we will go to you.

PRESENTATION OF PHILLIP S. FIGA, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF COLORADO, BY HON. BEN NIGHTHORSE CAMPBELL, A U.S. SENATOR FROM THE STATE OF COLORADO

Senator CAMPBELL. Thank you, Mr. Chairman. Senator Allard, my colleague, and I have appeared before you a number of times to recommend nominees for different positions. I have to say that I am very pleased to be here to support one. But you know as well as I do, Mr. Chairman, that the process by which a person gets nominated to the bench is not easy, and to get here in front of your Committee, they have to have pretty widespread support. And without that broad support, they simply couldn't be this far. Clearly, in democracy there is opportunity for anyone, any American, to dissent. But these nominations are not by accident, and I happen to think that all seven of these judicial nominees, including the appeals court nominee for the Ninth Circuit, are good nominees.

It is my pleasure to be here with my friend and colleague, Senator Allard, to introduce Phillip Figa, a good Coloradan, a well-qualified jurist, and I hope you will agree he is well suited to serve as a Federal judge. I would like to abbreviate my statement and have included in the record with your permission a full statement and an editorial by the Denver Post in support of Mr. Figa.

Chairman HATCH. Without objection.

Senator CAMPBELL. And as the other nominees have done, I wonder if I could ask Mr. Figa to introduce his wife, Candace, and his son, Ben, and daughter, Elizabeth.

Mr. FIGA. Mr. Chairman, this is my wife, Candy; my son, Ben; and my daughter, Lizzie.

Chairman HATCH. We are delighted to have all of you here and look forward to—

Senator CAMPBELL. I notice the other nominees also have their families here, Mr. Chairman, and I think that if you are going to serve in public office anywhere, whether it is an elected position or an appointed position, without the support of your family we couldn't be doing these things. And I am sure the same applies to our judges, and I am just delighted to see their families are supporting them.

Mr. Chairman, Phillip Figa is a well-qualified person to serve on the U.S. District Court for Colorado. He has been a Coloradan for 27 years and is an excellent jurist who will be a terrific addition to the Federal bench.

Since Phillip Figa earned his juris doctor degree at Cornell University Law School back in 1993, both his career and personal life have been one of service. He has accomplished a well-balanced combination of service in the local community in addition to his achievements in private practice. He is the president of Burns, Figa and Will, a well-respected law firm located in Englewood, Colorado. He is a fellow with the International Society of Barristers, whose membership includes about 600 outstanding trial lawyers dedicated to excellence and integrity and advocacy.

He has led the Colorado Bar Association, including service through everything as the head of the bar association's Ethics Committee. He has also served as the Chairman of the board of the Anti-Defamation League's Mountain States Region. He enjoys very broad bipartisan support, including former Senator and State Senate Majority Leader Mike Feeley's endorsement; also the endorsement of Colorado's Supreme Court Justice Gregory Hobbs, who predicted he would have a very fine view of the judiciary as the third branch of Government and a person who calls them as he sees them.

Former President of the Colorado Bar Association Miles Cortez said of Phillip, "Figa's extensive Federal court experience will likely enable him to hit the ground running."

John Sadwith, the Executive Director of the Colorado Trial Lawyers Association, said of Phil, "He is a calm, even-tempered person. I can't think of anything but superlatives."

On Friday, August 22nd, the Denver Post editorial, which I asked to be included in the record, declared that Phillip Figa's nomination was a win-win judicial pick. It states him as a good, solid choice, well-qualified lawyer with a moderate reputation. It goes on to describe him as a highly competent and smart lawyer who is known for being fair and thoughtful, and I think in this position that is a sentence that we all would try to adhere to, being fair and thoughtful.

So I just wanted to add my personal endorsement. I think he will be a very, very fine nominee, and I look forward to the early action of this Committee on confirming him.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you so much, Senator.

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

Chairman HATCH. Senator Allard, if I could ask you to defer to Senator Hutchison who has an appropriations meeting she has to get to.

Senator ALLARD. Mr. Chairman, I would be glad to defer to Senator Hutchison.

Chairman HATCH. We will come right back to you. Senator Hutchison?

PRESENTATION OF MARCIA A. CRONE, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TEXAS, BY HON. KAY BAILEY HUTCHISON, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator HUTCHISON. Thank you so much, Mr. Chairman, and thank you, Senator Allard. I appreciate that so much.

I am pleased to recommend the nomination of Judge Marcia Crone. Judge Crone is a Dallas native, and she is joined today by her husband, Seth, and I would like to ask him to stand. Their two children are not with them, I understand, but, Seth, thank you for being here.

Chairman HATCH. Happy to have you.

Senator HUTCHISON. Judge Crone is currently serving as a U.S. magistrate judge in the Southern District of Texas, having been there in that capacity since 1992.

Mr. Chairman, I have never given you a nominee with higher academic credentials than Judge Crone. She was valedictorian of her high school, one of the largest and best high schools in our State. She was a National Merit Scholar. She had a 4.0 at the University of Texas, was a member of Phi Beta Kappa, and graduated first in her class from the University of Houston Law School.

Chairman HATCH. That is pretty impressive, is all I can say.

Senator HUTCHISON. I have to say, if she ever made a B, I guess she would have thought that was failure in life.

Chairman HATCH. That makes you wonder how balanced she is. [Laughter.]

Senator HUTCHISON. But in addition to her academic credentials, she also has a wonderful professional achievement record. She has served in private practice with a great law firm in Houston, Andrews and Kurth, and became a partner there until her appointment to the Federal bench. And as a U.S. magistrate, she has presided over a number of civil and criminal cases. In her 10 years there, she has authored 700 opinions, over 130 of which are published.

She has also been active in the community, in the bar association; she serves on the board of directors of the Garland Walker Inn of Court, is a mentor to Houston area law students, and is active in her church.

She meets the high standards to which we hold Federal judges, and we had a number of appellants for this seat in East Texas, a newly created seat that will be in Beaumont. And she just came out on top of our Committee process, which, as you know, is a bipartisan process.

So thank you, Mr. Chairman, for allowing me to introduce her. I couldn't recommend anyone more highly. And thank you for your courtesies.

Chairman HATCH. Thank you, Senator Hutchison. We appreciate you taking time to be here. I am sure we will move ahead.

Senator Allard?

PRESENTATION OF PHILLIP S. FIGA, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF COLORADO, BY HON. WAYNE ALLARD, A U.S. SENATOR FROM THE STATE OF COLORADO

Senator ALLARD. Mr. Chairman, thank you for allowing me the opportunity to be here this morning and for holding this timely hearing. It is a great honor to introduce Phil Figa to the Judiciary Committee. He is up for consideration for the vacancy in the Colorado Federal District Court caused by the recruitment of Judge Match. Judge Match's departure leaves big shoes to be filled. However, by the end of this hearing on Phil Figa, I am sure you will understand why I believe that Phil is the right person for the job. I also want to thank Senator Campbell, my colleague and family member from Colorado, for working with me to help expeditiously fill this important vacancy.

Before I go any further, I, too, would like to welcome Phil's wife, Candy, and his children, Ben and Lizzie, to the hearing. Candy, Ben, and Lizzie, I bet you know—or, Mr. Chairman, I think it is an unusual opportunity for the children to be present when their father has to show up for a job interview. And so it is a privilege, I think, to be able to see something like that happen with a member of your family.

Earlier this summer, I had the privilege of having Ben Figa serve in my office as an intern, and through this experience, I learned to admire the strong family values so apparent in every member of the Figa family. I have warned Phil that the nomination process is a grueling one, but I know his family's continued support and encouragement will provide the strength and energy he needs in order to stand steadfast in pursuit of this most worthy endeavor.

Senator Campbell has already mentioned the strong and outstanding academic and community credentials that Phil will bring to the bench. And I would second that he has a keen intellect, an ideal temperament, and that is no secret. In a letter dated June 10, 2003, Senator Campbell and I wrote to the Committee, "Mr. Figa is highly qualified and will ably serve the people of the United States. . . (he) is well known throughout the Colorado legal community for his credibility, integrity, hard work, and firm grasp of the law." His supporters hail from across party lines and include a variety of elected officials from all levels of local, State, and Federal Governments.

Phil and Candace have been married for 30 years. They met in college at Northwestern, where he received his degree in 1973, Phi Beta Kappa. Candy then put Phil through law school at Cornell, paying for his education by teaching English in a nearby New York high school. Twenty-7 years ago, they moved to Boulder, Colorado, where Phil began a clerkship at Sherman and Howard. Eventually, the firm hired him as a full-time attorney. While in Boulder, Candy decided to attend law school at the University of Colorado, and I had to chuckle when he mentioned that between college and law school, they had 10 years of study dates together.

At Sherman and Howard, Phil worked with his mentor, Hugh Burns, a Rhodes Scholar and well-known attorney. Eventually, the two would form their own law firm, known today as Burns, Figa and Will. And I would just mention that Figa just doesn't stand for Phil. Candy also works at the firm. Together, they have partnered for 25 years in the successful and prestigious practice.

I had a good laugh when Phil said his "work relationship" with his wife may have been aided by the fact that they were on different floors and they had to communicate via e-mail. My wife and I have worked together in the same business, too, and we never had that luxury.

Mr. Chairman, when considering the nominee, please know that Mr. Figa has my unequivocal support. The confirmation of his nomination by the Senate will prove to be a great service to the people of the United States. As I have mentioned, his nomination has enjoyed broad and bipartisan support from judges, colleagues, and both Democrat and Republican Members of Congress. Of the many gracious comments I have heard about Phil, none characterizes him better than a statement made by the managing partner at his firm. He said, "He is a gracious fellow. . . a very likable person. He's a gentlemanly character."

Phil is well grounded in family values. He enjoys the Colorado outdoors. And according to criminal defense lawyer Gary Lozow, Figa is a "thoughtful and bright person who will make a good Federal judge and is mindful of the awesomeness of taking on that responsibility." The Rocky Mountain News noted that he has achieved a rare balance in his life of family, law practice, and community activities. The Denver Post has endorsed him, and since my colleague has already asked that his endorsement be made a part of the record, I will not make that request.

Mr. Chairman, Phil Figa will serve our Nation with the utmost of respect to our country and our Constitution, and for this, I urge you to forward his nomination to the Senate with a favorable recommendation. He is, in a word, ideal for the Federal bench.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator. We sure appreciate you coming, and I am sure that Mr. Figa does as well. So thank you for taking time out of your busy schedule.

Without objection, we will put the statement of the Democrat leader on the Committee, Senator Leahy, and also the statement of Dianne Feinstein in the record before the testimony of the Senators who have appeared.

Chairman HATCH. Well, Judge Bea, why don't we start with you? If you will raise your right hand, do you swear that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge BEA. I do, sir.

Chairman HATCH. Thank you so much.

Judge Bea, would you care to make an opening statement? We are delighted to have your family with you. What a good-looking family you have. In fact, every judgeship nominee here has a wonderful family.

**STATEMENT OF CARLOS T. BEA, NOMINEE TO BE CIRCUIT
JUDGE FOR THE NINTH CIRCUIT**

Judge BEA. Thank you, Senator. I think I will let my family be my opening statement, and we will proceed right to the questioning.

Chairman HATCH. Well, thank you so much. That is good. I think that is a pretty good opening statement.

[The biographical information follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)
CARLOS Tiburcio Pedro Andrés de la Santísima Trinidad BEA.
2. Address: List current place of residence and office address(es).
Residence: San Francisco, California
Office: 400 McAllister St., #518, San Francisco, California, 94102
3. Date and place of birth.
April 18, 1934, San Sebastian, Spain
4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).
Louise Phare Rubey, now Louise Bea
Homemaker
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.
1955-1958: Stanford Law School. J.D. 1958.
1951-1956: Stanford University. B.A. 1956.
1950-1951: Menlo Junior College, Menlo Park, CA.
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.
1990- present: Judge of the San Francisco Superior Court, 400 McAllister St., San Francisco, California. 94102.
1993-present: Managing Partner, Mount Olive Storage, 1500 Crestfield Drive, Duarte, CA 91010.

1966-1999: Sr. Vice President and Acting CEO, Board of Directors, American Pacific Pipe Company, Rancho Cucamonga, CA. The company was liquidated in 1999 and has no present address. The last address was 12167 Arrow Route Highway, Rancho Cucamonga, California 91729.

1975-1990: President and principal of Carlos Bea, a law corporation, San Francisco. The law firm was liquidated in 1990 and has no present address. The last address was 151 Union Street, San Francisco, California 94133.

1974-1980: Board of Directors, Hastings College of Advocacy

1959-1993: Vice President, Board of Directors, Radco Construction, Inc., San Marino, California. Company was liquidated in 1993 and has no present address. Last address was 12167 Arrow Route Highway, Rancho Cucamonga, California, 91729.

1959-1975: Associate and partner of Dunne, Phelps & Mills, a San Francisco law firm, which has since dissolved. The last address was 601 California Street, San Francisco, California 94108.

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.

Scholarship Award, Menlo Junior College (1951).

Pacific Coast Conference Intercollegiate Association Honor Roll (1953-1956) (best student athletes).

Participant's Medal, XV Olympiad, Helsinki, Finland (Member, Cuban basketball team).

Block S, Stanford Varsity Basketball, 1953-6.

Moot Court Finals Award, Stanford Law School (1957).

State Bar of California, State Moot Court Finals, Best Brief 1958.

Knight's Cross Order of Isabela la Católica, 1980 (King of Spain).

State Bar Governor's Award for *pro bono* services, 1989.

Knight's Emblem, Civil Order of Merit, Limited Number, 1993. (King of Spain.)

La Raza Lawyers of San Francisco, *Distinguished Judge Award*, 2002.

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

1959-1975: National Association of Railroad Trial Lawyers. Member of National Rehabilitation Committee (1971-1975).

1959-1990: American Bar Association, member of Litigation Section.

1974-1989: Hastings College of the Law, College of Advocacy, teaching staff; 1985-1988, Member of Board of Directors/Advisory Group.

1975-1990: California Trial Lawyers Association.

1977-present: American Board of Trial Advocates (ABOTA). Rank : Advocate, then Diplomat (1997). This is an elective association.

1996-present: California Judicial Council Advisory Committee on Fairness and Access in the Courts, various subcommittees including Ethnic & Gender fairness, Disability Rights, Educational.

1999-2001: California Judges Association-Rutter Group, panels for Bench and Bar on real estate, employment and disability issues.

1990-present: Various committees of the Superior Court, including the Executive, Budget & Finance, Alternate Dispute Resolution (ADR) Committee, Construction Committee, and Grand Jury-Civil.

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 don't belong to any organizations that lobby before public bodies.

Dolphin Swimming and Boating Club, San Francisco, 1979-present. (Wife is also a member). The club formerly was limited to males, but changed its policy before my wife and I joined.

The Olympic Club, San Francisco. (Wife is also a member) 1960-1990; 1991-present. The club formerly was limited to males. I resigned when I was appointed to the Bench in 1990. I

rejoined when women were admitted in 1991. My wife Louise joined at that time. Before 1991, I attempted to get the all-male policy changed by soliciting members' support for a change of policy.

St. Vincent de Paul, San Francisco. Parish and Advisory Councils (1990-1996); Auxiliary (sports sponsors).

Northern California Olympians 2000-present.

Unión Benéfica Española de California, 1959-approximately 1990.

The Federalist Society, San Francisco. 1990-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.

1959-1990: Supreme Court of California and lower courts.

1959-1990: State Bar of California. (Upon appointment to the Bench, members lose active membership, to be renewed on retirement or leaving office.)

1959-present: U.S. Court of Appeals for the Ninth Circuit.

1960-present: U.S. District Court, Northern District California.

1984-present: U. S. District Court, Central District California.

1985-present: U.S. District Court, District of Nevada.

1988-present: U. S. Court of Federal Claims, Washington DC

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.

"Nuts and Bolts of Rehabilitation" *The Chronicle*, National Association of Railroad Trial Lawyers, 1973. (Out of print)

"An Update on Rehabilitation", *Ibid.* 1974. (Out of print)

"Rehabilitation in Discovery and Trial: A Defense Tool to Mitigate Damages" *For the Defense*, Defense Research Institute (1976).

"Novel DUI Defense: Alcoholic Withdrawal Seizure" *Forum*, California Attorneys for Criminal Justice, November–December 1981.

"Enforce Your Settlement without Waiving Claims Not Included and without Becoming an Insurer." *Forum of California Trial Lawyers Association*, January, 1986.

"Inspection of Documents, Things and Places", Chapter 9, *Civil Discovery Practice in California, Second*, University of California-Continuing Education of the Bar series, 1988. (Available in libraries, not copied).

"Letter from Havana" S.F. Chronicle, This World, April 1, 1990.

"Under Discussion", Arguments and Facts International, Fall, 1990.

"Direct Examination of Experts and Other Witnesses Requires Finesse", *Daily Journal* (San Francisco & Los Angeles), April 23, 2002.

"Be Wary of Writings Your Opponent Offers to Jurors" *Daily Journal* (San Francisco & Los Angeles), June 11, 2002.

I have given numerous speeches over the years, but have maintained no records relating to the majority of such speeches. Those that I do recall are below:

Speech to University of San Francisco Law School La Raza students, March 14, 2003.

Annual speech to the Rutter-San Francisco Bar Association panel on Developments in the Law of Insurance, 1999-present (January 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 November 20, 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 - present: Judge of the San Francisco Superior Court.

Elected: 1990, 1996, and 2002

Jurisdiction: The Superior Court of California is a court of general jurisdiction, unlimited

as to amount in controversy (civil) and all types of crimes.

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 written

Aguilar v. Avis Rent-a-Car System, Inc., No. 948597 (San Francisco Super. Ct. 1995), aff'd mem., 33 Cal. Rptr.2d 599 (Cal. Ct. App. 1996), aff'd, 87 Cal. Rptr. 2s 132 (Cal. 1999); *cert. denied* 120 S. Ct. 2029 (2000).

This case involved an action for damages for racial harassment based on slurs directed at Hispanic workers by their supervisor and employer. Five of the seventeen plaintiffs recovered jury verdicts. They subsequently sought a prohibitory permanent injunction to restrain the defendants from further similar racial and ethnic taunts. I granted an injunction to prevent recurrent torts. The defendants appealed on the grounds that the injunction constituted a content-based prior restraint, which violated the First Amendment to the U.S. Constitution.

The Court of Appeal, 1st District, affirmed the judgment, but ordered the injunction modified to be limited to the workplace only. The Supreme Court of California affirmed the judgment of the Court of Appeal. The United States Supreme Court denied *certiorari*, with one Justice dissenting.

Kransco v. American Empire Insurance Co., No 939603 (San Francisco Super. Ct. 1996). aff'd, 63 Cal. Rptr. 2d 532 (Cal. Ct. App. 1997), aff'd 2 P.3d. 1 (Cal. 2000).

This case involved an action for damages suffered through the defendant insurer's bad faith refusal to settle a third-party action within the policy limits. The jury verdict was for plaintiff insured, but damages were reduced 90% due to the insured's "comparative" bad faith conduct in withholding Discovery during the pretrial phase of the underlying action.

I granted the plaintiff's motion for Judgment Notwithstanding the Verdict, restoring the full amount of the verdict without reduction for "comparative" bad faith. My ruling was based on the ground that insured's Discovery conduct was known to all parties BEFORE the third-party plaintiff offered to settle within the policy limits and played no causative role in the refusal of the defendant insurer to settle within the policy limits.

The Court of Appeal, 1st District, affirmed the judgment, adding as grounds that an insured's bad faith can never be a defense in an action for an insurer's bad faith. The Supreme Court of California affirmed the judgment of the Court of Appeal.

Ceridian v. Franchise Tax Board, No. 983377 (San Francisco Super. 1999), aff'd 102 Cal. Rptr. 2d 611 (Cal. Ct. App. 2000).

This case involved an action for the refund of California income tax paid on dividend income from an insurance subsidiary. The tax was imposed on the plaintiff, an insurance company not based in California, but not upon other similarly situated insurance companies with home offices in California. I held that Revenue & Taxation Code, Section 24410, violated the U.S. Constitution's Commerce Clause (U.S. Const. Art I, § 8, cl. 3) because it placed an undue burden on interstate commerce.

The judgment was affirmed by the Court of Appeal, First District.

This case established that the state cannot tax the dividend income from the California based subsidiary corporations to out-of-state parent corporations differently than to corporations with home offices in California. The California scheme for adjustment of such differences was inadequate to correct the discrimination. It also established that repayment to the taxpayer of the taxes paid was the proper remedy, rather than some future credits against taxes.

Ventresca v. City and County of San Francisco, No. 313-931 (San Francisco Super. Ct., 2000).

Plaintiffs sought a Writ of Mandate to require that a proposal for the formation of a Municipal Utility District in San Francisco be placed on the ballot for the November 2000 elections. I *denied* the issuance of the writ on the ground that California law required the prior approval of the Utility District's formation by a local agency formation commission before the measure could be placed on the ballot.

Robertson v. Asbestos Defendants, No. 304715, (San Francisco Superior Ct. 2001). (Decision on Defendants' Motion for Judgment based upon Statute of Limitations (Section 340.2 CCP)).

The defendants brought a motion for judgment of dismissal in the bifurcated trial of an asbestos case upon the grounds that the statute of limitations (Section 340.2 CCP) barred an action filed more than one year after the plaintiff was disabled because of an asbestos-related disease. The plaintiff previously had become disabled because of *asbestosis* and had filed an earlier action. At that time, he had no symptoms of *lung cancer*, nor any reason to believe that he would develop lung cancer. That action was

settled.

Some years later, the plaintiff developed symptoms of and was diagnosed with lung cancer. It was as to this second action that the statute of limitations was interposed.

I denied the defendant's motion to dismiss on the ground that Section 340.2 CCP could not be interpreted to bar a second action for injuries unknown and unknowable at the time of the earlier disability. I interpreted the statute of limitations to allow commencement of an action within one year of discovery, or reason to know of, a separate and independent disease.

Coalition for Healthy and Humane Business Practices v. Never Ending Quails, et al., No. 986-059 (San Francisco Super. Ct. 1998).

An animal rights group brought this action to prohibit certain local markets from keeping, selling or butchering live animals for human food consumption, on the grounds that the defendants' practices constituted unlawful trade practices. Plaintiffs alleged that the defendant markets violated Penal Code and Health and Safety Code sections with respect to the treatment of animals and selling of food where animals are kept (Business & Professions Code 17200, et seq.). Following a bench trial, I found the defendants' treatment of food animals was within the statutory limits, and that the keeping of animals and food on the same premises did not violate health codes.

Lindstrom v. Stone, No. 170 609, (San Francisco Super. Ct., Limited Jurisdiction 2000) Appellate Division, Appellate No. 5215 (January 2001).

This case involved the interpretation of the Rent Control Ordinance of San Francisco. The specific issue was whether a garage rented together with an apartment was part of the "dwelling unit" from which a tenant could not be evicted without just cause. I interpreted the Rent Control Ordinance to include the garage as part of the "dwelling unit."

This case's significance is limited to San Francisco as it is a case of first impression as to the interpretation of the Rent Ordinance. I interpreted the Ordinance as *including* the garage in the "rental unit." The ruling was affirmed.

PG&E v. Lexington Insurance (and Lloyds of London), No. 984209, (San Francisco Super. Ct., 1998).

Plaintiff insured utility brought an action for declaratory relief and breach of contract against various excess insurers for reimbursement and for the future costs of pollution cleanup that was ordered by Federal and State administrative agencies. The relevant period of time in this case covered 1933 to 1986.

The Statement of Decision tracked the issues involved in the interpretation of excess policies. I determined that certain indemnity policies did not contain a duty to defend, and that indemnity was not owed for costs of cleanup ordered by administrative agencies.

No appeal was filed. After trial of the Interpretation Phase of the case, settlements were reached as to the remaining defendants.

The case was significant as the first of several bench trials involving large policies and large damages. The determinations made played a part in disposing of cases involving other insured polluters (large oil companies) and their claims against their insurers.

Varian Associates v. Aetna Casualty & Surety Co., No. 944196 (San Francisco Super. Ct. 1998).

This case had several phases. Phase III (breach of contract, damages) and Phase IV (contribution) involved bench trials of a complex insurance coverage action by an insured manufacturer against excess insurers. The action required an interpretation of the rule in a landmark decision regarding which insurance policies were responsible for indemnity in a case where the pollution had taken place over a number of years. *FMC Corp. v. Plaisted*, (1998) 61 Cal. App. 4th 1132, 1189, had held that the insured could pick any year in which damage occurred and seek indemnity from primary and excess carriers in that policy year.

Insurers took the position that if the insured had settled with excess carriers in years outside the year so chosen, the insured had made an *election of remedies* and could not choose years other than those of policies which had contributed to the settlement. I ruled against insurers on the grounds the *FMC* case dealt only with litigation remedies; parties were free to settle out of court on whatever base they chose without effecting a "choice" of policy years through the settlement itself.

Another facet of the case was fact specific: I was required to allocate of over \$10,000,000 in earlier settlements with other defendants as offsets to damages for past and future damages to particular pollution sites. Plaintiffs claimed that the language of the releases were broad enough to allow for the interpretation the earlier settlement payments were not for the damages caused the sites in question. I found otherwise and allowed the earlier payments as offsets to the liability of the remaining defendants.

People v. Cooney, San Francisco Superior Court, 286 Cal. Rptr. 765 (1991) (Bea, J., dissenting).

I sat on the panel that heard this appeal from a trial court decision denying a motion to suppress evidence, a gun, which the police discovered in a locked closet during a search of defendant's home. The defendant claimed that she did not consent to the

search of the locked closet, although she did consent to a search of her home.

The trial court order was reversed on appeal. However, I dissented on the basis that when the defendant consented to a search of her house for a gun without any reservation of rights as to areas to be searched, the Magistrate was within his discretion in finding the consent reasonably included a locked closet. My dissent points out that the Magistrate's discretion in his fact finding as to the specificity of the consent given was not an abuse of discretion. His finding that the consent included any portions of the home was reasonable under the evidence adduced. The search was legal and the evidence admissible.

(2) Reversals:

I can recall 7 (of 101) appellate decisions that reversed my rulings, in whole or in part, or criticized my rulings. I do not have all the citations, as four of the cases were unpublished.

Stanley v. Richmond, 35 Cal. App. 4th 1070 (1993). I granted a motion for non-suit in a malpractice action against a domestic relations attorney, on grounds that plaintiff had not introduced expert testimony as to the standard of care required in the professional community. The court of appeal found error in not submitting the case to the jury on the issue of breach of fiduciary duty, which did not require expert testimony regarding professional standards of care. The judgment for the defendant was reversed.

Lungren v. Superior Court, 14 Cal 4th 294 (1996). A writ of mandate was issued by the California Supreme Court, reversing a ruling of dismissal on a demurrer to the complaint. (The Court of Appeal had denied the writ.) The Supreme Court found that lead in a water faucet was at a water "source." I had found that "source," as used in the legislation, meant the origin of water such as a spring, lake or stream.

Frost v. Abex Corp., No. 948397 (San Francisco Superior Ct.), unpublished decision. In this case involving claims for asbestos-related personal injuries, I instructed the jury that earlier Industrial Safety Orders of the State of California could be considered by them as evidence of the "State of the Art" knowledge available about the noxiousness of asbestos. The jury found for the plaintiff and against the Bechtel Company, who were the defendant contractors. On appeal, the judgment was reversed on the grounds that I should not have allowed the Industrial Safety Orders in evidence and should not have allowed the jury to consider them under the instructions given.

Herman v. Pelta, No. 969378 (San Francisco Superior Ct.), unpublished opinion. A former tenant, in *pro per*, sued in malicious prosecution against his former landlady. At the end of plaintiff's opening statement I granted a motion for non-suit on the grounds that he had not stated evidence sufficient to show malice. The appellate court found plaintiff's statement of the circumstances of his dispute with the landlady to contain sufficient

circumstantial evidence of malice. It also found that under the local rent control ordinance his eviction was unlawful. Judgment for the defendant landlady was reversed.

Coon v. Abex, No. 918248 (San Francisco Superior Ct.) This case was an action for asbestos damages. I entered a judgment giving credit for earlier payments by other defendants upon a basis suggested by plaintiff's counsel that took into consideration settlements that included wrongful death considerations. This resulted in a lower amount of credit being given to the non-economic element of the judgment than suggested by defendant. The Court of Appeal reversed finding that credit for earlier payments must be made based on the percentage of fault found by the jury, not the earlier settlements between plaintiff and settling defendants.

Snider v. Shea, No 984-182 (San Francisco Superior Ct.) This case involved a claim for unpaid sales commissions. I entered judgment for compensatory damages for the plaintiff, but denied a claim for treble damages under consumer protection legislation (Sec. 1738.10 Code Civ. Proc.) The Court of Appeal disagreed on the availability of the treble damage remedy, but found that the plaintiff had waived that remedy. The trial court judgment was affirmed on liability and damages, but reversed on the issue of the amount of interest due on the claim. I had awarded seven (7%) percent. The Court of Appeal found the proper interest rate to be ten (10%) percent.

Cal Contractors License Service v. Scrodin Enterprises, No. 704121 (San Francisco Superior Ct.), unpublished opinion. Plaintiff sought to enforce a court supervised settlement prior to 1991, when he refused to follow court instructions regarding issuance of a writ of execution. In 1996, without having taken any action on his judgment, I found plaintiff had been dilatory and that such delay had unreasonably prejudiced the defendants. I ordered the case dismissed under the doctrine of Laches. The Court of Appeal reversed on grounds that the settlement agreement was contractual in nature and that the equitable doctrine of Laches did not apply.

(3) Significant Opinions on State or Federal Constitutional Issues

Aguilar v. Avis Rent-a-Car System, Inc. No. 948597 (San Francisco Super. Ct. 1995), aff'd mem., 33 Cal. Rptr.2nd 599 (Cal. Ct. App 1996), aff'd 87 Cal Rptr. 2d 132 (Cal. 1999). *Cert. Denied* 120 S. Ct. 2029 (2000).

This case involved an action for damages by Hispanic employees and ethnic harassment on the part of their supervisor and employer. Five plaintiffs recovered jury verdicts, then sought a prohibitory permanent injunction to restrain defendants from further similar racial and ethnic taunts. I granted an injunction to prevent recurrent torts. Defendants appealed on the grounds that the injunction constituted a content-based prior restraint, violative of the First Amendment to the U.S. Constitution. The judgment was affirmed in appellate and California Supreme Court.

As far as I am aware, this was the first racial harassment workplace injunction in the U.S. It survived First Amendment scrutiny based on the prior determination of discrimination by the jury, and the fact that the speech occurred in the workplace.

Ceridian v Franchise Tax Board, No.983 377 (San Francisco Super. Ct. 1999), aff'd 102 Cal. Rptr. 2d 611 (Cal.Ct. Appeal 2000).

This case involved an action for refund of California income tax paid on dividend income from an insurance subsidiary. The tax was imposed on the plaintiff, an insurance company not based in California, but not on other similarly situated insurance companies with home offices in California. I held that Rev. & Taxation Code Sec. 24410 violated the U.S. Constitution's commerce clause (U.S. Const. Art I, Sec. 8, cl.3) as an undue burden on interstate commerce.

This case established that the state cannot tax the dividend income from the California based subsidiary corporations of out-of-state parent corporations differently than corporations with home offices in California. The California scheme for adjustment of such differences was inadequate to correct the discrimination. It also established that repayment to the taxpayer of the taxes paid was the proper remedy, rather than some future credits against future taxes.

People v. Cooney, 235 Cal. Supp. 1 (1991). Appeal from trial court decision denying motion to suppress evidence based on defendant's claim that police made an unconsented and warrantless search of a locked closet in her home, where a gun was found. The trial court order was reversed.

I *dissented* from the majority opinion on the basis that as the defendant had consented to a search of her house for a gun, without any reservation of rights as to areas to be searched, the Magistrate was within his discretion in finding the consent reasonably extended to the locked closet.

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 did not serve as a law clerk to a judge.
 2. whether you practiced alone, and if so, the addresses and dates;

I did practice alone for approximately one year, from 1975-1976, under Carlos Bea, a law corporation. I then hired an associate.
Address: 611 Front Street, San Francisco, California 94111.
 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;

1959-1975: Dunne, Phelps & Mills, I was an associate from 1959 until 1966, when I became a partner.
Address: 333 Montgomery Street and later 601 California Street, San Francisco, California.

1975-1990: Carlos Bea, a law corporation, I was the principal of the firm.
Address: 611 Front Street, San Francisco, California 94111;
1986-1990: 151 Union Street, San Francisco, California 94111.
- 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?
- 1959-1975: My practice consisted primarily of trial and appellate work in the area of civil defense, mainly Federal Employers Liability Act (railroad) cases. I also did a fair amount of plaintiff work for heavy equipment contractors (underground construction).
- 1975-1990: I continued trial and appellate work, but with a more

varied pattern of plaintiff as well as occasional defense litigation. I also did plaintiff work for contractors and manufacturers in Federal labor relations both in negotiations with unions and appearing before the NLRB and occasionally, the 9th Circuit Court of Appeals. I also did some (*pro bono*) immigration work and represented foreign investors making direct investments in the USA.

Since 1990, I have served as a judge of the San Francisco Superior Court.

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

1959-1975: Southern Pacific Company, The Western Pacific Railroad Company, Tidewater Southern, Globe Indemnity, Wausau Insurance Company, Radco Construction, Inc., American Pacific Concrete Pipe Co. Inc.

1975-1990: Plaintiff railroad workers, American Pacific Concrete Pipe Co. Inc., immigration clients, AGEMAC (Spanish tile making machinery manufacturer), Katy Railroad (Winslow, Arizona explosion), plaintiff claimant against North American Car Company (Flying Tiger subsidiary).

I specialized in the area of litigation in trial courts, administrative courts (NLRB, INS) and occasionally in the state and federal appellate courts.

- 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.

Commencing in 1960 I appeared in court either on Law & Motion weekly or to commence trials (many of which settled after 1-2 days of trial) or went through to jury verdicts at least once or twice a month. Jury experience peaked during the 1970s. When I commenced my own law firm, I still appeared in Law and Motion and commenced trial with the less frequency, until I was appointed to the Bench in late 1989, early 1990.

2. What percentage of these appearances was in:
 (a) federal courts;

- 5%
 (b) state courts of record;
 90%
 (c) other courts.
 5% (including time spent in NRLB and INS courts)

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 have tried over 125 cases to verdict or judgment, always as sole counsel or chief counsel.

5. What percentage of these trials was:

- (a) jury;
 Approximately 60%
 (b) non-jury.
 Approximately 40%

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.

U.S. v. Sarasa, Board of Immigration Appeals (1989) (I was unable to get the docket number after several calls, the Alien Registration Number is needed and that is not available to me.)

Judge: Hon. Irene Weiss, Immigration Judge, Phoenix, Arizona

Opposing counsel: Charles Knuck, Esquire
 U.S. Attorney

230 N. Main Avenue
Phoenix, Arizona
(602) 379-3122

This case involved the *pro bono* defense of deportation hearing in the Executive Office of Immigration Review, Phoenix, Arizona. A Basque shepherd had overstayed his visa for 14 years. He could have been eligible for (a) Registry and (b) Suspension of Deportation, but not Amnesty because of several Driving Under the Influence (no injuries) convictions.

The Immigration Judge ruled from the Bench that the applicant was a person of good moral character and that it would be hardship to deport him in view of the fact of the separation it would cause with his six-year-old son.

Interlocking Roof Tile Cases, (1988) (consolidated cases, by order of Lucas, C.J.).

Judge: Winton McKibben, Alameda Superior Court, Department 16.

Opposing Counsel: William Scott, Esquire
2501 Park Boulevard
Palo Alto, California
(650) 326-3633

Walter V. Hays, Esquire
755 Page Mill Road - #A280
Palo Alto, California
(650) 494-9100

Three cases in Sonoma, San Mateo and Alameda (Southern) Superior Courts were consolidated by Judicial Council Order after a contested motion made by our firm. The cases involved a large (\$1.8 million) unpaid equipment sales contract between a local manufacturer and our client, a foreign equipment manufacturer (AGEMAC), and its Swiss banker. I was able to procure (a) a Summary Judgment for the Swiss bank (\$250,000); and (b) an attachment for the foreign manufacturer (\$800,000), and proceeded to trial before Judge Winton McKibben on issues narrowed somewhat by motions for Summary Adjudication. The case settled while trailing on the trial calendar. This case dealt with novel matters of UCC Law regarding what constitutes acceptance of goods, when there can be a withdrawal of acceptance of goods after their use, and their hypothecation by the buyer. Depositions took place in Spain involving issues of discovery on foreign soil.

Lacy v. Selleck, San Diego Superior Court No. 37106 (1988)

Judge: None, settled.

Opposing Counsel: John V. Kays, Esquire
4000 McArthur Boulevard
Newport Beach, California
(714) 833-9499

Foster Furcolo, Esquire
 Hillside & Costanzo
 450 "B" Street - 9th floor
 San Diego, California
 619) 434-5011

This case was a San Diego Superior Court action for professional malpractice and fraud by a patient and former lover against a psychologist (our client). The plaintiff had signed a release for an insurance company for policy limits on a prior auto accident settlement, but claimed the release was procured through fraud and promissory estoppel. A dismissal without prejudice had been procured by prior insurance counsel and insurance company. We were able to establish in Discovery that the plaintiff fully understood the terms of the release, and her abandonment of all rights against the psychologist stated in her release. I procured Summary Judgment against a "non-negotiable" demand for several hundred thousand dollars. The legal issues involved were primarily the extent to which Section 622, Evidence Code, and Code of Civil Procedure 1856 can be used to establish the language of the release as conclusive evidence against claims of oral promises and fraud. The case was appealed. We represented respondents in the Fourth District as Cumis counsel. (The case settled in December 1989.)

Ampac v. NLRB, (Roland) 290 NLRB 77 (1988)
 Judges: Panel of NLRB (Johnson, Babson, Cracraft; Stephens, Chairman)
 Opposing Counsel: Aileen Armstrong
 Assistant General Counsel
 NLRB General Counsel
 Washington, D.C.
 (202) 254-9150

This case made new law under the National Labor Relations Act. It established the doctrine that a release of a "back-pay" dispute directly with the worker and his Union representative, if fairly and openly negotiated, could not be disregarded by the General Counsel of the National Labor Relations Board. Such a release was held to bar the claim of Roland put forward by the General Counsel. I represented Ampac.

McArthur v. Bookman, Docket No. 559170 San Diego Superior Court (1987)
 Judge: T.G. Duffy
 Opposing Counsel: Herman A. Hauslein, Esquire
 110 West "C" Street
 San Diego, California
 (916) 234-6812

Ronald J. Mix, Esquire
 1059 Tenth Avenue

San Diego, California
(619) 236-0011

This case involved a San Diego Superior Court action by a Canadian couple against a Mexican architect, resident in San Diego, for a constructive trust of a Mexican property that defendant had put in his mother's name under a fictitious sale. Defendant's *forum non conveniens* motion was denied in trial court and taken up on writs in Fourth District. Our clients won denial of the writ 2-1. The losing Mexican architect petitioned for a hearing in Supreme Court. Our clients won 6-1. The case recognized California law that foreign land can be the subject of a California State Court transitory action under constructive trust theory. I represented plaintiffs McArthur.

***Spicer v. McDonnell-Douglas*, C-572463-3 O, Alameda Superior Court (1987)**

Judge: W. McKibben

Opposing Counsel: Jeffrey Williams, Esquire
101 Market Street – Suite 601
San Francisco, California
(415) 896-0666

This case involved a product liability action against an airplane manufacturer for a steward's fall in airplane elevator. The action had originally been filed in Municipal Court [\$25,000 jurisdictional limitation] by former counsel, but resulted in substantial six-figure recovery on the first day of trial in Alameda Superior Court. The issues included the application of non-airplane manufacturing standards for elevators to lifts in airplanes, and extensive expert witness depositions. Also, there were complicated medical issues due to prior accidents and injuries, lawsuits and workmen's compensation proceedings. I represented plaintiff Spicer.

***Ampac v. NLRB*, (1986)**

Panel: Hug, Wallace & Hall

Opposing Counsel: NLRB General Counsel
Los Angeles Office

Trial Counsel, NLRB: Rachel Young
Assistant General Counsel
11000 Wilshire Boulevard
Los Angeles, California
(213)575-7351

On Appeal: Patrick J. Szyman
Aileen A. Armstrong
NLRB
Washington, D.C.

(202) 254-9150

I represented Ampac in an appeal to the Ninth Circuit from a NLRB ruling. The case presented a matter of first impression in the Circuit regarding an interpretation of the Equal Access to Justice Act: Does the "net worth" limit to claimants require deduction of the accumulated depreciation of assets in arriving at "net worth"? The Government took the position that depreciation should not be deducted in arriving at net worth. We prevailed at the 9th Circuit.

B.O.E. v. Ampac, Affirmed, First District court of Appeal, (1985) (non-published).

Opposing Counsel: Attorney General of California
Assistant Attorney General Abe
3115 Buchanan Street
San Francisco, California
(415) 567-6989

This case involved a Franchise Tax Board appeal by Ampac, the taxpayer seeking a refund of a sales tax assessment on shipping charges (a service) where pipe was sold FOB at the plant. The Franchise Tax Board took the position that the shipping charges were not "services", exempt from the sales tax. The company lost before Board of Equalization, but sued in Superior court, San Francisco, and won judgment in the full amount of sales tax and interest. The case established that a properly separated statement of shipping charge to customer's destination is not part of a "sale" of *goods* and should not be subject to Sales and Use Tax. The case was appealed to the First District Court of Appeal, Affirmed (1990), but the opinion was not published. I handled all of the administrative proceedings. The Superior Court trial handled by my associate Jeanette Shipman, before Judge Carlos Baker (1988). I represented Ampac.

Estaun v. Heckler (1985)

Judge: Eugene Lynch, U.S.D.C. Northern District of California

Opposing Counsel: Attorney General of California
Michael Tonsing
Assistant Attorney General
7677 Oakmont
Oakland, California
(415) 569-3097

I represented the plaintiff in this case where Summary Judgment cross-motions were filed on SSA disability issues. The plaintiff was a 40-year-old Basque shepherd who had a surgically fixed, rigid right knee. SSA claimed he was able to do "some" work, according to their Grid Guidelines. The ruling disapproved of SSA use of Grid Guidelines for a disability when there was no foundational evidence that there was residual ability to do any of the tasks of the work classifications in the SSA Grid.

NLRB (Teamsters) v. Ampac, 290 NLRB 22; 290 NLRB 77 (1988)

Judge: Clifford Anderson

Opposing Counsel: NLRB General Counsel
Rachel Young
Assistant General Counsel
11000 Wilshire Boulevard
Los Angeles, California
(213) 575-7351

Back-pay specification before Administrative Judge in Los Angeles, NLRB. There were several cases. Most of the cases involved complicated issues of whether the applicants had worked during the back-pay period, and had falsified interim work statements to the NLRB. This called for a great deal of documentary probing and cross-examination without the aid of discovery, which was disallowed by the General Counsel.

The Womack case was significant. As finally determined (290 NLRB 22 (1988)), the NLRB held that the General Counsel acted "without substantial justification" in bringing the back-pay specification after the Respondent company had provided evidence that Womack had taken permanent Workmen's Compensation disability benefits before the "back-pay" period. This cleared the way for an award of attorneys' fees to the Respondent company under the Equal Access to Justice Act. To my knowledge, it is the first adjudicated case which held that the General Counsel of the NLRB can "overstep" his authority to prosecute "back-pay" cases, and that the NLRB must pay employer counsel when that happens. I represented Respondent, AMPAC.

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 1970s and 1980s I spent a good deal of time teaching civil trial advocacy. First, I participated and taught in the summer Hastings College of the Law program for practicing lawyers. Later, I was elected to the Board of Directors of the Advocacy Program at Hastings College of the Law (University of California, San Francisco). In 1979, I was asked to teach a seminar course on civil trial advocacy at Hastings, which I did yearly until 1982, when I was hired away by my alma mater, Stanford Law School. I taught a slightly different seminar course at Stanford Law School for two years, and returned to Hastings in 1985.

Perhaps not a strictly legal activity, but none the less significant, was my participation in the "Conozca la Ley" program with KTVU Channel 14 (San Francisco) from 1995-1997.

I prepared a weekly program for the *Six O'Clock* news in which I presented a 2-3 minute talk on some legal matter of interest to the Hispanic/Latino community, in the Spanish language. The subjects included: (1) how to present or defend a claim in Small Claims Court, (2) which contracts California law requires be written in Spanish, (3) how to defend oneself for a traffic citation, and (4) common coverage pitfalls in homeowner and automobile insurance.

From the time I came on the Superior Court, I have participated on several committees of the court. Among the most significant were the Executive Committee, which cleared matters to the agenda for meetings of the Judges, and the Courthouse Construction Committee, which was charged with the oversight of the contract negotiation, construction and contract oversight of our new (1998) courthouse. Further, I have been on the Judicial Council's Advisory Committee on Access and Fairness, which considers suggestions to court rules that address courthouse access for the disabled and gender, race and sexual orientation fairness in the courtroom.

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 meeting the requirements after departing from the state bench, I would be eligible for state retirement benefits.

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 I have in my capacity as a California state judge, I will continue to monitor my investments to limit potential conflicts. In all cases I will follow the Code of Judicial Conduct and 28 U.S.C. § 455.

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

Yes, I plan to continue to act as Managing Partner for Mount Olive Storage, Duarte, California, a family owned partnership in the indoor and outdoor mini-warehouse business. I can manage the business from San Francisco with occasional weekend (once a month) trips to Southern California. The business has a resident manager.

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.

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.

Since I began practicing law, I commenced doing *pro bono* work in 1959 in the 1st District Court of Appeals (California) for a convicted murderer, "String-Bean Richardson" on a writ of *coram nobis*, to review his conviction. I spent approximately 40 hours on this case. I then handled an Alaska appeal for Vernon Burke (*USA v. Vernon Burke*) on an assault with a deadly weapon charge. This is a reported 9th Circuit case (1959). I did all the research and brief writing. This involved approximately 100 hours, much of the time spent in researching the law of some 40 states with respect to the mental element required by the crime of assault.

I did some "storefront" counseling in the Mission District of San Francisco in the 1960s.

In the late 70s I started doing *pro bono* work for Spanish nationals who had criminal or immigration problems. These individuals were referred to me by the Spanish Consulate. Over the years until I became a judge, I would estimate that I spent 10-20 hours a month on this work.

I received a California State Bar's Award for Pro Bono work in 1989 and two decorations (medals) from the King of Spain for the *pro bono* work I performed for Spanish and Spanish Basque workers.

Since becoming a judge, I have participated once a year as a mock trial or moot court judge at the local law schools: Golden Gate University Law School and Hastings College of the Law. I have also participated as a judge for the finals of the Hispanic National Bar Association Moot Court Competition held at the U.S. Court of Appeals for the Ninth Circuit, San Francisco. In addition, each year I spend a day or two at Stanford Law School in the Litigation (Trial) Workshop program teaching law and motion, discovery, and other litigation subjects. Similarly, I have given evening courses for the Queens' Bench (a San Francisco Women's Bar group) program to acquaint young lawyers with customs and practices in trial courts. I have also participated this year in the Carroll, Burdick and McDonough (San Francisco) mock trial program as a judge.

Other Pro bono activities: Between 1995 and 1997, I appeared weekly on a Spanish language television program which presented information on questions of law and

procedure through Channel 14 (Univision) KTVU in San Francisco. The segments lasted two-three minutes and would take me about 45 minutes to research and film.

I made 4 trips for the United States Information Agency and gave lectures in Spanish in Latin American countries between 1995 and 1997. The subject matter of my lectures was mostly Small Claims Court, Case Management, and administration of jury trials.

I traveled for the Inter-American Development Bank to Rio de Janeiro, Brazil, in 1997 to lecture on the California Small Claims Court program at the "Access to Justice" conference.

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?

The Olympic Club, San Francisco. (Wife is also a member) 1960-1990; 1991-present. The club formerly was limited to males. I resigned when I was appointed to the Bench in 1990. I rejoined when women were admitted in 1991. My wife Louise joined at that time. Before 1991, I attempted to get the all-male policy changed by soliciting members' support for a change of policy.

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).

As far as I know, there is no commission for Circuit Court of Appeals nominations. I was interviewed by the White House, Department of Justice, and the FBI.

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.

In general, my view of the federal judiciary has as its touchstone the system of separation of powers, which I see as the foundation for our democracy. My view also takes into account that the federal judiciary, alone among the three powers, is not popularly elected (unlike California trial courts). Because there is no accountability to the voters, the judiciary must not usurp the policy-making powers from the Executive and Legislative branches of the federal government.

I take quite seriously the idea that the federal judiciary power is limited to "Cases and Controversies" (Art. III, U.S. Constitution), and should not extend to general societal problems which are not framed and presented as legal or equitable cases. In general, a judge should restrict judicial remedies to the parties to the case. The purpose of such requirements is to make sure that the case before the court is restricted to real-life issues presented by genuinely interested parties.

Lastly, it is important for a judge to follow the precedents set by the decisions of the higher courts because adherence to the doctrine of *stare decisis* gives stability and predictability to the law.

AFFIDAVIT

I, CARLOS BEA, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

April 14, 2003
(DATE)

Carlos Bea
(NAME)



Barbara M. Compton
(NOTARY)

Chairman HATCH. You have significant experience as a private litigator and practitioner representing both plaintiffs and defendants in primarily civil litigation, and since 1990, of course, as a State court trial judge. Now, I understand that you have also participated on appellate panels of the San Francisco Superior Court during your tenure there.

Now, could you tell us how these experiences have helped or prepared you to serve on the Ninth Circuit Court of Appeals? And how would you characterize the key differences between the trial and the appellate judicial roles?

Judge BEA. Well, I think the key difference between the trial and the appellate court is the ability of the trial court to determine facts, weigh the evidence, weigh the credibility of witnesses, and come to conclusions when there is not a jury there.

The appellate court, of course, has to determine the case from the record that's presented and has a much narrower scope of review and fact-finding, of course, than does the trial court.

I have been fortunate, as you mentioned, to have been both on the plaintiff and the defendant side, even in FELA cases, which I think you have some experience with. For 15 years I was a defense attorney, and then for the next 15 years I was a plaintiff's attorney.

Chairman HATCH. It is a lot nicer being a plaintiff's attorney, is it not?

Judge BEA. I think it's better paid for certain.

Chairman HATCH. Much easier too.

Judge BEA. And besides, you win more often.

Chairman HATCH. That is right.

Judge BEA. So that gave me a great deal of experience in trial practice, and of course I think the 3 years I spent on the appellate panel of the Superior Court, including 1 year when I was the Presiding Judge, helped me because we were taking appeals from the Municipal Court directly to the Superior Court.

Chairman HATCH. That is great. You have been active in efforts to make our legal system more understandable and accessible to both Hispanics in this country and Spanish in the Latin American audiences abroad. As I understand it, one example of such efforts was your hosting of a program on Spanish language television in the San Francisco area that addresses various legal topics from labor union rights to handling speeding tickets.

Could you tell us about some of your other outreach efforts to the Hispanic community in the San Francisco area, and tell us how successful some of these efforts have been.

Judge BEA. Well, getting back to that, I was the host of a two- or three-minute segment every week which took questions from the public as to how do you pay for a traffic ticket, how do you use small claims court, what contracts have to be in Spanish to be enforceable in California, and this would go on once a week, and I would give a Spanish language explanation of this on the 6 o'clock news which had a pretty wide readership.

In addition to that, of course, I've been pretty active in the Hispanic National Bar Association, and they have a moot court competition, nationwide moot court competition, and I have sat as a judge in that. And I've participated in a lot of Hispanic National

Bar Association matters including I'm supposed to give a speech tomorrow in San Jose, but I won't be there. One of my friends, Alex Aldemondo, is taking my place, giving a speech on motions in limine, which is a trial practice issue.

I've attempted to give as much education as I can to the hispanic community that needs to be educated in the Spanish language.

Chairman HATCH. That is great. Can you tell us about some of your pro bono activities, particularly those that led to your Civil Order of Merit Award from the King of Spain in 1993, and of course the Distinguished Judge Award from the La Raza Lawyers of San Francisco in 2002.

Judge BEA. Well, we found, back in the late 1970's we found that many Basque immigrants who had come as shepherds to the Western United States, probably also to Utah, certainly in Idaho, Nevada, California, had not been informed of their rights to become American citizens after a period of time working here. In some cases they had been misinformed by their bosses to keep them on the farm. The Spanish Government at that time—this was 1979, a democratic government of Spain—asked me to please help inform these folks about their rights to become citizens in the United States, as I have become a citizen, and so I started a program of doing that. Then that led to sort of representing all the Spaniards and some other hispanics, relatives of Spaniards, who found themselves in legal difficulties, whether it be immigration or criminal misdemeanor type cases, and I would go to the jails and try to get them out on their own recognizance. I appeared also in Immigration Court several times for persons who had been here so long that they were entitled to remain, although their paperwork wasn't all that good.

Chairman HATCH. I am really impressed with you and your service. One of my closest friends is Paul Laxalt, who is a Basque himself, and very proud of it, as he should be. I am proud of the service that you have given.

The Ninth Circuit Court of Appeals is a very controversial court in this country. It is reversed a high percentage of the time by the Supreme Court. Of course, they hear thousands of cases that the Supreme Court does not have time to consider. My only caution to you there is just that we need people there who are going to abide by the rule of judging, which is to interpret the laws that are made by those who have to stand for reelection, in other words, those who are politically supposed to be making the laws, not judges. That is an easy statement, but a lot of times where there are cases that are in gray areas, where the law has not defined it, or where there is an inter-circuit conflict, and I would count on you being one of the real stable solid people on that court because of your experience, and help to bring that court more into the mainstream than it is right now. We are hopeful that you will be able to do that.

Judge BEA. Thank you, Senator.

Chairman HATCH. It is a wonderful opportunity to serve on a very distinguished court which is probably the largest population presiding circuit court in the country, and it is very, very important. It is an honor to have you here. It is an honor for you to be nominated by the President of the United States, and to have the

support of both of your senators. That means a lot to me. We will try to put you through as quickly as we can.

I want to compliment your family. They look like really wonderful people, and I am sure they are, and we are grateful to have you here, and I will do everything in my power to get you through as quickly as we can.

Judge BEA. Thank you very much.

Chairman HATCH. Thank you. With that, we will let you go.

I am pleased now to turn to our District Court nominees on today's agenda. Our first nominee, Marcia Crone, is a graduate of the University of Houston Law Center. She worked as an associate and later as a partner at the prestigious law firm of Andrews and Kurth before being appointed as a Federal Magistrate Judge in 1992.

If you could just come up and take your seat right there. We welcome you. You are on your far right.

I have no doubt that her elevation to the District Court will greatly benefit the Eastern District of Texas.

Phillip Figa, our nominee for the District of Colorado has been actively involved in the Colorado legal community since the beginning of his legal career.

If you all will just take your seats as I announce you. Mr. Figa.

A graduate of Cornell Law School, Mr. Figa has been a partner at a Colorado litigation firm for the past 20 years. He currently serves on the Board of Directors of the Anti-Defamation League for his region, and has assumed various leading roles in the American Bar Association and the Colorado Bar Association. So I look forward to confirming this very accomplished and community-oriented practitioner to the federal bench. We welcome you here, both of you.

Robert Clive Jones is our nominee for the District of Nevada. Judge Jones graduated from UCLA School of Law in the top 10 percent of his class. A member of the Order of the Coif, and having served as an associate editor of the UCLA Law Review. He clerked for Ninth Circuit Judge J. Clifford Wallace before entering private practice. In 1983 he was appointed to the U.S. Bankruptcy Court for the District of Nevada, where he currently serves. I think Nevada is very fortunate to have you as a person who will serve on the Federal District Court Bench, and we are grateful that you are willing to make this sacrifice.

William Hayes has been nominated to the Southern District of California. Mr. Hayes received his BS, JD and MBA degrees from Syracuse University. He began his legal career as a civil litigation associate. Then in 1987 joined the United States Attorney's Office for the Southern District of California where he currently serves as Criminal Division Chief. Mr. Hayes is an extremely accomplished trial lawyer, and I believe his extensive civil and criminal legal experience will serve him very well when he is confirmed to this position, and I expect to see that you are. We are delighted to have you here and delighted you have this opportunity.

John Houston is our nominee for the Southern District of California. Judge Houston entered public service after law school when he joined the U.S. Army Judge Advocate General Corps. He then joined the U.S. Attorney's Office for the Southern District of Cali-

for California before his appointment in 1998 as a Federal Magistrate Judge. Judge Houston has been recognized repeatedly for his outstanding legal skills over the course of his career, and I have no doubt that he will continue to serve well the Southern District of California upon his elevation to the District Court Branch, and we are honored to have you here. We look forward to talking with you.

Our nominee for the Eastern District of Oklahoma, Ronald White, is a distinguished litigator. After graduating from the University of Oklahoma Law School in 1986, Mr. White joined the law firm of Hall, Estill, Hardwick, Gable, Golden and Nelson in Tulsa. His practice has focused on litigation in the areas of tort and insurance defense, medical malpractice, corporate litigation, ERISA and telecommunications. Mr. White is a well-respected legal practitioner in Oklahoma and will make a fine addition to the Federal Bench there.

I want to welcome all of you impressive nominees to the Committee, and I certainly commend the President for nominating each of you to these positions.

Would any of you care to make any opening statements? We will start with you, Judge Crone.

STATEMENT OF MARCIA A. CRONE, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TEXAS

Judge CRONE. Mr. Chairman, thank you very much. It is such an honor to be here today before the Committee, and I just want to express what great feelings I have to be given the opportunity to serve the country. I have been very honored to be a United States Magistrate Judge, and I look forward to continuing my service if confirmed.

My husband is here with me today. Unfortunately, my children, who—I guess you would say in our household academics are important. But my two daughters, who are in high school, it is science test day on Wednesdays. So they are in school today.

Chairman HATCH. They need to be there.

Judge CRONE. But thank you, Mr. Chairman.

[The biographical information of Judge Crone follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Marcia Ann Cain Crone
Marcia Ann Cain Graham
Marcia Ann Cain Copeland
Marcia Ann Cain

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

Residence:	Office:
Houston, TX	515 Rusk Street, Room 7525 Houston, TX 77002

3. Date and place of birth.

December 12, 1952
Dallas, TX

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 Walter Seth Crone, Jr.
C.P.A./Banker
Vice President
JP Morgan Chase Bank
JP Morgan Chase Tower
600 Travis, 11th Floor
Houston, TX 77002

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

University of Houston Law Center	1975-1978—J.D. 1978
University of Texas at Austin	1971-1973—B.A. 1973
Vanderbilt University	1970-1971—transferred to University of 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.

United States District Court 515 Rusk St. Houston, TX 77002	1992-present United States Magistrate Judge
Andrews & Kurth L.L.P. 600 Travis St. Houston, TX 77002	1978-1992 partner (1986-1992) associate (1978-1986) summer clerk (5/78-6/78)
Fulbright & Jaworski L.L.P. 1301 McKinney Houston, TX 77010	7/1978-8/1978 summer clerk
Vinson & Elkins L.L.P. First City Tower Houston, TX 77002	6/1978-7/1978 summer clerk
Levi Strauss & Co. Tyler, TX	1975-1976 management trainee
TRW Controls, Inc. Houston, TX	1974-1975 production control and material control planner
Texas Instruments, Inc. Lubbock and Houston, TX	1973-1974 manufacturing supervisor
Richard E. Kammerman 7200 N. Mo Pac Expy. Austin, TX	summer 1973 legal secretary
Federal Bar Association, South Texas Chapter	Board of Directors—1993-present President—1996-1997 National Delegate—1997-1998
American Inns of Court, Garland Walker Inn	Board of Directors—1993-present Counsel—1996-present
Southeast Texas Chapter of the National Multiple Sclerosis Society	Board of Directors—1986-1992

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.

Law school:

Order of the Barons, 16 American Jurisprudence Awards, 3 Corpus Juris Secundum Awards, 3 West Hornbook Awards, Federal Bar Association Award, Judge Sam Davis Award, Wall Street Journal Award, Barksdale-Stevens Scholarship, Zonta Club of Dallas Scholarship

College:

Phi Beta Kappa, Mortar Board, Phi Kappa Phi, Alpha Lambda Delta honorary societies, National Merit Scholarship

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	1979-present
District of Columbia Bar	1982-present
Federal Bar Association, South Texas Chapter	1992-present Board of Directors—1993-present President—1996-1997 National Delegate—1997-1998
American Inns of Court, Garland Walker Inn	Board of Directors—1993-present Counsel—1996-present
Houston Bar Association	1979-present
American Bar Association	1986-1997
Federal Magistrate Judges Association	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 belong to no organizations that are active in lobbying before public bodies.

Organizations to which I belong:
Phi Beta Kappa Alumni Association
Houston World Affairs Council

Houston Bar Foundation
 Texas Bar Foundation
 Parent Teacher Association—Second Baptist School, Houston, TX
 Chapelwood United Methodist Church, Houston, TX

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	1979
District of Columbia Bar	1982
United States District Court for the	
Southern District of Texas	1979
Northern District of Texas	1980
Western District of Texas	1980
Eastern District of Texas	1980
District of Columbia	1982
United States Court of Appeals for the	
Fifth Circuit	1980
District of Columbia Circuit	1982
Sixth Circuit	1980's
Ninth Circuit	1980's
Supreme Court of the United States	1982

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

published articles:

“The Departing Employee—Prevention of Competition and Protection of Trade Secrets,”
 50 *Texas Bar Journal* 4 at 372 (April 1987)
 “Homosexuals and Transsexuals—Out of the Closet and Into the Courtroom,” 13
Employee Relations Today 2 at 167 (Summer 1986)
 “Obscenity and Profanity at Work,” 11 *Employee Relations Law Journal* 4 at 662 (Spring
 1986)
 “Seniority Systems and Title VII—Reanalysis and Redirection,” 9 *Employee Relations
 Law Journal* 1 at 31 (Summer 1983)

I have given no speeches involving constitutional law or legal policy. I have given speeches to local bar organizations and to the court's attorney admissions workshop since

- (7) *Salameh v. Provident Life & Accident Ins. Co.*, 23 F. Supp. 2d 704 (S.D. Tex. 1998)
- (8) *Dupre v. Harris County Hosp. Dist.*, 8 F. Supp. 2d 908 (S.D. Tex. 1998)
- (9) *Lenihan v. The Boeing Co.*, 994 F. Supp. 776 (S.D. Tex. 1998)
- (10) *Williams v. Upjohn Co.*, 153 F.R.D. 110 (S.D. Tex. 1994)

Decisions that were reversed or reversed in part:

- (1) *Staten v. Johnson*, No. H-99-879 (S.D. Tex. July 13, 2000) (unpublished), *rev'd*, No. 00-20669 (5th Cir. Nov. 29, 2000) (unpublished)

A state prisoner filed a federal petition for a writ of habeas corpus challenging the outcome of a prison disciplinary hearing. The prisoner had filed ten other *pro se* cases in the federal courts of Texas, including four habeas corpus petitions; two of the cases had been dismissed as frivolous by the Northern District of Texas, and the appeal had been dismissed as frivolous by the United States Court of Appeals for the Fifth Circuit, giving him “three strikes” under 28 U.S.C. § 1915(g). The Fifth Circuit had also ordered that the prisoner be “BARRED from filing . . . any *pro se*, in forma pauperis, initial civil pleadings in any court which is subject to [the Court of Appeals’] jurisdiction, without the advance written permission of a judge of the forum court; . . . the clerks of all federal district courts in this Circuit are directed to return to Staten, unfiled, any attempted submission inconsistent with this bar.” See *Staten v. Pruitt*, No. 97-10396 (5th Cir. 1998) (unpublished). Relying on the Fifth Circuit’s sanction and bar order, I dismissed the prisoner’s petition without prejudice because he had not obtained written permission from a judge before filing the action. The Fifth Circuit reversed and remanded the case, finding that its prior sanction order did not preclude the prisoner from initiating a habeas corpus proceeding under 28 U.S.C. § 2254.

- (2) *Emerson v. Johnson*, No. H-98-254 (S.D. Tex. Mar. 15, 1999) (unpublished), *rev'd*, 243 F.3d 931 (5th Cir. 2001)

A state prisoner filed a federal petition for a writ of habeas corpus challenging the constitutionality of his Texas state court conviction for aggravated sexual assault. I dismissed the petition as untimely under the Antiterrorism and Effective Death Penalty Act’s (“AEDPA”) one-year statute of limitations. After his application for state habeas corpus relief had been rejected by the Texas Court of Criminal Appeals, the petitioner filed a “suggestion that the court reconsider on its own motion the denial of the application for writ of habeas corpus” with the Texas Court of Criminal Appeals, which remained pending for 280 days. I determined that because the Texas Rules of Appellate Procedure prohibited motions for

rehearing, the prisoner's suggestion for reconsideration was not properly filed and did not serve to toll the limitations period under the AEDPA. On appeal, the United States Court of Appeals for the Fifth Circuit held, as a matter of first impression, that notwithstanding the express prohibition found in the Texas Rules of Appellate Procedure, the petitioner's suggestion for reconsideration was properly filed because the Texas Court of Criminal Appeals could have reconsidered its prior decision on its own motion. Therefore, limitations were tolled during the pendency of the suggestion for reconsideration, rendering the petitioner's federal habeas petition timely.

- (3) *Clearstream Wastewater Sys., Inc. v. Hydro-Action, Inc.*, No. H-95-5233 (S.D. Tex. Feb. 4, 1999) (unpublished), *rev'd*, 206 F.3d 1440 (Fed. Cir. 2000)

Licensees of a patent covering an apparatus for treating wastewater that uses aerobic bacteria to digest solid particles in the water filed a patent infringement action against a competitor, whose treatment system also uses aerobic bacteria rather than a mechanical filter to clean water. Following a *Markman* hearing, I granted summary judgment on the defendant's motion regarding claim interpretation and non-infringement, finding that the defendant's device did not infringe on the patent because it contained a rigid conduit structure for injecting air, which was utilized in the prior art before the issuance of the patent, while the patent disclosed a device containing a new structure for injecting air, "teaching away" from the prior art. On appeal, the United States Court of Appeals for the Federal Circuit distinguished the cases I had cited in reaching its conclusion and held that the patent at issue covered not only devices utilizing the inventive means for injecting air but also the prior art structure used by the defendant.

- (4) *FDIC v. Enventure V*, 868 F. Supp. 870 (S.D. Tex. 1994), *rev'd*, 77 F.3d 123 (5th Cir. 1996)

The Federal Deposit Insurance Corporation ("FDIC"), as receiver for an insolvent bank, filed suit to collect on a promissory note owed the bank by the borrower and guarantors. The parties filed cross-motions for summary judgment. I held that the FDIC was not bound by the terms of the borrower's limited partnership agreement which was not in the FDIC's possession and the terms of which the FDIC was not aware. I granted summary judgment in favor of the FDIC, holding that the lawsuit was timely when it was filed on the sixth anniversary of the defendant's appointment as receiver, relying on Federal Rule of Civil Procedure 6(a), which excludes the day of the transaction and includes the last day of the period when calculating federal statutes of limitation. On appeal, the Fifth Circuit reversed and rendered judgment, rejecting the application of Rule 6(a) when a more specific rule regarding the commencement of the limitations period was set forth in a federal statute, providing that limitations begin to run on a contract

claim on the date the FDIC is appointed receiver. Therefore, the FDIC's filing of the action on the anniversary date was one day late.

In a subsequent Fifth Circuit opinion, *Flanagan v. Johnson*, 154 F.3d 196, 201 n.4 (5th Cir. 1998), the appellate court appeared to question its prior holding in *Enventure V*, noting that it was "the only published case in our Circuit rejecting application of Rule 6(a) to a federal statutory limitations period."

- (5) *Northwinds Abatement, Inc. v. Employers Ins. of Wausau*, No. H-93-1776 (S.D. Tex. Nov. 3, 1994) (unpublished), *aff'd in part and rev'd in part*, 69 F.3d 1304 (5th Cir. 1995)

An employer that was insured by a policy issued by the Texas Workers' Compensation Insurance Facility filed suit in state court contesting a servicing company's payment of the workers' compensation claims of six former employees, alleging breach of the duty of good faith and fair dealing, violations of the Texas Deceptive Trade Practices Act and the Texas Insurance Code, breach of fiduciary duty, unfair claim settlement practices, breach of contract, affirmative misrepresentation, negligence, and gross negligence. After the action was removed to federal court, I granted summary judgment in favor of the defendant, holding that it was merely a servicing company contracted by the Texas Workers' Compensation Insurance Facility to provide claims handling services and was not an insurer of the employer, absolving it from any liability to the employer in connection with the payment of the workers' compensation claims. On appeal, the Fifth Circuit affirmed that portion of the judgment denying recovery for breach of the duty of good faith and fair dealing, reasoning that the servicing company was not the employer's insurer. The Fifth Circuit reversed the remainder of the judgment, holding that, pursuant to the doctrine of primary jurisdiction, I should have abstained from resolving the other claims asserted by the employer until the administrative and judicial review procedures prescribed by the Texas Insurance Code had yielded final determinations on the issue of whether the contested workers' compensation claims were improperly paid. The Fifth Circuit remanded the case with instructions to hold it in abeyance until the state administrative and judicial review procedures were complete.

- (6) *Amica Mut. Ins. Co. v. Moak*, 155 F.R.D. 165 (S.D. Tex. 1994), *aff'd in part and rev'd in part*, 55 F.3d 1093 (5th Cir. 1995)

An underinsured motorist carrier brought an interpleader action to resolve claims asserted for the \$500,000 policy proceeds by a deceased insured's surviving spouse, minor son, two adult sons, and parents. In probate court, the insured's estate and family members had previously divided \$1,000,000 in insurance proceeds deposited by the negligent driver's insurance company. I held that all the claimants were "covered persons" under the underinsured motorist policy

because they were all entitled to recover damages under the Texas Wrongful Death Act, which permits recovery by a decedent's surviving spouse, children, and parents for losses they sustained as a result of the decedent's death. I further held that the probate court's apportionment of damages collaterally estopped relitigation of the apportionment issue. On appeal, the Fifth Circuit affirmed my interpretation of the insurance policy, holding that all the claimants were "covered persons" who could share in the policy proceeds. The appellate court held, however, that the principles of collateral estoppel did not apply because, under the single satisfaction rule, each claimant was entitled to recover only the amount of damages proven, an issue that was not actually litigated or necessary to the agreed judgment in the probate court. The Fifth Circuit remanded the case to allow each claimant to prove his or her damages.

Significant opinions on federal or state constitutional issues:

- (1) *Bluitt v. Houston Ind. Sch. Dist.*, 238 F. Supp. 2d 703 (S.D. Tex. 2002)
 - (2) *Alexander v. Johnson*, 217 F. Supp. 2d 780 (S.D. Tex. 2001), *aff'd*, 294 F.3d 626 (5th Cir. 2002)
 - (3) *Olabisiotosho v. City of Houston*, No. H-95-5434 (S.D. Tex. Nov. 20, 1997) (unpublished), *aff'd*, 185 F.3d 521 (5th Cir. 1999)
 - (4) *Chacko v. Texas A & M Univ.*, 960 F. Supp. 1180 (S.D. Tex. 1997), *aff'd*, 149 F.3d 1175 (5th Cir. 1998)
 - (5) *Sharp v. City of Houston*, 960 F. Supp. 1164 (S.D. Tex. 1997), *aff'd*, 164 F.3d 923 (5th Cir. 1999)
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 held no non-judicial public offices.

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;

Andrews & Kurth L.L.P.	1978-1992
600 Travis, Suite 4200	partner (1986-1992)
Houston, TX 77002	associate (1978-1986)

- 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?

1979-1982	labor and employment law
1982-1984	products liability
1984-1986	labor and employment law
1986-1992	products liability and commercial litigation

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

I generally represented large corporations, such as:
 Intermedics, Inc.
 The American Tobacco Company
 Essex Chemical Corporation
 Lufkin Industries, Inc.
 BJ-Hughes, Inc.
 Hughes Tool Company
 Brown Oil Tools

I practiced primarily in areas of labor and employment, products liability, and commercial 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.

Occasionally

2. What percentage of these appearances was in:
- (a) federal courts;
 - (b) state courts of record;
 - (c) other courts.
- (a) federal courts—50%;
- (b) state courts of record—50%;
- (c) other courts.
3. What percentage of your litigation was:
- (a) civil;
 - (b) criminal.
- (a) civil proceedings—100%;
- (b) criminal proceedings.
4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.
- 4; chief counsel in 3; associate counsel in 1
5. What percentage of these trials was:
- (a) jury;
 - (b) non-jury.
- jury—25%; non-jury—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.
- (1) 1990-1991
Russell Chambers v. Intermedics, Inc., No. 88-G-1614 (239th Dist. Ct. of Brazoria County, Tex. 1991) (Judge J. Ray Gayle)

I defended Intermedics against a multitude of claims brought by its former CEO, including claims for stock, severance benefits, a condominium, business expenses, interest in a yacht, *etc.* This case prevented an unprincipled individual, who had taken the company to the verge of bankruptcy by improper expenditures of corporate assets, from recovering excessive sums of money upon his termination. The case was tried in a mini-trial before Judge Paul Ferguson, and Intermedics ended up paying only nuisance value on a multi-million dollar claim. Opposing counsel was Michael Phillips, 223 N. Velasco St., Angleton, TX 77516, (409) 849-4382.

- (2) 1990
Quality Tubing v. Smith, Clarke, Benge, et al., No. 90-45-338 (334th Dist. Ct. of Harris County, Tex. 1990) (Judge Russell Lloyd)

After discovery and briefing, I obtained a dismissal on special appearance grounds for my client, Defendant Gordon S. Ferguson, Trustee of a Connecticut Trust. This saved Mr. Ferguson and his law firm from substantial exposure on tortious interference with contract and related business tort claims. I was in charge of all phases of the litigation on behalf of Mr. Ferguson and his law firm. Opposing counsel was Ronald McDearman, 12222 Merit Drive, Suite 1850, Dallas, TX 75251, (214) 788-1888. Counsel for codefendants was Charles R. Gregg, Chase Tower, Houston, TX, (713) 226-1478, formerly of Reynold, Allen & Cook, Houston, TX

- (3) 1988-1989
Vermedco, Inc. v. Intermedics, Inc., No. 88-3475 (D.N.J. 1989) (Judge John Bissell)

I prevailed in avoiding an injunction sought against my client, Intermedics, Inc., a heart pacemaker manufacturer, to prevent it from terminating an unproductive sales representative organization covering the Northeastern United States. This permitted wider accessibility of pacemaker products and related accessories at reasonable prices in the Northeast. I was in charge of all phases of the litigation, including discovery, hearings, briefing, and arbitration. The case ultimately went to arbitration and was resolved under terms quite favorable to my client. Opposing counsel was Steven Edwards, Davis, Markel & Edwards, 100 Park Avenue, New York, NY 10017, (212) 685-5885. Local counsel was William T. Reilly, McCarter & English, Four Gateway Center, 100 Mulberry Street, Newark, NJ 07101, (973) 622-4444.

- (4) 1988-1989
Medical Devices, Inc. v. Intermedics, Inc., No. CV 87-L-656 (D. Neb. 1989) (Judge Warren Urbom)

I defended Intermedics from a suit brought by its upper Midwestern sales representative organization challenging its termination for poor performance. I was in charge of all phases of the litigation. Intermedics settled the case on very reasonable terms after substantial discovery, resulting in greater availability of pacemakers and related products in the upper Midwest. Opposing counsel was Gary Dolan, P.O. Box 80833, Lincoln, NE 68502, (402) 476-9750. Local counsel was Terry Wittler, Cline, Williams, Wright, Johnson & Oldfather, L.L.P., 1900 U.S. Bank Building, 233 South 13th Street, Lincoln, NE 68508, (402) 474-6900.

- (5) 1987
Intermedics, Inc. v. Cardiac Pacemakers, Jouko Rissanen, et al., No. 1:87CV-2130-ODE (N.D. Ga. 1987) (Judge Orinda Evans)

I devised all legal strategy, supervised other counsel, and participated in obtaining permanent injunctions on behalf of Intermedics against a number of defecting sales representatives to prevent them from going to work for a direct competitor in violation of covenants-not-to-compete. This lent greater stability to the pacemaker supply in the Southeastern United States. Opposing counsel was Freeman & Hawkins, now Hawkins & Purnell, 4000 Sun Trust Plaza, 303 Peachtree St., N.E., Atlanta, GA 30308, (404) 614-7400. Local counsel was Alan Lubel, Troutman Sanders L.L.P., Bank of America Plaza, 600 Peachtree Street, N.E., Suite 5200, Atlanta, GA 30308, (404) 885-3000

- (6) 1986
Bertina Johnson v. The American Tobacco Co., et al., No. 86-1343 (S.D. Tex. 1986) (Judge Lynn N. Hughes)

I took depositions, prepared motions, wrote briefs, and appeared at hearings on behalf of The American Tobacco Company, leading to final summary judgment for my client in a case brought by family members of a smoker who died of lung cancer. Opposing counsel was William Townsley, Townsley, Bush & Ramsey, 3550 Fannin Street, Beaumont, TX 77701, (409) 832-3453. Co-counsel was Sam W. Cruse, Jr., then with Andrews & Kurth L.L.P., now with Cruse, Scott & Henderson, 600 Travis, Suite 3900, Houston, TX 77002, (713) 650-6600.

- (7) 1985-1987
Marino Elec., Inc. & Marin Elec., Inc. & International Bhd. of Elec. Workers Local Union No. 716, No. 23-CA-10000, 285 NLRB 344, 1987 WL 89841 (1987) (ALJ Al Linton)

I successfully defended Marin Electric against unfair labor practice charges stemming from an alleged “double-breasted” operation. I was responsible for all phases of the litigation on behalf of Marin Electric. This case supported the right-to-work laws of the State of Texas, permitting workers to decline affiliation with a union without the threat of coercion. Opposing counsel was Robert Breaux with the NLRB and Patrick Flynn, 1330 Post Oak Blvd., Suite 2995, Houston, TX 77056, (713) 861-6163. Counsel for Codefendant Marino Electric, Inc. was James V. Carroll, III, then with Andrews & Kurth L.L.P., now with Littler Mendelson, P.C., 1301 McKinney, Houston, TX (713) 652-4700.

- (8) 1985-1990
Jeannie Grinnell v. The American Tobacco Co., No. E-122-878 (172d Dist. Ct. of Jefferson County, Tex. 1985) (Judge Donald Floyd)

I took numerous depositions, prepared a number of motions and briefs, and appeared at hearings in the district court on behalf of The American Tobacco Company, leading to summary judgment at the district court level on preemption grounds in a case brought by family members of a smoker who died of lung cancer. The Beaumont Court of Appeals reversed the summary judgment, but the appellate holding was subsequently reversed in part by the Texas Supreme Court. *See* 883 S.W.3d 791 (Tex. App.—Beaumont 1994), *aff’d in part & rev’d in part*, 951 S.W.2d 420 (Tex. 1997). The defendant ultimately prevailed in a trial on the merits. This and numerous other tobacco cases in which I participated in the 1980’s helped define the scope of tobacco product litigation in Texas. Opposing counsel were Roger McCabe and David Gaultney of Mehaffy & Weber, 2615 Calder Ave., Beaumont, TX 77704, (409) 835-5011. Co-counsel was Sam W. Cruse, Jr., then with Andrews & Kurth L.L.P., now with Cruse, Scott & Henderson, 600 Travis, Suite 3900, Houston, TX 77002, (713) 650-6600.

- (9) 1981-1984
In re MGM Grand Hotel Fire Litig., MDL No. 453, 570 F. Supp. 913 (D. Nev. 1983) (Judge Louis C. Bechtle)

I took numerous fact and expert depositions, wrote many briefs, and participated in a number of hearings on behalf of Essex Chemical Corp., a supplier of adhesive mastic used on ceiling tiles, in the MGM Grand Hotel

Litigation. The case arose out of a fire that occurred on November 21, 1980, in the MGM Hotel and Casino in Las Vegas, Nevada. Eighty-four persons died as a result of the fire. Over 1,000 persons suffered injuries due to smoke inhalation, and hundreds of others suffered sprains, broken bones, and lacerations when escaping the fire. Essex Chemical was one of 118 defendants against whom the plaintiffs brought strict products liability, breach of warranty, negligence, and a variety of other claims. Essex Chemical remained in the litigation, and I worked on the case almost full-time, for over three years. A global settlement in the amount of \$223,386,069.00 was ultimately reached, of which Essex paid only a small fraction. *See* 660 F. Supp. 522 (D. Nev. 1987). Opposing counsel was the Plaintiffs' Legal Committee consisting of John J. Cummings, III, 416 Gravier St., New Orleans, LA 70130, (504) 586-0000; Stanley M. Chesley, 2930 Belkay Ln., Cincinnati, OH, (513) 631-2277; Wendell H. Gauthier, New Orleans, LA 77015, (504) 894-9039; Melvin M. Belli, San Francisco, CA (now deceased); Toxey H. Smith, 6255 Sunset Blvd., Los Angeles, CA; Will S. Kemp, 3800 Howard Hughes Pkwy., 17th Floor, Las Vegas, NV 89109, (702) 385-6000; Joseph W. Cotchett, 9454 Wilshire Blvd., Suite 907, Los Angeles, CA 90212, (310) 247-9247; Leonard M. Ring, Chicago, IL; J. Bruce Alverson, 7401 W. Charleston Blvd., Las Vegas, NV 89117, (702) 384-7000; and Joseph Weiner, Philadelphia, PA. Thomas H. Foulds, 703 6th Avenue N, Seattle, WA, (425) 235-4930, counsel for Kemper Insurance Company, the property insurer for the MGM Grand Hotel, became adverse when he brought a subrogation claim against the supplier defendants. Co-counsel were Harold Morse, Bank of America Plaza, 300 S. Fourth St., Suite 1400, Las Vegas, NV 89101, (702) 384-6340, and O. Clayton Lilienstern, then with Andrews & Kurth L.L.P., now with Hicks, Thomas & Lilienstern LLP, 700 Louisiana, Houston, TX 77002, (713) 547-9100. Counsel for the 117 other defendants are too numerous to list.

- (10) 1980-1981
Willie Richards v. Hughes Tool Co., 624 S.W.2d 598 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ) (Judge William Blanton)

I participated as counsel for Hughes Tool Company in the trial and three appeals of one of the first cases tried in Texas under a statute prohibiting discrimination against an employee for filing a workers' compensation claim. The employee initially prevailed at trial, but the case was reversed on appeal on the grounds that the plaintiff was precluded from bringing suit when he had received an adverse determination regarding his termination through the contractual grievance procedure. *See* 610 S.W.2d 232 (Tex. Civ. App.—Houston [14th Dist.]), *rev'd*, 615 S.W.2d 196 (Tex. 1981). The Texas Supreme Court reversed the appellate court's decision

and remanded the case to the court of appeals for consideration of several factual sufficiency points. The court of appeals ultimately held that the evidence was insufficient to establish a causal link between the plaintiff's discharge and his filing of a workers' compensation claim. Final judgment was entered for Hughes Tool Company. This case served to define the parameters of this statutory cause of action in Texas. Opposing counsel was Gordon R. Cooper, II, 3003 South Loop West, Houston, TX 77054, (713) 665-7081. Co-counsel was Kent Robinson, Andrews & Kurth L.L.P., 600 Travis, Suite 4200, Houston, TX 77002, (713) 220-4200.

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.)

While practicing labor and employment law, I represented various employers in arbitration cases against unions, gave advice regarding union election activities and collective bargaining, advised employers regarding their obligations under an array of civil rights statutes, prepared employee manuals, conducted supervisory training classes, represented employers in proceedings before the EEOC, participated in discrimination cases tried to the bench, and was involved in a variety of OSHA administrative proceedings.

When practicing commercial litigation, I represented an oil exploration company in a dispute regarding an oil well drilled in Grimes County, Texas, advised executives of a Kuwaiti oil company regarding a gas balancing agreement with Saudi Arabia, represented an owner of a television pay-per-view business in a dispute with his partners, litigated a dispute involving shareholders in a private hospital company, regularly advised a grocery store chain with regard to food safety regulations, obtained visas on behalf of foreign executives and technical personnel of multi-national corporations, and, when practicing products liability litigation, was involved in numerous cases brought by smokers that ended in summary judgment or dismissal for a tobacco company client.

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.

For the past ten years while serving as a judge, I have been precluded from providing legal services to anyone, including the disadvantaged. Prior to that time, I served on the Board of Directors of the Southeast Texas Chapter of the National Multiple Sclerosis Society and provided legal advice to the board on a regular basis, provided information regarding employment law on public television, volunteered for legal call-in lines, and gave advice to adoption agencies. As a judge, I am a fellow of both the Texas Bar Foundation and the Houston Bar Foundation, and my financial support of those organizations goes to various legal programs for the disadvantaged. I am also actively involved in and devote a substantial amount of time to programs for disadvantaged law students, giving them the opportunity to serve as interns in my chambers, working with the South Texas Chapter of the Federal Bar Association's Blask Fellowship program to provide grant money in order to encourage their pursuit of public service careers, judging mock trial and moot court competitions at the local law schools, and participating annually in the American Bar Association's Minority Judicial Externship Program. On a personal level, I support programs for the less fortunate through my church, volunteer at a day care center for disadvantaged pre-schoolers, perform marriage ceremonies for persons unable to pay for an officiant, participate in book and clothing drives sponsored by local charities, and collect and donate personal items requested for distribution to American troops overseas.

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, a selection committee recommended me as a candidate for nomination to the federal courts. After submitting an application, I was interviewed by a merit selection panel in Houston, Texas. I was one of four candidates for the position invited to Washington, D.C., to interview with Senators Kay Bailey Hutchison and John Cornyn of Texas. Following the interviews, the senators recommended me for a district judgeship in the Eastern District of Texas. I returned to Washington, D.C., where I was interviewed by Judge Alberto Gonzales, White House Counsel, and two of his staff members. Several days later, I was notified that I had been approved for consideration and would be receiving questionnaires about my background. I completed the questionnaires and then underwent a background check by the Federal Bureau of Investigation. Several weeks later, I was sent yet another questionnaire regarding my background, which I subsequently completed.

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.

Judges should not overstep their judicial roles to become policy makers or enforcers, areas which should be left to the legislative or executive branches of the government. The function of the judiciary is to interpret the law as set forth by the lawmakers in accordance with the Constitution, federal statutes, and controlling precedent. This role is best accomplished by deciding the merits of individual cases involving specific grievances by named parties within the framework of the facts presented, without giving undue regard to broader policy implications when inconsistent with established law. Judges can further this goal by strictly construing jurisdictional prerequisites and maintaining vigilance over matters of standing and ripeness. While common sense should not be left behind on the courthouse steps, judges should be careful not to step outside the courtroom and become embroiled in societal or institutional problems that go beyond the scope of tangible issues in dispute before the court.

Chairman HATCH. We are delighted to have you here.
Mr. Figa?

**STATEMENT OF PHILLIP S. FIGA, NOMINEE TO BE DISTRICT
JUDGE FOR THE DISTRICT OF COLORADO**

Mr. FIGA. Mr. Chairman, first of all, I would like to thank you and the Committee for allowing me the opportunity to be considered on such an expedited basis.

In addition to my family, I would like to introduce a few people including Chuck Turner, the Executive Director of the Colorado Bar Association, who came out for this.

Chairman HATCH. Glad to have you here, Chuck.

Mr. FIGA. My law partner, J. Kemper Will, who came out from Denver yesterday for the hearing.

Chairman HATCH. I am honored you are here.

Mr. FIGA. Good friends, Jim and Marlene Bailor of Washington, D.C., and my children's college classmates, Seth Rosen and Erica Gorchow, who are here today.

Chairman HATCH. Good to have you both here.

Mr. FIGA. And I would also like to thank my Senators for their participation in this process, and their support, and of course, the President for honoring me with this nomination.

[The biographical information of Mr. Figa follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Phillip S. Figa

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

Residence: Greenwood Village, CO

Office: Burns, Figa & Will, P.C., 6400 S. Fiddlers Green Circle, Suite 1030,
Englewood, CO 80111 (office)

3. Date and place of birth.

Born July 27, 1951 in Chicago IL

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 Candace Cole Figa for 30 years on August 19. Her maiden name is Cole. She is a lawyer practicing at Burns, Figa & Will, P.C., 6400 S. Fiddlers Green Circle, Suite 1030, Englewood, CO 80111

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

Attended college at Northwestern University from 9/69 until 3/73, receiving a B.A. degree in Economics in 6/73. Attended law school at Cornell Law School from 8/73 until 6/76, receiving a J.D. degree in 6/76.

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.

1973 - Summer Security Guard for Marshall Field & Company, Old Orchard Shopping Center, Skokie, IL;

1974 - Summer law clerk for Miller & Gray, P.C., Boulder, CO;

1975 – Summer law clerk for Dawson, Nagel, Sherman & Howard (now Sherman & Howard LLC), Denver, CO;

1976-1980 – Associate, Sherman & Howard, Denver, CO;

1980-present – Shareholder, Burns, Figa & Will, P.C., Englewood, CO (name changed from Burns & Figa, P.C. in 1991).

1986-88 – Colorado Bar Association Board of Governors, Denver, CO

1995-96 – President, Colorado Bar Association, Denver, CO

1984-present – Anti-Defamation League Board of Directors, Mountain States Region; Chairman of the Board (1996-98)

1999-2001 – Board member, Colorado Lawyer Trust Account Foundation.

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.

Evans Scholarship (4-year full-tuition college scholarship for needy golf caddies sponsored by the Evans Scholarship Foundation of the Western Golf Association); Chairman, Student Hearing & Appeals Board, Northwestern University, 1972-73 (jurisdiction limited to alleged student misconduct on campus); Phi Beta Kappa; Managing Editor, Cornell International Law Journal; Fellow, International Society of Barristers (by invitation only, membership limited to “600 outstanding trial lawyers dedicated to excellence and integrity in advocacy”); Colorado Bar Foundation (by invitation only, membership limited to 3% of active members of the state bar); American Bar Association Foundation (by invitation only, membership limited to 1/3 of 1% of the lawyer population of the state); recognized in 1998 by Colorado Supreme Court “[i]n appreciation of your outstanding leadership of the Coalition for the Independence of the Colorado Judiciary.”

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.

Colorado Bar Association (President 1995-96; Chair, Ethics Committee 1984-85; Chair, Awards Committee 1998-99; Chair, Nominating Committee 1999-2000). American Bar Association (Member, ABA Standing Committee on Professional Discipline 1997-99). Faculty of Federal Advocates (Chair, Nominating Committee 1999 & 2000). Civil Justice Reform Act Advisory Group, U.S. District Court for the District of Colorado (Member 1994-97). American Judicature Society. Federalist Society. Denver Bar Association. Arapahoe County Bar Association. Colorado Lawyers Committee (vice-chair 1987-88; treas. 1988-89). Member, Colorado Supreme Court/Bar Association Joint Committee to Study the Model Rules of Professional Conduct (1987-92). Member, Colorado Supreme Court/Bar Association Committee on Lawyer Regulation to Revise Colorado Disciplinary Rules (1997-98). Member, Colorado Supreme Court Advisory Committee on Group Legal Services and Advertising (1982-86). Member, Senator Wayne Allard's Judicial/Legal Advisory Board (1997-2000). Member, Judicial Compensation Panel, appointed by Chief Justice Anthony F. Volland (1997-98). Board member, Colorado Lawyer Trust Account Foundation (1999-2001). Pres., Colorado Bar Fellows 2001-03.

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.

Lobby: Anti-Defamation League; American Israel Public Affairs Committee (AIPAC);
Other: Trustee, Rose Community Foundation (Rose does not lobby).

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.

Member in good standing (without lapses) of the bars of the State of Colorado (1976-), United States District Court for the District of Colorado (1976--), the Court of Appeals, Tenth Circuit (1980--) and the Supreme Court of the U.S. (1980--).

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.

"Judging the Judges: Remain Vigilant—Independent Judges Make Their Branch Least Dangerous," 26 Colorado Journal 6 (Aug. 21, 2002).

"Colorado Bar Association President's Message to Members: What We Would Like to Tell a Brand New Lawyer," (contributing author) 28 Colo. Lawyer 25 (Apr. 1999).

"Jury Selection," (co-author) Colorado Courtroom Handbook for Civil Trials (September, 1998).

"Colorado's Top Court is Top-Notch," The Denver Post, July 12, 1998, at H-1, col. 5.

"Summing Up," 25 Colo. Lawyer 9 (June 1996).

"The First Thing We Do, Let's Kill All the Law Schools," 25 Colo. Lawyer 13 (May 1996).

"Same Sex Marriages: Should the CBA Take a Position?" 25 Colo. Lawyer 7 (Apr. 1996).

"Advertising Redux," 25 Colo. Lawyer 11 (Mar. 1996).

"The Merits of Merit Selection," 25 Colo. Lawyer 29 (Feb. 1996).

"Learning from Learned Hand," 25 Colo. Lawyer 9 (Jan. 1996).

"Government Lawyers and the Bar Association," 24 Colo. Lawyer 2687 (Dec. 1995).

"Women in the Profession: Beyond Tokenism," 24 Colo. Lawyer 2513 (Nov. 1995).

"Take a Sabbatical--You Deserve It (Life is Short but Careers are Long)," 24 Colo. Lawyer 2309 (Oct. 1995).

"Courting Controversy: When Should the State Bar Take Positions?," 24 Colo. Lawyer 2129 (Sept. 1995).

"Why the O.J. Simpson Trial Can't Happen Here," 24 Colo. Lawyer 1749 (Aug. 1995).

"Helping Young Lawyers," 24 Colo. Lawyer 1553 (July 1995).

"The Misuse of Settlement Agreements," 43 Trial Talk 14 (Feb. 1994).

"The Fugitive From Real-Life Justice," Nat. Law J., Sept. 13, 1993 at 13, col. 1, also published in The Denver Post, May 29, 1994 at 5-D, col. 1, and in abridged form as "'Fugitive' Might Not Escape These Days", Rocky Mtn. News, Aug. 25, 1993 at 41A, col. 2.

"Good Ethics are Good Business in Long Run," The Denver Post, July 9, 1990 at 2-C, col. 3.

"The 'American Rule' Has Outlived Its Usefulness," Nat. Law J., Oct. 20, 1986 at 13, adopted for republication in the Rocky Mtn. News, Feb. 15, 1987 at 71.

"Ethics," 1984 Annual Survey of Colorado Law 77 (1985).

"Rule 11 as a Litigation Tool," 12 Colo. Lawyer 1246 (Aug. 1983).

"Lawyer Solicitation Today and Under the Proposed Model Rules of Professional Conduct," 52 U.Colo.L.Rev. 393 (1981).

"The Lawyer-Client Relationship as Autonomous," 9 Colo. Lawyer 2555 (Dec. 1980) (co-author).

"The Adversary Model is Bent," 9 Colo. Lawyer 2577 (Dec. 1980) (co-author).

"The Capacity of Foreign Sovereigns to Sue in Private Federal Antitrust Actions," 9 Cornell Int'l L.J. 137 (1975).

With regard to speeches I have made, I do not have any copies of any of my speeches, and, to my knowledge, none of my speeches has involved constitutional law or legal policy.

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. The date of my last physical examination was 3/24/03.

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.

None.

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

1995-present Member, Colorado Commission on Judicial Discipline (Secretary 2001-present) (twice nominated by the Governor and confirmed unanimously by the Colorado State Senate).

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 have not served as a clerk to a judge.

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;

8/76-3/80 Dawson, Nagel, Sherman & Howard (now Sherman & Howard LLC), 633 17th St., Suite 3000, Denver, CO 80202;
4/80-present Burns, Figa & Will. P.C., currently 6400 S. Fiddlers Green Circle, Suite 1030, Englewood, CO 80111.

- 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?

After law school graduation I practiced at a Denver law firm that is now known as Sherman & Howard LLC. It was then as now one of the largest firms in Denver having a full service practice. I was unassigned to any department within the firm for about 2½

years, working mainly on commercial litigation and general business matters, including a healthy dose of municipal bond work. Thereafter I affiliated with the general business department doing principally securities and other transactional work, although I continued with some civil litigation.

In April 1980, my mentor at Sherman & Howard, Hugh Burns, left the firm and asked me to join him. We formed Burns & Figa, P.C. in Denver, CO. A year or so later, my wife, Candace, joined us. The three of us practiced together until 1988, when Mr. Burns retired due to the onset of multiple sclerosis. (He passed away in 2001.) Our firm maintained a boutique litigation practice emphasizing complex commercial litigation, especially antitrust, contract, real estate and other business-related disputes. Our clients were some of the biggest companies in Colorado and nationally but also many individuals and small business entities. Over time, by virtue of being a longstanding member of the Colorado Bar Association Ethics Committee (1978-93) and its Chairman (1984-85), I began representing a number of lawyers and law firms in a variety of malpractice, ethics, attorneys fee and disciplinary contexts.

In 1991, I affiliated with J. Kemper Will, who is an environmental law specialist but not a trial practitioner. That affiliation resulted in my handling environmental litigation as well. We relocated the firm to the "Tech Center," a large business and commercial area located in Englewood, CO, a suburb of Denver. With some splendid additions to our firm and natural growth, we now have a 22-lawyer firm of which I am president and very proud. My practice mix varies from year but usually about one-half is in federal court. In recent years I have done more trademark, oil & gas, health care and employment litigation than I had done in the past. In the last four to six years particularly, I have been called upon increasingly to act as an expert witness in the areas of legal ethics, standard of care of lawyers, conflicts of interest, malpractice and attorneys fees.

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

My former clients include large business clients with one-time or occasional litigation needs. They include Bridgestone Tire (antitrust); Woolworth and Kinney Shoes—now Venator Group (trademark infringement); Castrol (dealer termination); Crested Butte Mountain Resort (antitrust, employment and ski industry related litigation). Numerous ex-clients are lawyers whom I have represented on disciplinary, fee collection and malpractice 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 average going to court a few to several times a month and have done so throughout my career. Obviously trials from time to time increase my monthly presence there, and there are periods when my court appearances are few and far between.

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

Approximately 50% is in federal court; the remainder is in state court, which includes the Colorado court for attorney discipline where I practice frequently.

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

Almost all of my practice is civil. I seldom am involved in criminal matters except lawyer disciplinary matters, which are sometimes deemed to be quasi-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.

In over 26 years of practice I have tried over 35 cases to verdict or judgment that I recall, approximately two-thirds of them to jury. Most have been as sole or chief counsel.

5. What percentage of these trials was:
- (a) jury -66%
 - (b) non-jury -34%

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. Case Name/Number: *People v. Kamins*, Case No. 01 PDJ 103 (Colorado Original Proceedings in Discipline).
Presiding Judge(s): Roger L. Keithley, Presiding Disciplinary Judge, tel. 303-825-2797; Maureen Cain, Esq., tel. 303-839-5837; Judith M. Goeke, Esq., tel. 303-271-6800.
Opposing Counsel: Debra Jones, Assistant Regulation Counsel, Dominion Plaza Building, 600 17th St., Suite 200-S, Denver, CO 80202; tel. 303-893-8121, X- 314.

My client was an attorney who operated a taxi business. His disbarment was sought based on allegations that he, through his company, engaged in Medicaid theft by adding an unauthorized surcharge to taxi fares for Medicaid patients needing transportation for covered medical services. The Office of Attorney Regulation refused to offer a resolution short of disbarment of Mr. Kamins, yet at the conclusion of the People's case-in-chief on September 4, 2002, the Presiding Disciplinary Judge dismissed all the claims. No appeal was taken. I was lead counsel. The representation began in the Fall of 2001 and recently ended.

2. Case Name/Number: *Dennis Green Design Group, Inc. v. Woolworth Corp., et al.*; 90-CV-661; 1991 WL 228717 (D. Colo. 1991).
Presiding Judge(s): Richard P. Matsch, U.S. District Court for the District of Colorado, tel: 303-844-4627;
Opposing Counsel: Miles C. Cortez, AIMCO, 200 S. Colorado Blvd., Suite 2-1000, Denver, CO 80222, tel. 303-691-4301;
Opposing Counsel: Sheldon E. Friedman, Isaacson, Rosenbaum, Woods & Levy, P.C., 633 17th St., Suite 2200, Denver, CO 80202; tel. 303-292-5656.

I represented Woolworth and its wholly owned subsidiary, Kinney Shoe Corp., as lead counsel in a trademark infringement case. The plaintiff, a local inventor-design, developed a product known as "Sneaker Balls," used to deodorize sports shoes and gym bags. My clients developed a somewhat similar product known as "Sports Balls," which plaintiff claimed was a knock-off of its product. The lengthy jury trial in November 1992 on liability was a mixed victory, with defendants prevailing on some claims but losing on others. The damages trial occurred in July 1993, and Judge Matsch essentially accepted defendants' theory of damages, which was a fraction of what the plaintiffs were seeking. The case was settled on a confidential basis while an appeal was pending before the Tenth Circuit.

3. Case Name/Number: *Laura M. Toth v. Service Corporation International, et al.*; 92-CV-2066;
Presiding Judge(s): Zita L. Weinshienk, U.S. District Court of the District of Colorado, tel. 303-844-2784;
Opposing Counsel: B. Lawrence Theis, Perkins Coie LLP, 1899 Wynkoop, Suite 700, Denver, CO 80202; tel: 303-291-2306;
Gregory B. Kanan (co-defendant's counsel), Rothgerber, Johnson & Lyons LLP, 1200 17th St., Suite 3000, Denver, CO 80202; tel. 303-623-9000.

The plaintiff, one of two similarly situated, alleged wrongful imprisonment and defamation by her employer, a mortuary located in Pueblo, CO, and the fraud investigator it hired. The mortuary believed it was suffering from employee theft. It hired my client, John Capezzi—an experienced fraud investigator, to determine the cause of the losses. Mr. Capezzi interviewed the plaintiff as well as other mortuary employees. He determined that the thefts were caused by another employee and so stated in a report, which through no fault of his ultimately was forwarded onto the local police and into the hands of the local newspaper. The paper referred to the plaintiff as a suspect. She claimed the interview was conducted roughly and constituted wrongful imprisonment and intimidation, as well as making allegations of libel. The libel claim was dismissed before trial and the investigator and the mortuary obtained a defendants' jury verdict. Earlier, in a related state-court case brought by a similarly situated plaintiff my client settled before trial with no payment of funds. In that other case, the mortuary went to trial and lost, being subject to an unfavorable jury verdict that included monetary damages. I was sole counsel for Mr. Capezzi. The trial occurred in about 1995 and I represented the client for approximately two years leading up to the federal trial.

4. Case Name/Number: *Out of Line Sports, Inc. v. Rollerblade, Inc.*; 96-B-2406, appeal dismissed, 213 F.3d 500 (10th Cir. 2000);
Presiding Judge(s): Lewis T. Babcock, U.S. District Court for the District of Colorado, tel. 303-844-2527;
Opposing Counsel: Peter A. Jaffe, 2624 Catamount Creek Rd., McCoy, CO 80463, tel. 970-653-4361.

My client was a law firm, Breit Bosch Levin & Coppola, P.C., that represented Out of Line Sports, Inc., a plaintiff in a contested patent infringement case that settled on the eve of a *Markman* hearing. Subsequently, Out of Line refused to pay Breit Bosch its six figure fee owing pursuant to their contingent fee agreement. The client's refusal to pay was based on the contention that the Breit Bosch attorneys coerced the client to settle against its will for a far lower amount than the case was worth and that the attorneys had committed other ethical improprieties, including champerty, thereby justifying voiding the fee agreement or mandating a lesser fee than what was contractually agreed upon. On behalf of the law firm I asserted a charging lien. In disputed evidentiary lien enforcement proceedings in December 1999, the law firm was deemed entitled to recover nearly all the fees the law firm sought. I successfully argued before the Tenth Circuit that it had no jurisdiction to consider Out of Line's appeal because the money at issue had been distributed with Out of Line's assent as the district court had ruled, leaving no *res* in dispute upon which appellate jurisdiction could attach. I was lead counsel for Breit Bosch, handling this case and related state court proceeding involving the successful enforcement of a promissory note for approximately two years.

5. Case Name/Number: *People of the State of Colorado v. Bronstein*, 964 P.2d 514 (Colo. 1998), #98SA121;
Presiding Judge(s): Chief Justice Anthony F. Vollack (Retired), tel. 303-572-1919, and Justice Rebecca Love Kourlis, tel. 303-861-1111, among other justices.

Opposing Counsel: John S. Gleason, Chief Attorney Regulation Counsel, Office of Attorney Regulation, Dominion Plaza Building, 600 S. Dominion Plaza, Suite 200-S, Denver, CO 80202; tel. 303-893-8121, X-306.

Mr. Bronstein was a young lawyer who “moonlighted,” *i.e.* he was doing work for clients and billing for them separately unbeknownst to his law firm. I persuaded the disciplinary prosecutor to accept a 30-day suspension as an appropriate sanction. The Colorado Supreme Court rejected it. I then persuaded the prosecutor to accept a year-and-a-day suspension. Again, the Supreme Court refused to accept the conditional stipulation of misconduct to that effect. A hearing then ensued before a three-person hearing board in which I persuaded the board to recommend to the Supreme Court that a three-year suspension was an appropriate sanction. While the hearing board so found, the Supreme Court issued an order to show cause why Mr. Bronstein should not be disbarred. I argued to Colorado’s highest court that the hearing board’s recommendation should be honored. The Colorado Supreme Court agreed with one justice indicating a more severe sanction was warranted. The Court later came to consider its legal analysis too favorable to Mr. Bronstein, overruling the case “to the extent that it suggests that disbarment is not the presumed sanction when a lawyer knowingly misappropriates funds.” *See In re Thompson*, 991 P.2d 820, 823 (Colo. 1999); *In re Elinoff*, 22 P.3d 60, 64 (Colo. 2001). I was lead counsel for Mr. Bronstein, and the representation was for about one year’s duration.

6. Case Name/Number: *People v. Rudman*, 948 P.2d 1022 (Colo. 1997), #96SA466.
 Presiding Judge(s): Chief Justice Luis Rovira (Retired), tel. 303-572-1919, and Justice William Erickson, tel. 303-789-0333, among other justices;
 Opposing Counsel: James Coyle, Deputy Regulation Counsel, Office of Attorney Regulation, Dominion Plaza Building, 600 S. Dominion Plaza, Suite 200-S, Denver, CO 80202; tel. 303-893-8121, X-328.

This is another lawyer disciplinary case in which a lawyer who was found guilty of serious misconduct received a sanction less than disbarment. Two members of the court would have disbarred him. *See* 948 P.2d at 1027. I was lead counsel for Mr. Rudman throughout the approximately three years of the disciplinary process.

7. Case Name/Number: *Vernon P. Vance v. Colorado Dept. of Corrections, et al.*, 94-D-1569 (D. Colo.);
 Presiding Judge(s): Wiley Y. Daniel, U.S. District Judge for the District of Colorado, tel. 303-844-2170);
 Co-Counsel: Nathan Longenecker, Temkin Wielga & Hardt LLP, 1900 Wazee Street, Suite 303, Denver, CO 80202; tel. 303-382-2901;
 Opposing Counsel: Christina Valencia, current address and telephone number unknown, formerly Assistant Attorney General, 1525 Sherman St, Fifth Floor, Denver, CO 80203; tel. 303-866-4500.

This was a court-appointed civil rights case for a prisoner claiming excessive force was used on him in an altercation while in prison and claiming he was denied his due process

rights in connection with subsequent prison disciplinary proceedings. The jury found a due process violation in violation of 42 U.S.C. § 1983, and awarded him \$25,000 in damages. That amount was collected along with negotiated attorneys fees after I argued with initial success that the State's appeal was barred as untimely. I was lead counsel for the prevailing plaintiff. The representation lasted several months. More about this case is discussed below in response to Question III.1.

8. Case Name/Number: *Miami International Realty Co. v. Town of Mt. Crested Butte, et al*, 1986 WL 966, 1986-1 Trade Cases ¶ 67,144 (D. Colo. 1986); 607 F. Supp. 448 (D. Colo. 1985), 1984-2 Trade Cases ¶ 66,166 (D. Colo. 1984); Presiding Judge(s): John Kane, U.S. District Judge for the District of Colorado, tel. 303-844-6118); Co-Counsel for defendant: Richard Slivka, Denver Broncos Football Club, 13655 Broncos Way, Englewood, CO 80112; tel. 303-649-9000; Co Counsel for defendant: Paul Cooper, Cooper & Clough, PC, 1512 Larimer St., Suite 600, Denver, CO 80202; tel. 303-607-0077; Opposing Counsel: B. Lawrence Theis, Perkins Coie LLP, 1899 Wynkoop, Suite 700, Denver, CO 80202, tel. 303-291-2306.

This was an antitrust and civil rights case brought against a Colorado mountain town, certain town officials and the local ski area by a timeshare marketing firm. It claimed it was deprived of the opportunity to market fractional interests in real estate through an organized campaign by the ski area and town officials to drive it out of business. After extensive litigation and following a two-week trial to a jury in March 1986, the district judge granted defendants' motion for directed verdict at the conclusion of plaintiff's case. I was lead counsel for the ski area, Crested Butte Mountain Resort, Inc. No appeal was pursued in exchange for defendants waiving the costs to be awarded. The representation lasted approximately three years.

9. Case Name/Number: *William G. Noell et al v. RAF Financial Corporation et al.*, 94-CV-0730, Denver District Court; Presiding Judge(s): John McMullen, tel. 720-865-8303; Opposing Counsel: Dennis Graham, Colorado Court of Appeals, Colorado State Judicial Building, 2 E. 14th Ave., 3d Floor, Denver, CO 80203, tel. 303-861-1111.

I represented a trustee of a trust and related family members against a securities firm for making unsuitable investments and otherwise mishandling the brokerage account for the trust, which was for the benefit of an elderly woman suffering from Alzheimer's disease. In November 1995, my clients, the plaintiffs, won a favorable jury verdict that included substantial damages, compensatory and punitive. After the judgment was affirmed on appeal, the securities firm paid the judgment. I was lead counsel for the plaintiffs. The representation lasted about 4-5 months plus the time involved during the appeal.

10. Case Name/Number: *Altresco Philippines, Inc., et al. v. CMS Generation Co.*; 95-D-2336, 111 F.3d 140 (Table, Text in WESTLAW), Unpublished Disposition, 1997 WL 186257 (10th Cir. 1997);

Presiding Judge(s): Wiley Y. Daniel, tel. 303-844-2170;
 Co-Counsel: Robert F. Hill, Hill & Robbins, P.C., 1441 18th St., Suite 100, Denver,
 CO 80202, tel. 303-296-8100;
 Opposing Counsel: L. Richard Freese, Jr., 844 Humbolt St., Unit 1, Denver, CO 80218,
 tel. 303-837-1330;
 Arbitrator: Neil Kaplan, QC, 011-44-020-7813-8000 (UK phone), 011-44-020-7813-
 8080 (UK fax), 011-852-2869-6301 (Hong Kong phone), 011-852-3869-6372 (Hong
 Kong fax), ntkqc@attglobal.net (e-mail).

This was a case in which my client, a cogeneration power plant developer known as Altresco, sued an international affiliate of a Michigan utility company for breaching a contract in such a way that it scuttled the development of a power plant with the Luzon Power Company in the Philippines which my client had worked on for a couple of years. The Michigan utility, CMS, removed the case to federal court and then sought to have the case arbitrated. While the district court disagreed, the Tenth Circuit reversed in part stating that some aspects of the case had to be arbitrated. That led to a three-week arbitration in Hong Kong under the auspices of the International Chamber of Commerce as required by one the parties' agreements with the Luzon Power Company. Altresco prevailed in the arbitration, receiving a sizeable monetary judgment plus a seven-figure attorneys fee. It received a further monetary sum after a favorable settlement which I negotiated in seven figures of the non-arbitrable aspects of the case. I was co-lead counsel with Mr. Hill (there were four counsel and one paralegal on our side in Hong Kong), but while the client was a longstanding one of mine, the involvement in this matter by my co-counsel, Mr. Hill, whom I enlisted in this cause, exceeded mine in terms of quantity of time expended, financial risk and leadership.

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 November 2001, I was appointed by the board of trustees of the largest hospital and medical center in Colorado, Northern Colorado Medical Center (NCMC), to investigate conflicts of interest, disclosed and undisclosed, certain board members may have had with the hospital's operator, Banner Health System. This was occurring at a critical time when NCMC was considering a long-term renewal of Banner's operating contract. Alleged conflicts by NCMC board members with Banner representatives were a major local issue. After interviewing many interested parties, I issued a report that outlined the conflicts and recommended that negotiations between NCMC and Banner start over after certain conditions were met, including evaluating other potential operators besides Banner. The report was well received by the public in the Greeley area. *See, e.g.:*

<http://www.greeleytrib.com/apps/pbcs.dll/artikkel?SearchID=73129566503768&Avis=G&R&Dato=20020227&Kategori=NEWS&Lopenr=102270025&Ref=AR>

<http://www.greeleytrib.com/apps/pbcs.dll/artikkel?SearchID=73129566733581&Avis=G&R&Dato=20011222&Kategori=NEWS&Lopenr=112220007&Ref=AR;>

<http://www.greeleytrib.com/apps/pbcs.dll/artikkel?SearchID=73129566804799&Avis=G&R&Dato=20011220&Kategori=TRIBEDIT&Lopenr=112200015&Ref=AR;>

<http://www.greeleytrib.com/apps/pbcs.dll/artikkel?SearchID=73129566868237&Avis=G&R&Dato=20011220&Kategori=NEWS&Lopenr=112200006&Ref=AR;>

<http://www.greeleytrib.com/apps/pbcs.dll/artikkel?SearchID=73129566940003&Avis=G&R&Dato=20011219&Kategori=NEWS&Lopenr=112190001&Ref=AR;>

[http://www.greeleytrib.com/apps/pbcs.dll/artikkel?SearchID=73129566989081&Avis=G&R&Dato=20011128&Kategori=NEWS&Lopenr=111280001&Ref=AR.](http://www.greeleytrib.com/apps/pbcs.dll/artikkel?SearchID=73129566989081&Avis=G&R&Dato=20011128&Kategori=NEWS&Lopenr=111280001&Ref=AR;)

In the period 1986-90, I represented as general outside counsel for Altresco, Inc. a power plant developer. My work was partially responsible for the development of a power plant in Pittsfield, Massachusetts for General Electric. I negotiated the letter of intent that culminated in a \$160,000,000 financing for Altresco through General Electric Capital Corp. in New York in December 1988. The plant was constructed and it remains in operation.

Currently, I am representing Zurich American Insurance Company as coverage counsel for a putative class action alleging massive defects in windows of homes constructed in Colorado. The case is captioned *Braverman, et al. v. Ryland Homes, Inc., et al.*, Case No. 1999-CV-1811, Boulder County District Court, Div. 4. Several insurance carriers that insured the window manufacturer, Champagne Industries, Inc., and its successor-in-interest, the Atrium Door & Window Company of the Rockies, have multi-million dollar exposure each. Zurich has the largest potential exposure with a \$50 million umbrella policy. It has been my job to work with representatives of the insureds, the carriers and plaintiff's counsel to attempt to craft a proposed class-wide solution, get participation of all affected carriers and the insureds (which have some uninsured exposure), satisfy the plaintiffs (both named and putative class members), get court approval if agreement is reached and avoid bad faith insurance litigation.

I have used alternative dispute resolution whenever appropriate. I have successfully mediated resolution of many of my cases as well as arbitrating a number of them.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

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

I have been negotiating a shareholders agreement with my fellow shareholders of my law firm that will include a buy-out. The agreement is in the process of being finalized, but will avoid any conflict of interest or other impropriety. I will consult with knowledgeable experts to insure that before finalizing any such agreement.

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 plan to recuse myself from hearing any matter involving my law firm as counsel of record or as a party until at least five years after I cease having any financial buyout arrangement with the firm. I would recuse myself from ever hearing any matter involving my wife or her law firm (which is currently the same firm I founded and am still with). I further anticipate recusing myself from matters involving any lawyer and non-lawyer social friends, recent ex-clients or clients with whom I once had a longstanding or otherwise intense professional relationship. I would consult with judicial colleagues and applicable judicial ethical authorities and standards as appropriate about handling actual and potential conflicts of interest. I would make disclosures of any potential conflicts of interest to parties and their counsel if such could be deemed to be even arguably in a gray area that could result in a plausible claim of bias or prejudice or the perception of same.

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 financial 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.

I am most proud to have created the Federal *Pro Bono* Mentor Program for the U.S. District Court of the District of Colorado. That program, in existence since 1995, assists Colorado's federal trial bench in providing counsel for *pro se* litigants whose civil cases the judges determine to be in need of appointed counsel. It serves a fourfold purpose: (1) assisting the Court by providing competent counsel for otherwise *pro se* civil litigants for whom the Court believes representation is merited; (2) assisting the otherwise *pro se* litigants at no cost to them, most of whom are prisoners who have plausibly meritorious claims and perhaps a few non-incarcerated plaintiffs pursuing employment-related claims; (3) helping senior lawyers discharge their *pro bono* obligations by taking on court appointments; and (4) aiding junior lawyers in acquiring skills and values necessary for becoming premier federal advocates through working closely with a senior lawyer "mentor." See attached brochure. This program, founded when I was president of the Colorado Bar Association, is now operating under the auspices of the Faculty of Federal Advocates. I devoted hundreds of hours over a period of two to three years to formulating the program, obtaining court acceptance of it for court appointments, securing senior and junior lawyers to take on these cases, and developing protocols for pairing arrangements, funding, and obtaining volunteer services from paralegals and court reporters. As the program has evolved, successful counsel can keep a fraction of any fees recovered, but not out of any recovery obtained for the client.

I, along with my co-counsel/mentee, won the first jury verdict through the program, representing a state prisoner claiming excessive force and disciplinary due process violations while incarcerated. *Vernon P. Vance v. Colorado Dept. of Corrections, et al.*, 94-D-1569 (D. Colo.). See Case 7. in answer to Question I.18, above. The verdict was for \$25,000, which my client collected. My "mentee" and I donated \$18,000 of the attorneys fee recovered in the case back to the program to help fund expenses in other such cases.

I am on a Colorado Bar Association panel that provides assistance to lawyers who have disciplinary problems and who cannot afford competent representation. On occasion, I provide free advice and help to often young and inexperienced lawyers who are navigating through this often arcane process.

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. There was a selection commission for the previous two federal district vacancies in Colorado approximately two years ago. It recommended me along with eight others for those two positions. The two who were nominated were confirmed and are now sitting on the district court bench. Five of the remaining candidates, including myself, were asked and agreed to be considered once again for the current vacancy without committee screening.

The selection commission was composed by persons chosen by Colorado's two senators, Sen. Campbell and Allard, and reflected a variety of backgrounds and legal interests. The application itself was thorough and reasonable in probing of matters relevant to its purpose—not much different than this one. A number of personal interviews were conducted by the commission, out of which the names of eight individuals were forwarded to the White House. The questions posed at my commission interview were thoughtful and appropriate in my opinion, and not case or result specific as to any matter that might come before a federal judge.

I was interviewed at the Office of White House Counsel in June 2001 as part of this process. For the current vacancy, I was again interviewed in February 2003 by the White House Counsel's Office and the Department of Justice. I came away both times impressed with the honorable way the process was conducted.

The same was true of my interviews with representatives of the Federal Bureau of Investigation and the Department of Justice. I, and others who informed me of being interviewed themselves, report that the questions asked were proper, non-ideological and thorough.

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 judiciary is a co-equal branch of government. Federal judges need to exercise extraordinary self-discipline to insure that their decisions are fair and impartial, their reasoning transparent and candid and their deportment impeccable on and off the bench. Judges must be constrained by the need for constant self-discipline and adherence to principles of adjudication irrespective of personal beliefs or preferences of a judge.

A Colorado federal district court judge (the position I am being considered for) should apply the law of the Tenth Circuit and the Supreme Court, as he or she is obligated to do. Giving individual attention to the parties, facts and issues before a judge in a particular case. That would be true even if the judge were to consider application of class action status to certain types of cases as recognized by F.R.Civ.P. 23 and relevant precedent. Ultimately, a judge should decide cases based on neutral principles of adjudication.

without regard to result or station of the parties involved. Those precepts are guidepost that I would strive to follow along with strict adherence to my oath of office.

Due deference must be accorded by judges to the other branches of government, which are more directly accountability to the people, for addressing social ills and formulating public policy. The will of Congress and the President as set forth in constitutional legislation and executive actions should be given full respect even if considered ill-advised or counterproductive by a reviewing judge.

Chairman HATCH. Thank you.
Mr. Hayes?

**STATEMENT OF WILLIAM Q. HAYES, NOMINEE TO BE DISTRICT
JUDGE FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

Mr. HAYES. Thank you, Mr. Chairman. I just wanted to thank you as well for scheduling this hearing, and also wanted to express my thanks to both of the Senators from California for their support.

[The biographical information of Mr. Hayes follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)
William Quinn Hayes
Bill Hayes
Quinn Hayes
2. Address: List current place of residence and office address(es).
Residence: La Mesa, California
Office: 880 Front Street, Room 6293, San Diego, California 92101
3. Date and place of birth.
April 14, 1956; Bronxville, 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).
Wife's name: Julia Yñiguez Jáuregui
Employment: United States Probation Officer
Employer: United States District Court, Southern District of California
Employer's address: 101 west Broadway, suite 700
San Diego, California 92101
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Syracuse University School of Law
9/79 to 5/83; J.D. 5/83

Syracuse University Graduate School of Business
9/80 to 5/83; M.B.A. 5/83

Syracuse University
9/76 to 12/78; B.S. 5/79

University of Georgia
9/74 to 6/76; none

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.

2/87 to present	United States Attorney's Office Southern District of California Chief, Criminal Division
6/98 to 9/98	University of San Diego Law School Adjunct Faculty
9/89 to 5/96	Thomas Jefferson School of Law Adjunct Faculty
11/84 to 12/86	Stone and Associates Litigation Associate Denver, Colorado
1/85 to 12/86	University of Colorado at Denver Adjunct Faculty
1/84 to 2/85	National College Aurora, Colorado Adjunct Faculty
6/83 to 11/84	Scheid and Hortlbeck Litigation Associate Denver, Colorado

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.
- Phi Kappa Alpha, 1978: one of eight male students selected from Syracuse University undergraduate class of 1978. Selection was based upon scholarship and service to Syracuse University.
 - Executive Office of United States Attorney's Office Director's Award, Washington D.C., 1999.
 - United States Attorney Special Act Award: 1990, 1991, 1995, 1996, 1997, 1998, 1999, 2000, 2001, and 2002.
9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Denver Bar Association
 San Diego Bar Association
 Federal Bar Association
 Business Trial Lawyers Association
 Louis M. Welsh Inns of Court (Barrister 1991)
 Rocky Mountain Business Law Association
 American 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.

Syracuse University Law School Alumni Association
 Syracuse University Alumni Association
 Sigma Alpha Mu Alumni Association
 Phi Kappa Alpha Men's Honor 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.

Federal Courts

Ninth Circuit Court of Appeals	May 26, 1988
Southern District of California	January 19, 1989
District of Colorado	March 21, 1984
District of Arizona	March 7, 1991

State Courts

California November 8, 1988
Colorado October 31, 1983

My bar membership in Colorado is in inactive status because I no longer appear in Colorado State Court.

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 published books, articles, or reports. I have not made any speeches involving constitutional law or legal policy. On November 7, 2002, I was a panelist on a local public radio (KPBS) program. The topic of the program was the Patriot Act. I did not have prepared remarks nor did I make a prepared statement.

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

I am in excellent health. I had a complete physical examination on March 24, 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.

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;

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;

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Southern District of California
880 Front Street, Room 6293
San Diego, California 92101-8893
Supervisor: United States Attorney Carol Lam
Phone (619) 557-6244
Chief, Criminal Division
2/87 to present

Stone and Associates
19751 East Main Street, Suite 225
Parker, Colorado 80138
Supervisor: Patricia Stone
Phone (303) 805-7080
Litigation Associate
11/84 to 12/86

Scheid and Horlbeck
216 16th Street, Suite 1210
Denver, Colorado 80202
Supervisor: William Horlbeck
Phone (303) 592-1650

Litigation Associate
6/83 to 11/84

- 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?

At Scheid and Horlbeck, between 1983 and 1984, my practice was almost exclusively civil. I was assigned to a number of legal malpractice defense matters. My assignments included extensive motion practice, legal research and writing. While at Scheid and Horlbeck, I accepted a state court appointment in a state criminal case.

While at Stone and Associates, between 1984 and 1986, I took and defended numerous depositions in connection with a wide variety of civil litigation matters. I wrote a wide variety of civil litigation motions and appeared in state, federal and bankruptcy court.

Since 1999, as chief of the criminal division of the United States Attorney's Office the focus of my practice is federal criminal law. As criminal chief, I am responsible for the supervision of approximately 100 lawyers within the criminal division.

One of my primary duties is the review of all criminal cases presented to federal grand juries for indictment. I review the facts and legal issues of each case before deciding whether the case will be presented for indictment.

My responsibilities require that I have a thorough understanding of a broad range of criminal statutes. I closely review all appellate decisions to determine their impact on current prosecution policies. As criminal chief, I also supervise all trial team meetings which are held before any criminal case proceeds to trial. At the trial team meetings, I review with the Assistant United States Attorney assigned to the case the proof supporting the charges, and any evidentiary or legal issues presented by the facts of each case. Since assuming the duties of criminal chief in May 1999, I have reviewed thousands of cases submitted for indictment and hundreds of cases which were tried. As a result of my criminal chief duties, I have an excellent understanding of the factual and legal issues presented in the criminal cases charged in the Southern District of California.

I also directly supervise the chiefs of all of the units in the criminal division which include the following: General Crimes, Fraud, Appellate, Drug, and Financial Litigation Units. I also respond to court inquires about particular cases.

Prior to becoming chief of the criminal division in 1999, I appeared in federal court frequently. Between 1987 and 1999, I tried a wide variety of criminal cases including those involving the following: drug offenses, export violations, child abuse, tax evasion, money laundering, and investment fraud. From 1991 to 1999, my practice was focused on the investigation and prosecution of complex fraud cases.

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

During my employment at Scheid and Horlbeck, the firm represented a number of insurance companies and other general business-related clients. At Scheid and Horlbeck, I was assigned primarily to insurance defense and coverage issues.

While I was at Stone and Associates, the firm primarily represented plaintiffs in product defect cases and general business clients. The typical Stone and Associate client in a product defects case was a woman who had suffered injuries after utilizing an intrauterine birth control device. The firm also represented construction and concrete companies in business-related litigation.

While at the firm Stone and Associates, I performed a wide range of litigation-related assignments including the taking and defending of depositions, extensive motion practice and the trial of a civil action brought by the United States Department of Labor.

During the time I have been an Assistant United States Attorney, I have investigated and prosecuted a wide variety of criminal cases including cases involving child abuse, bank robbery, violent crime, drug offenses, immigration offenses, and financial crimes. Prior to assuming the duties of criminal chief in 1999, I was a supervisor in the fraud unit where I specialized in complex fraud cases. My practice in the fraud unit was concentrated in the areas of racketeer influenced corrupt organization (RICO), mail fraud, money laundering and tax offenses.

- 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.

The majority of my trial experience occurred between February 1987 and May 1999.

While an associate at Scheid and Horlbeck, I appeared in state and federal court infrequently.

While at Stone and Associates, I appeared occasionally in state, federal and bankruptcy court.

Since joining the United States Attorney's Office in 1987, I have appeared frequently in Federal District Court.

2. While I was at Scheid and Horlbeck, and Stone and Associates, my appearances were as follows:
- (A) 40% in federal courts;
 - (B) 50% in state courts;
 - (C) 10% in bankruptcy courts.

Since joining the United States Attorney's Office, my appearances have been as follows:

- (A) 100% in federal courts;
- (B) 0% in state courts;
- (C) 0% in other courts.

3. While I was at Scheid and Horlbeck, and Stone and Associates, my practice was as follows:
- (A) 95% civil;
 - (B) 5% criminal.

Since joining the U.S. Attorney's Office my appearances have been as follows:

- (A) 0% civil;
- (B) 100% 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 tried seventeen trials to verdict; sixteen jury trials and one non-jury trial. I was either sole counsel or lead counsel in all of the jury trials.

5. What percentage of these trials was:
- (a) jury: 95%
 - (b) non-jury: 5%

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.

Case No. 1:

Case Name: United States v. Lynn Boyd Stites, et al.
 Criminal Case No.: 90cr0391-K
 Civil Case No.: 97cv0751-K
 Court of Appeals No.: 94-50123

Description of Case: This case concerned unethical and illegal conduct, on a massive scale by lawyers licensed to practice in the State of California. In approximately 1983, Defendant Lynn Stites and a number of other corrupt attorneys and support personnel formed a group called the "Alliance." Between 1983 and 1990, Stites, acting in concert with Alliance members, defrauded insurance companies of fifty million dollars.

The Alliance embarked on a far-reaching scheme to gouge insurance companies of multimillion dollar legal fees through the control, manipulation and prolongation of complex civil litigation. The Alliance members participated in a secret financial network in which costs were shared, litigation opponents financed, and kickbacks paid. Lynn Stites, the organizer of The Alliance, set up a network of law firms over which he had control and a financial interest. Stites used a number of attorneys and support personnel to assist him in expanding his network of law firms.

Lynn Stites and seventeen other defendants were charged in an Indictment which alleged the defendants participated in the affairs of a criminal enterprise (The Alliance) through a pattern of racketeering activity (RICO). The pattern of racketeering activity consisted of mail fraud violations. The Indictment alleged six separate schemes to defraud, each of which related to civil litigation. The mailings in furtherance of the various schemes were civil pleadings served on various Alliance members through the mail. The Indictment

identified twenty-seven different mailings related to six different schemes to defraud.

Two separate trials were held with respect to criminal case number 90cr0391-K. The first trial included eight defendants (all lawyers) and was held from April 15, 1991 through June 25, 1991. As a result of the first trial, four defendants were convicted of RICO and mail fraud and four were acquitted of all charges. The second trial included the lead defendant Lynn Stites and was held from September 13, 1993 through October 7, 1993. Visiting Judge Clarence C. Newcomer was the presiding judge in both trials. Lynn Boyd Stites was convicted of RICO and mail fraud. Twelve attorneys and six non attorneys either plead guilty or were convicted of criminal offenses arising from their participation in The Alliance.

Court: Presiding Judge for Pretrial Motions:	United States District Court, Southern District of California Honorable Judith N. Keep
Presiding Judge at Trial:	Honorable Clarence C. Newcomer (Visiting Judge sitting in the Southern District of California)
Indictment:	April 24, 1990
Jury Trial Dates:	April 15, 1991 through June 25, 1991 September 13, 1993 through October 7, 1993
Disposition:	<p>On June 25, 1991, defendants Mason Radomile Noyer and Koss were convicted of RICO and Mail Fraud. Defendants Dezes, Caiafa, Sternberg and Waisbren were acquitted of all charges.</p> <p>On June 15, 1994, the Ninth Circuit Court of Appeals affirmed the convictions of defendants Mason, Radomile, Noyer, and Koss.</p> <p>Lynn Boyd Stites was convicted on October 7, 1993 of violating the Racketeer Influence Corrupt Organization Statute and several counts of mail fraud. On October 7, 1993, the jury returned a \$50 million criminal forfeiture verdict against Stites. On January 7, 1994, Stites was sentenced to 120 months in federal custody.</p> <p>On May 26, 1995, the Ninth Circuit Court of Appeals issued a published decision affirming defendant Stites' conviction. The decision focused on the trial court's decision to grant the</p>

Government's motion to disqualify two different attorneys from representing Stites. The Ninth Circuit Court of Appeals analyzed each disqualification and concluded that the trial court had acted properly by disqualifying both attorneys.

Lead Trial and
Appellate Counsel:

William Q. Hayes
Assistant United States Attorney

During the investigation of the Alliance, I appeared regularly in the grand jury and negotiated several plea dispositions.

I was lead trial counsel at both the 1991 and 1993 trials. At both trials, I made the opening statement and both closing arguments. During each trial I examined approximately one-half of the witnesses called by the Government and defense, including the only defendant who testified.

I wrote the appellate briefs for both the 1991 and 1993 trials, and successfully argued both cases on appeal before the Ninth Circuit Court of Appeals.

Trial Co-counsel:

George D. Hardy (1991 Trial)
Assistant United States Attorney
880 Front Street, Suite 6293
San Diego, California 92101-8893
(619) 557-6787

Stephen P. Clark (1993 Trial)
Assistant United States Attorney
880 Front Street, Suite 6293
San Diego, California 92101-8893
(619) 557-5096

Trial Counsel for
Defendant
Lynn Boyd Stites:

Jennifer Keller, Esq.
Early and Keller
19100 Von Karman Avenue, Suite 950
Irvine, California 92715
(714) 476-8700

Appellate Counsel:

Bernard Skomal, Esq.
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Counsel for Defendant

Bradley William Brunon, Esq.

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Counsel for Defendant
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(619) 231-4100

Counsel for Defendant
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Douglas Caiafa
Stanley I. Greenberg, Esq.
Law Office of Stanely I. Greenberg
6080 Center Drive, #800
Los Angeles, California 90045-1574
(310) 215-7509

Counsel for Defendant
Steven Waisbren
Mark Adams, Esq.
Attorney at Law
964 Fifth Avenue, Suite 214
San Diego, California 92101
(619) 239-4344

Case No. 2:

Case Name:

United States v. Mark Robinson, et al.

Criminal Case No.:

95cr0827-JNK

Court of Appeals Case No.:

96-50573

Description of Case: On June 20, 1995, a federal grand jury returned a Superseding Indictment charging Mark Robinson and others with: Conspiracy to Smuggle Goods into the United States; Money Laundering; Mail Fraud; and Arson. At trial the Government proved that Mark Robinson and Bradley Hirou conspired to have IBM computer processor cards smuggled into the United States from Paris, France. The processor cards were hidden throughout computer equipment shipped from Paris, France to San Diego, California by co-conspirator, Stephane Pecqueraux. After the smuggled cards arrived in San Diego, Robinson and Hirou sold the smuggled cards (which ranged in value from \$10,000 to \$250,000 each) to companies in California and Georgia.

Robinson and Hirou received millions from the sale of smuggled computer cards. Robinson transferred funds received from the sale of the processor cards to entities he controlled in Ireland and Switzerland. The funds were ultimately transferred to a bank account held for his benefit in Zurich, Switzerland.

Robinson and Hirou stored the smuggled cards in a warehouse facility in Del Mar, California. The value of the smuggled cards decreased sharply after IBM issued new and more powerful cards. In response to the decline in value of the cards, Robinson and Hirou conspired with Gerald Nantz and Brian Story to burn down the warehouse containing the cards in order to collect from an insurance policy covering the cards.

Bradley Hirou contacted Gerald Nantz and requested Nantz burn down the warehouse. Nantz ultimately convinced Story to start the fire which destroyed the structure storing the cards.

After the fire, Robinson and Hirou submitted an inflated insurance claim for the value of the insured cards.

Prior to trial, Bradley Hirou, Stephane Pecqueraux, Gerald Nantz and Brian Story all plead guilty to felonies in connection with their participation in the above described criminal offenses.

Court: United States District Court, Southern District of California
 Presiding Judge: Honorable Judith N. Keep
 Jury Trial: May 23, 1996 through July 2, 1996 (Robinson only)

Disposition: On July 2, 1996, a federal jury convicted defendant Robinson of: conspiracy, smuggling, money laundering, and mail fraud.

Also on July 2, 1996, the jury determined that approximately \$7.5 million was forfeitable to the United States pursuant to a criminal forfeiture count.

On September 30, 1996, Judge Keep sentenced defendant Robinson to a term of 121 months in prison, and imposed a fine of \$175,000.

On October 7, 1996, Judge Keep entered an order of criminal forfeiture in the amount of \$1,941,236.21.

On June 4, 1998, the Ninth Circuit Court of Appeals affirmed defendant Robinson's convictions in a published opinion. The Ninth Circuit rejected the analysis of the Third Circuit Court of Appeals with respect to the meaning of the term "intent to defraud" and instead determined that "intent to defraud" in connection with 18 United States Code, Section 545 did not require an intent to deprive the government of revenue.

Lead Counsel for
Jury Trial and Appeal:

William Q. Hayes
Assistant United States Attorney

I was lead counsel during the investigation of Mark Robinson, et al. I appeared regularly before the grand jury and drafted the indictment returned by the grand jury.

At trial I was lead counsel. I examined approximately one-half of the witnesses called by the Government and defense, and cross examined defendant Robinson. I also made the Government's closing and rebuttal arguments.

I wrote the Government's appellate brief with assistance from my trial co-counsel. I successfully argued the case on appeal before the Ninth Circuit Court of Appeals.

Co-counsel for
Jury Trial and Appeal:

Timothy L. Coughlin
Assistant United States Attorney
880 Front Street, Suite 6293
San Diego, California 92101-8893
(619) 557-7044

Defense Counsel for
Defendant Mark Robinson:

Eugene Iredale, Esq.
105 West F Street, 4th Floor
San Diego, California 92101
(619) 233-1525

Defense Counsel for
Defendant Bradley Hirou

Ezekiel Cortez, Esq.
Law Offices of Ezekiel Cortez
1010 Second Avenue, Suite 1850
San Diego, CA 92101
(619) 237-0309

Defense Counsel for Defendant Stephane Pecqueraux	Charles L. Goldberg, Esq. Seltzer, Caplan, McMahon, Vitek 750 B Street, Suite 2100 San Diego, CA 92101 (619) 685-3051
Defense Counsel for Defendant Gerald Nantz	Charles Adair, Esq. Attorney at Law 432 F Street, Suite 500 San Diego, California 92101 (619) 233-3161
Defense Counsel for Defendant Brian Story	Michael Littman, Esq. Attorney at Law 105 West F Street, 4th Floor San Diego, California 92101 (619) 236-1826
<u>Case No. 3:</u> Case Name:	United States v. Randall Smith Kuhlmann (1) <u>and David Sidney Darling (2)</u>
Criminal Case No.:	97cr2871-H
Description of Case:	<p>Randall Kuhlmann and David Darling, while officers of Amtel Communications, a San Diego telecommunications company, conspired to defraud investors of approximately \$32 million. Kuhlmann and Darling misrepresented to investors Amtel's true financial condition. Both were aware that investors received financial information which suggested Amtel was a profitable company despite being aware that balance sheets and tax returns reflected losses of \$25.7 million for the period from 1991 through 1995. In addition to making false material statements to investors, Kuhlmann and Darling, both knowingly failed to comply with a desist and refrain order issued by the California Department of Corporations.</p> <p>On October 27, 1997, a 29-Count Indictment was filed in the Southern District of California against Kuhlmann and Darling charging both defendants with: conspiracy, mail fraud, money laundering and tax evasion (only Kuhlmann was charged with tax evasion).</p>
Court: Presiding Judge:	United States District Court, Southern District of California Honorable Marilyn L. Huff
Disposition:	On August 5, 1998, Randall Kuhlmann plead guilty to conspiracy, mail fraud and tax evasion.

On August 18, 1998, David Darling plead guilty to conspiracy and mail fraud.

On January 12, 1999, David Darling was sentenced to 46 months in custody and ordered to pay \$32 million in restitution.

On April 19, 1999, Randall Kuhlmann was sentenced to 60 months in custody and ordered to pay \$32 million in restitution.

Lead Counsel: William Q. Hayes
Assistant United States Attorney

I was lead counsel during the investigation and prosecution of Randy Kuhlmann and David Darling. During the investigation, I appeared regularly before the grand jury and drafted the indictment returned by the grand jury. I also negotiated the plea agreements which resolved the case.

Co-counsel: Stephen P. Clark
Assistant United States Attorney
880 Front Street, Suite 6293
San Diego, California 92101-8893
(619) 557-5096

Counsel for Defendant
Randall S. Kuhlmann: Stephen E. Hoffman, Esq.
Frank and Milchen
136 Redwood Street
San Diego, California 92103
(619) 574-1888

Counsel for Defendant
David S. Darling: Robert Brewer, Esq.
McKenna, Long and Aldridge, LLP
750 B Street, Suite 3300
San Diego, California 92101
(619) 595-5408

Case No. 4:
Case Name: United States v. Arjang Miremadi
Criminal Case No.: 99cr2722-JM (BTM)

Description of Case: In August 1990, Dr. Miremadi purchased his current medical practice for \$250,000. Between 1991 and 1995, Dr. Miremadi failed to report to the Internal Revenue Service (IRS) cash payments made to the Miremadi Dermatology Clinic. Additionally, during the same period, he failed to report to the IRS certain patient checks received

from the Miremadi Dermatology Clinic. In 1995, IRS agents began an investigation of Dr. Miremadi after meeting with a former employee, who was by then a competitor of Dr. Miremadi's skin cream products business. In 1997, the IRS searched Dr. Miremadi's home and office and seized a large volume of business records.

On September 16, 1999, Dr. Miremadi was indicted for filing false tax returns. The tax returns concerned his personal form 1040 and corporate forms 1120 for his medical practice. The years covered by the Indictment were from 1992 through 1995.

Court: United States District Court, Southern District of California
 Presiding Judge: Honorable Barry Ted Moskowitz
 Jury Trial: November 7, 2000 through December 13, 2000

Disposition: On December 13, 2000, the court declared a mistrial on all counts after the jury announced it was deadlocked. On February 15, 2001, Dr. Miremadi entered a guilty plea to Count One of the Indictment. On May 30, 2001, Dr. Miremadi was sentenced to ninety days community confinement, three years of supervised release, ordered to serve 720 hours of community service and fined \$19,000.

Lead Counsel: William Q. Hayes
 Assistant United States Attorney
 Chief of the Criminal Section

I was lead counsel during the investigation of Dr. Miremadi. I appeared regularly before the grand jury during the investigation.

At trial I was lead counsel. I made the Government's opening statement and both closing arguments. I examined approximately one-half of the witnesses called by the Government and defense.

Co-counsel: Thomas W. Flynn, Tax Division Attorney
 Tax Division-Western Criminal Enforcement
 600 E Street, N.W. Room 5712
 Washington, D.C. 20004

Counsel for
 Opposing Party: Pamela J. Naughton, Esq.
 Sheppard, Mullin, Richter and Hampton
 12544 High Bluff Drive, Suite 300
 San Diego, California 92130
 (858) 720-8900

Case No. 5:
 Case Name: United States v. David P. Gnrirke
 Criminal Case No.: 95cr1122-J
 Court of Appeals No.: 96-50112

Description of Case: On June 22, 1995, Rufina Hoskins, left her 20-month-old male child in the custody of her then boyfriend, David Gnrirke. When she returned to her military housing residence at Camp Pendleton, she discovered David Gnrirke applying ice to her child's red and swollen penis. The child was taken to the emergency room at the Naval Hospital at Camp Pendleton. Treating physicians at the hospital suspected child abuse and contacted criminal investigators. On August 18, 1995, a federal grand jury returned a Superseding Indictment charging David Gnrirke with Aggravated Sexual Abuse and Crime on a United States Government Reservation-Corporal Punishment or Injury of a Child. At trial the Government called treating physicians who testified that the injuries of the 20-month-old male child were inconsistent with the explanation offered by Gnrirke (Gnrirke claimed the child fell on the slats of a crib). The Government called a forensic dentist who testified that marks seen on a picture of the child taken on the day the injuries were discovered were consistent with teeth marks which matched the teeth of defendant Gnrirke.

Court: United States District Court, Southern District of California
Presiding Judge: Honorable Napoleon A. Jones, Jr.

Jury trial: November 21, 1995 through December 5, 1995

Disposition: On December 5, 1995, Gnrirke was convicted of both counts charged in the Indictment. On February 26, 1996, Gnrirke was sentenced to 235 months in federal custody. On February 13, 1996, Gnrirke's conviction was affirmed by the Ninth Circuit Court of Appeals.

Lead Counsel: William Q. Hayes
Assistant United States Attorney

I was lead trial counsel. I made the Government's opening statement and both closing arguments. I examined approximately one-half of the witnesses who testified at trial.

I co-authored the Government's appellate brief along with my trial co-counsel. The case was decided by the Ninth Circuit Court of Appeals without oral argument.

Co-counsel: Jill Burkhardt
Assistant United States Attorney
880 Front Street, Suite 6293
San Diego, California 92101-8893
(619) 557- 7047

Counsel for Defendant David Gnrirke: Mario Conte, Esq.
Carl Rupp, Esq.

Federal Defenders of San Diego, Inc.
 225 Broadway, Suite 900
 San Diego, California 92101-5008
 (619) 234-8467

Case No. 6:

Case Name:

Criminal Case No.:

United States v. Brian Wright

96cr1670-H

Description of Case:

In November 1978, Carl Millyard, established a trust at Security Pacific Bank (Security Pacific was purchased by Bank of America "B of A" in 1992). Mr. Millyard was concerned that his wife would mismanage her sizable inheritance because of her long-term chronic alcoholism and resulting mental impairment. While alive, Mr. Millyard exercised total control of their financial matters, including the payment of the bills. Mrs. Millyard had no knowledge of their financial status or the financial sophistication to handle their substantial estate. In 1992, Carl Millyard died. At the time of his death, Brian Wright was the Bank of America trust officer assigned to the Millyard trust.

In October 1992, Brian Wright began embezzling money from the Bank of America. He accomplished this by authorizing, or having Mrs. Millyard authorize transfers from her trust account to her personal checking account. The defendant then caused Mrs. Millyard to issue checks to himself, his wife or to one of four investment accounts he held in his name. During the period covering October 1992 through 1994, Brian Wright caused Mrs. Millyard to write thirty-four checks from her account, totaling \$227,500, to the defendant, his wife, or their accounts. The money was used by Brian Wright to purchase a house, a car, furniture, stocks and mutual funds for the benefit for himself and his wife.

The theft of the funds was discovered in November 1994. Mrs. Millyard, in poor mental health, initially stated that she had given the funds to Brian Wright. She later changed her position to one of not remembering whether she had given him the funds or not. Mrs. Millyard died prior to trial.

Court:

Presiding Judge:

Dates:

United States District Court, Southern District of California
 Honorable Marilyn L. Huff

March 5 through March 13, 1997

On March 13, 1997, defendant Brian Wright was convicted of bank fraud, embezzlement, money laundering and filing false tax returns. On October 6, 1997, Brian Wright was sentenced by Judge Marilyn L. Huff to 18 months in federal custody.

Sole Counsel: William Q. Hayes
Assistant United States Attorney

I was sole counsel at trial for the Government. I made the Government's opening statement and both closing arguments. I examined all witnesses called by the Government and defense. The defendant waived his right to appeal his trial conviction.

Counsel for Defendant Walter L. Maund, Esq.
Brian Wright: 707 Broadway, Suite 1700
San Diego, California 92101
(619) 234-8261

Case No. 7:
Case Name: United States v. Robert A. Zander
Criminal Case No.: 91cr045-PHX-EHC
Court of Appeals No.: 92-10606

Description of Case: On May 11, 1984, Robert A. Zander purchased all of the stock of the Long Life Dairy Products Company (hereinafter LLDPC) from the Beatrice Food Company. LLDPC was a dairy products speciality processing and distribution company located in Jacksonville, Florida.

On August 2, 1984, Zander, while acting as the new Chairman of the Board of LLDPC and Chief Executive Officer, called a special meeting with the Board of Directors of LLDPC. At the meeting, Zander was elected sole trustee of both LLDPC pension plans.

While acting as sole trustee of both pension plans, Zander transferred funds from each plan to Zander and Company, a company he owned and controlled. During the period of 1984 through 1986, Zander transferred essentially all of the pension plan assets to Zander and Company. Between 1984 and 1987, Zander made false statements concerning the balances of the pension plan accounts to firm accountants and the pension plan actuary. In December 1986, Zander sold LLDPC to the Fine Vest Services Company. Zander did not transfer any pension plan funds to the FineVest Services Company as required. In July 1988, Zander advised the plan administrator that the plan funds were at City Bank in Phoenix, Arizona. No pension plan funds were ever obtained from City Bank or any other source.

On February 12, 1991, a federal grand jury for the District of Arizona returned an indictment charging Zander with three counts of theft and embezzlement from an employee benefit plan.

Court: Federal District Court of Arizona
Presiding Judge: Honorable Earl H. Carroll
Jury Trial: June 9 through June 17, 1992

Disposition: On June 17, 1992, Zander was convicted after a jury trial of three counts of theft and embezzlement from an employee benefit plan. On September 21, 1992, Zander was sentenced to 36 months in custody.

On October 12, 1993, Zander's conviction was affirmed by memorandum decision.

Sole Counsel: William Q. Hayes
Assistant United States Attorney

I was sole counsel during the investigation and prosecution of Robert Zander. I handled all matters before the grand jury and drafted the indictment returned by the grand jury.

At trial I was sole counsel for the Government. I made the Government's opening statement and both closing arguments. I examined all witnesses called by the Government and defense.

I wrote the Government's appellate brief and successfully argued the case before the Ninth Circuit Court of Appeals.

Counsel for Defendant Robert Zander: Gerald A. Williams, Esq.
Federal Public Defender's Office
222 North Central Avenue, Suite 810
Phoenix, Arizona 85004
(602) 379-3561

Case No. 8:
Case Name: United States v. John D'Acquisto
Criminal Case No.: 98cr1703-K

Description of Case: On May 28, 1998, a federal grand jury returned a 39-count criminal Indictment charging former professional baseball player and San Diego Padre John D'Acquisto with wire fraud and money laundering. The Indictment alleged that D'Acquisto induced investors to invest approximately \$7 million in business entities he controlled on the basis of false, fraudulent and misleading representations. D'Acquisto falsely represented to potential investors that several hundred million dollars were invested in his programs and that the programs could provide returns of five to seven and one-half percent per week. The Indictment also alleged that D'Acquisto caused false investment transaction reports to be sent to investors which, in some instances, claimed that their investments had grown by millions of dollars, when in fact, little or no funds had been invested on their behalf. D'Acquisto was alleged to have operated a

Ponzi scheme in which investors were paid with funds obtained from earlier investors.

The Indictment further charged that D'Acquisto used investor funds for personal purposes, including: (1) the purchase of three race horses; (2) vacant land in Mexico; (3) a contingent interest in a Mexican minor-league baseball team; and (4) personal and business items and services. The investigation of the case involved the flow of funds through North Carolina and Switzerland.

Court: United States District Court, Southern District of California
 Presiding Judge: Honorable Judith N. Keep

Disposition: On March 1, 1999, John D'Acquisto plead guilty to wire fraud and money laundering.

On May 27, 1999, defendant D'Acquisto was sentenced to serve 55 months in federal custody to be served concurrently with a sentence previously imposed in the Southern District of New York.

Sole Counsel: William Q. Hayes
 Assistant United States Attorney

I was sole counsel during the investigation and prosecution of John D'Acquisto. I examined all of the witnesses who testified before the grand jury and drafted the indictment returned by the grand jury. I negotiated the plea agreement which resolved the case.

Counsel for Defendant John D'Acquisto: Frank T. Vecchione, Esq.
 105 West F Street, Suite 215
 San Diego, California 92101
 (619) 231-3653

Case No. 9:
 Case Name: United States v. Amhad Kheir Albulfeilat
 Criminal Case No.: 95cr1367-IEG

Description of Case: On August 22, 1994, Albulfeilat had a telephone conversation with a United States Customs agent, who was acting in an undercover capacity, during which Albulfeilat explained to the agent that he was the vice president of Albulfeilat and Partners, a company which was located in Jordan. During the conversation Albulfeilat explained to the agent that he understood that United States regulations prohibited him from dealing in goods of Iraqi origin, but explained that large profits could be made from the sale of Iraqi oil on the black market.

Albulfeilat and his co-defendant, Saide Albulfeilat, agreed to supply a large quantity of Iraqi oil which would be disguised with a false Iranian certificate of origin. Albulfeilat and his partner agreed with the undercover agent to execute a contract calling for the shipment of Iraqi oil for delivery to Bombay, India. Albulfeilat and his partner agreed to provide to the undercover agent approximately 700,000 metric tons of gas oil of Iraqi origin for the price of approximately \$90 million United States dollars. The oil was to be provided over a six-month period and would be accompanied by false Iranian certificates of origin which would be provided by officials of Iran who were assisting in the transactions.

On November 23, 1994, Albulfeilat traveled to San Diego, California to pick up the first payment due on the Iraqi oil he had agreed to sell to the undercover agent. Albulfeilat was arrested shortly after concluding his meeting with the undercover agent.

Court: United States District Court, Southern District of California
 Presiding Judge: Honorable Irma E. Gonzalez

Disposition: On April 28, 1995, Amhad Kheir Albulfeilat plead guilty to conspiring to evade the Iraqi Sanctions Act.

On September 11, 1995, Amhad Kheir Albulfeilat was sentenced to thirty months in custody and three years of supervised release.

Sole Counsel: William Q. Hayes
 Assistant United States Attorney

I was sole counsel during the investigation and prosecution of Amhad Kheir Albulfeilat. I examined all witnesses who testified before the grand jury and drafted the search warrant executed at the residence of Amhad Kheir Albulfeilat. I also drafted the indictment returned by the grand jury and negotiated the plea agreement which resolved the case.

Counsel for Defendant Amhad Kheir Albulfeilat: Frank J. Ragen, III, Esq.
 The Senator Building
 105 West F Street, Suite 215
 San Diego, California 92101
 (619) 231-4330

Case No. 10:
 Case Name: United States v. Arellano
 Criminal Case No.: 85cr0687-B

Description of Case: For several years prior to 1985, defendant Arellano lived with Edith Brasche, in Rosarito Beach, Baja California. In the Spring of 1985,

Arellano and Brasche no longer enjoyed a harmonious relationship. The chief dispute between them concerned the ownership of their Rosarito Beach mobile home. In June 1985, Arellano moved out of the Rosarito Beach home.

On June 7, 1985, Arellano returned to the mobile home and attempted to enter the home, however, his key would not work as the locks had been changed. Arellano confronted Brasche who advised Arellano that he should leave because the police were looking for him. Before leaving, Arellano told Brasche he was going to come back and kill her.

On July 15, 1985, Arellano went to Simon's Loan and Jewelry, a pawn shop in Lemon Grove, California where he purchased a 38-caliber handgun. At the time of purchase, Arellano provided his sister's address in Antioch, California, as his own address. Arellano made a \$40.00 deposit on the gun and was told to return in fifteen days to complete the purchase. On August 3, 1985, he returned to the store, paid the balance due on the hand gun and purchased ammunition for the firearm. Arellano left the store and immediately crossed the border into Mexico. He stayed with his sister for the remainder of the weekend. On Monday morning he drove south to Rosarito Beach where he confronted Brasche. After exchanging angry words, he grabbed and began to hit Brasche. During the struggle he raised his gun and fired three shots at Edith Brasche who broke away from Arellano and retreated to a neighbor's home. Brasche died shortly after Arellano fled the scene. Arellano drove north to the border where he abandoned his car and walked across the Tijuana River channel and illegally entered the United States. Arellano was taken into police custody shortly after illegally entering the United States.

Court:	United States District Court, Southern District of California
Presiding Judge:	Honorable Rudi M. Brewster
Jury Trial:	March 8 through March 18, 1988
	On March 18, 1988, Arellano was convicted of unlawful transportation of a firearm in foreign commerce with the intent to commit a felony (murder).
Disposition:	On May 18, 1988, Arellano was sentenced to ten years in custody.
Sole Counsel:	William Q. Hayes Assistant United States Attorney

At trial I was sole counsel for the Government. I made the Government's opening statement and both closing arguments. I examined all of the witnesses called by the Government and defense.

I wrote the Government's appellate brief and successfully argued the case before the Ninth Circuit Court of Appeals.

Counsel for
Defendant Arellano:

Mario Conte, Esq.
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101-5008
(619) 234-8467

Ezekiel Cortez, Esq.
Law Offices of Ezekiel Cortez
1010 Second Avenue, Suite 1850
San Diego, CA 92101
(619) 237-0309

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.)

Teaching a variety of legal and business courses at four different academic institutions is one of the most significant legal activities I have pursued since my graduation from law school. I began my teaching career in 1984 at National College in Denver, Colorado where I taught Business Management and Cost Accounting. Between 1984 and 1986 I taught Business Law and The Legal and Ethical Environment of Business at the University of Colorado at Denver.

In 1987 I moved to San Diego, California. In 1989 I resumed my teaching career at Thomas Jefferson School of Law. Between 1989 and 1996, I taught the following courses: Federal Courts; Advanced Federal Criminal Law; Criminal Procedure; and, Corporate and White Collar Crime. In 1998 I taught Tax Fraud at the University of San Diego School of Law.

I have enjoyed the challenge of teaching a variety of courses throughout my career.

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.

While I was in private practice at the firm of Scheid and Horlbeck I sought and received a state court appointment to represent Dennis Nyberg, an indigent criminal defendant. I spent a considerable amount of time investigating and preparing the case of Dennis Nyberg. I tried the case in Denver District Court and represented Dennis on appeal. His conviction was ultimately affirmed by the Colorado Supreme Court in a published decision. The firm received only a \$1,000 fee for several hundred hours of my time spent on the case. My employment as an assistant United States attorney has limited the type of pro bono work I have been permitted to perform.

From 2000 through 2001, I often assisted my wife, Julia Jáuregui, in delivering meals to homebound AIDS patients in the San Diego downtown area for a soup kitchen known as Mama's Kitchen. I assisted in the delivering of the meals on Friday evenings, between 4:30 pm and 7 pm.

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?

In 1976, while a student at Syracuse University, I joined the Sigma Alpha Mu fraternity. Sigma Alpha Mu is a national fraternity, which to my knowledge, does not admit female members. In 1976, Sigma Alpha Mu was one of approximately twenty fraternities on campus, none of which admitted female members. There were approximately fifteen sororities on campus which did not admit male members.

In 1978, while an undergraduate at Syracuse University, I was one of eight male students from the undergraduate student body asked to join the Phi Kappa alpha Honor Society. The Phi Kappa Alpha Honor society was formed at Syracuse University approximately one hundred years ago. To my knowledge, membership has continued to be limited to males.. I have never been actively involved in the society. Since being selected for membership in 1978, I have attended approximately two induction ceremonies. I have paid \$25.00 in annual dues approximately ten of the past twenty years.

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 in the Southern District of California to recommend candidates for nomination to the federal courts, which recommended my nomination. In December 2002, I submitted an application for the position of United States District Court Judge to all members of the selection commission. On February 24, 2003, I interviewed with the commission in San Diego, California. On February 28, 2003, I interviewed with Mr. Gerald L. Parsky in Los Angeles, California. On March 4, 2003, I interviewed with members of the Office of White House Counsel and a representative of the Department of Justice in Washington D.C. Prior to my nomination, I was interviewed by the Department of Justice and 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.

When the focus and intent of the judiciary becomes broad problem solving through far reaching orders, the likely effect is the usurping of power delegated to the executive or legislative branches of government. Even if the Federal judiciary is motivated by noble goals and possesses good judgment, separation of powers requires that the court refrain from overtaking democratic choices made through the legislative and executive branches. The role of a district court judge is to follow established precedent, not make social policy. Jurisdictional requirements strictly limit the power of the Federal judiciary. The creative interpretation of jurisdictional requirements for whatever purpose, unwisely expands the power of the judiciary beyond the limits granted by law. The unsupported expansion of power by any branch of government weakens the ability of all branches to effectively exercise the powers lawfully delegated by the Constitution.

Chairman HATCH. Thank you.
Judge Houston?

**STATEMENT OF JOHN A. HOUSTON, NOMINEE TO BE DISTRICT
JUDGE FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

Judge HOUSTON. Good morning, Mr. Chairman. I thank you for the opportunity for this expedited hearing.

I would also like to thank my family for being here today to support me in this endeavor as they have throughout my legal career, and also a special thanks to the Senators for their support.

[The biographical information of Judge Houston follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)
John Allen Houston
2. Address: List current place of residence and office address(es).

Office:

Edward J. Schwartz Federal Courthouse
940 Front Street
Room 1118
San Diego, CA 92101

Residence:

San Diego, CA
3. Date and place of birth.
February 6, 1952; County of Guilford, Greensboro, NC
4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Charlotte Clarke Houston, Ph.D.
Clinical Psychologist and Consultant
9663 Terra Grande, Suite 104
San Diego, California 92126
(858) 695-2243
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

SCHOOL	From	To	Degree Received	Date Received
School of Law, University of Miami Coral Gables, FL	1974	1977	J.D.	1977

North Carolina A & T State University Greensboro, NC	1970	1974	B.S. Political Science	1974
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6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

United States Magistrate Judge, Southern District of California, April 1998 - Present

Senior Financial Litigation Counsel	Jan 1996 - April 1998
Senior Counsel For Asset Forfeiture	April 1994 - Jan 1996
Chief, Asset Forfeiture Unit	Sept 1987- Mar 1994
AUSA, Asset Forfeiture Cases	Nov 1985 - - Sept 1987
AUSA, General Crimes	Aug 1981 - - Dec 1986

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

United States Army, SSN 244-80-9770

May 1974:	Commissioned 2LT-ROTC Outstanding Military Student; Outstanding Military Graduate
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Aug 1978- Aug 1981	Assistant Judge Advocate Fort Leavenworth, Kansas Highest Rank: Captain Honorable Discharge
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United States Army Reserve

May 1974 - Aug 1978	Inactive Reserve (Not assigned to a unit)
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721

Aug 1981- June 1982: Inactive Reserve

Rank at Transfer: Captain

June 1982- April 1999: Active Reserve

78th Legal Support Organization
10451 Calle Lee Street, Ste. 101
Los Alamitos, CA

Rank at Transfer: Lieutenant Colonel

May 1999-Sept 2000 Inactive Reserve

October 2000 - Present: Active Reserve

Current Assignment:

Deputy Commander

78th Legal Support Organization
10451 Calle Lee Street, Ste. 101
Los Alamitos CA

The 78th Legal Support Organization is comprised of approximately 30 officers/attorneys 2 officers/non-attorneys, and 27 soldiers/legal specialists.

Current Rank: Lieutenant Colonel (presently before selection board for consideration for promotion to the rank of Colonel)

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

Secretary-General, Anti-Money Laundering Office, Bangkok, Thailand, With Great Appreciation for Support, February 2002

National Association of Black Customs Enforcement Officers, In Appreciation for Support, August 2000

Organized Crime Drug Enforcement Task Force, For Outstanding Contributions, April 1998

FBI, Outstanding Service Award, April 1998

IRS Criminal Investigation Division, Outstanding Service, April 1998

U.S. Customs Service, Outstanding Support, April 1998

San Diego County Integrated Narcotic Task Force, Outstanding Support, April 1998

HQ United States Marshal's Service - Outstanding Assistance to its Asset Forfeiture Program, July 1997

Director's Award for Superior Performance in Asset Forfeiture, Presented by Attorney General Janet Reno, April 1996

Best Oral Argument and Best Brief Awards, Moot Appellate Competition, 78th Legal Support Organization, U.S. Army Reserve, May 1996

International Association of Credit Card Investigations (Annual International Convention) - In Appreciation for Support, 1995

Executive Director Award, Executive Office for Asset Forfeiture, U. S. Department of Justice, December 1992

Special Recognition Award for Outstanding Support to Drug Law Enforcement, DEA Administrator, 1986

Special Recognition Award, IRS - CID, Laguna Niguel District, July 1992

Other special achievement awards from the Department of Justice and federal agencies.

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.

Federal Magistrate Judges Association
 San Diego County Judges Association
 Judicial Section, Earl B. Gilliam Bar Association (Co-chair 1999-2001)
 Federal Bar Association
 Earl B. Gilliam Bar Association (Historian 1992-1993)
 National Bar Association
 California Association of Black Lawyers

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

Federal Magistrate Judges Association is active in lobbying before public bodies.

Other organizations to which I belong:

Legal Ministry, Bethel AME Church, San Diego (Founder/Chair),
 Jan 2002 - Present
 Alpha Pi Boule' Fraternity (President 1998-2000) (Social Action
 Chair 1996-1998) (Programs Chair - 1992)
 Alpha Phi Alpha Fraternity, Inc. (President 1989, 1990);
 Secretary 1984-1988)
 Alpha Phi Alpha Fraternity Inc. Scholarship Fund (Secretary 1990
 - 2002)
 Bernardo Trails Homeowners Association, San Diego, CA (Chair -
 CC&R revision committee, Dec. 1990-1992)
 Board of Directors - Legal Aid Society of San Diego 1985 - 1989
 Member, Volunteers in Parole Program (1982-1984)
 Member, San Diego Volunteer Lawyers' Program (1983-1987)
 Parade Committee - Martin Luther King Day Parade (1987- Present)
 Jack and Jill of America, Inc. (1987-1999)
 Continuing Academic Excellence Program, - Morse and Lincoln
 Preparatory
 High Schools (1987 - 2002)
 The Links of San Diego, Inc., Mentor, "Achiever" Program

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

The Florida Bar, Bar No. 025580 - 1978
 Army Court of Military Review - 1973

U.S. Military Court of Appeals - 1978
 U.S. District Court, Southern District of California - 1982
 State Bar of California - 1982
 U.S. Court of Appeals for the Ninth Circuit - 1982
 United States Supreme Court - 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.

1. Swearing-in Ceremony. Courtroom One. Southern District of California. July 16, 1998.
2. Naturalization Ceremony Speech. San Diego Civic Center Complex. San Diego, CA. April 2000 and August 2001 (same speech).
3. Black History Month Celebration, Immigration and Naturalization Service, Federal Building, San Diego, CA. February 28, 2002.
4. Martin Luther King Day Speech. Sponsored by the City of La Mesa. City of La Mesa Community Center. January 19, 2003.

Copies of the speeches are at Exhibit 1.

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

My health is very good. Last physicals: January 11, 2003 (military -VA Hospital-Long Beach, CA); March 2002, Kaiser Permanente (Clairmont Mesa Blvd., San Diego, CA)

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

United States Magistrate Judge, Southern District of California (April 1998- Present); appointed by the United States District Court.

As a magistrate judge, I handle pre-trial proceedings in felony criminal cases (arraignment, appointment of

counsel, bail and detention hearings, scheduling of pre-trial dates, removal proceedings, violations of supervised release and pre-trial release, and substantive motions upon referral by the district court); misdemeanor cases (from arraignment through sentencing); habeas corpus proceedings and prisoner civil rights matters by report and recommendation (or as trial court upon filing of consent by the parties); extraditions; Central Violations Bureau matters (traffic and petty offenses committed on military reservations); pre-trial proceedings in civil cases (early neutral evaluation conferences, settlement conferences, Fed. R.Civ.P.26 proceedings and the scheduling of pre-trial dates, discovery disputes, and motions for summary judgment on report and recommendation) and post-trial enforcement of judgment matters.

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

USA v. Antonio Rubio Flores, Case No. 98m1525.
Extradition case involving a Mexican political figure sought by Mexican authorities in a shooting death that occurred in Mexico. Rubio Flores contended, among other things, that the homicide was justifiable. The court extensively analyzed the legal requirements for extradition under the facts, and ultimately found Rubio Flores extraditable on the homicide charges.

Spilkin v. Blyth et al., Case No. 98cv00717. Action arising from alleged violations of the Securities and Exchange Act. Defendant, a citizen of South Africa, moved

to dismiss the action based on lack of personal jurisdiction and on forum non conveniens grounds. The court recommended that the motion to dismiss for lack of personal jurisdiction be denied and the motion to dismiss on forum non conveniens be granted. The district court adopted the court's recommendation in its entirety.

City of Vista v. Lumbermens Mutual Casualty Company, Case No. 97cv01672. Complaint alleging insurance company failed to pay claim for losses incurred due to acts of the city's treasurer and director of finance. On consent to trial before the magistrate judge, the parties sought, pretrial, an order establishing the standard of care to which the treasurer should be held regarding his responsibilities in investing public funds and a determination of the meaning of material loss as used in the city's resolution.

Miller v. NTN Communications, et al., Case No. 97cv01116. Class action suit based on securities fraud. During depositions, attorneys for defendants refused to answer certain questions on attorney-client privilege grounds. The court, after addressing privilege law in the untested area of communications occurring in connection with Securities Exchange Commission document preparation, found it appropriate to conduct an *in camera* review of the material at issue.

Karras v. Teledyne Industries, Case No. 99cv00996. Complaint filed by trust entities seeking contributions under the Comprehensive Environmental Response, Compensation and Liability Act for hazardous waste disposal cleanup. Defendant sought discovery directly from the individuals that formed the trusts, contending that the individuals were real parties in interest. Plaintiff trusts contended that the trusts were the only real parties in interest. The court found that the individuals had substantial interest and involvement in the litigation, and thus were required to respond to party discovery. Affirmed by the district court.

Wakefield v. Mayberg, Case No. 01cv01679. Petition for writ of habeas corpus seeking relief from involuntary civil commitment under California's Sexually Violent

Predator Act. Defendant moved to dismiss the petition on mootness grounds because the petition was filed during petitioner's first two-year commitment. After a detailed discussion of the mootness doctrine as applied to civil commitments, the court recommended that the petition be dismissed as unexhausted.

Hydranautics v. Filmtec Corporation, Case No. 93cv00476. Pending patent infringement litigation. Plaintiff moved to compel production of attorney-client privileged documents from defendant and from defendant's parent company based on the invocation of the advice of counsel defense. The court ultimately found the documents discoverable.

Gateway v. Lucent Technologies, Case No. 97cv02229. Breach of contract case. Defendant sought documents that plaintiff claimed were privileged as confidential commercial information. The court granted defendant's motion.

Freeman v. San Diego Association of Realtors et al., Case No. 98cv00139. Antitrust litigation involving realty multiple listing services. Plaintiff alleged that defendant improperly and deliberately withheld pertinent information sought through discovery requests. The court granted plaintiff's motion to compel the information and awarded monetary sanctions against defendant.

B. Braun Medical v. Rogers, Case No. 98cv00250. Declaratory relief action as to arbitrability of a dispute arising from a licensing agreement. Defendant sought an *in camera* review of documents claimed to be privileged by plaintiff, asserting the documents fell within the crime-fraud exception to the attorney-client privilege. The court granted the motion for *in camera* review.

Johnson v. Ashworth Inc., Case No. 99cv00121. Securities fraud case. Defendant moved to compel plaintiffs to produce the identities of those persons plaintiffs selected to interview in their pretrial investigation which plaintiffs deemed protected under the work product doctrine. The court found the information protected as attorney work product.

Copies of the above cases at Exhibit 2.

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

Of the hundreds of orders, decisions and reports and recommendations I have issued, the following have been reversed or significantly criticized as a result of objections or appeal:

Masek v. City of San Diego Police Department et al., Case No. 98cv00307. Civil rights complaint by prisoner. Defendants moved for summary judgment. The court recommended that defendants' summary judgment motion be granted in its entirety. The district court, on objections, rejected the recommendation but *sua sponte* dismissed the complaint for failure to state a claim.

McBrearty v. City of Brawley et al., Case No. 98cv00521. Civil rights complaint against police officers for off-duty conduct. Plaintiff sought discovery of information deemed by defendant to be privileged under the governmental privilege. The court conducted an *in camera* review and, thereafter, ordered a substantial portion of the requested documents produced pursuant to a protective order. On objections, the district court found the order overly broad and limited the discovery accordingly.

Wright v. Terhune et al., Case No. 98cv01390. Petition for habeas corpus. Respondent moved to dismiss on statute of limitations grounds and failure to exhaust state court remedies. The court recommended dismissal on exhaustion grounds. The district court disagreed with the conclusion that petitioner had failed to adequately present his claims to the state court and remanded the matter for further proceedings.

Waldrop v. Pfliler, Case No. 99cv00154. Petition for writ of habeas corpus. Respondent moved to dismiss on statute of limitations grounds and failure to exhaust state judicial remedies. The court recommended dismissal on

statute of limitations grounds. The district court declined to adopt the recommendation and remanded for further proceedings based on superseding Ninth Circuit law that came into effect after the recommendation was submitted.

Virgil v. Poole et al., Case No. 99cv00469. Petition for writ of habeas corpus. Petitioner claimed that her trial counsel was ineffective because he failed to investigate and present the battered women's syndrome as a defense to a murder charge. After an evidentiary hearing, the court recommended that the writ be granted. The district court, on objections, found that counsel acted reasonably and petitioner failed to prove prejudice. The Ninth Circuit recently granted petitioner's request for a certificate of appealability.

Carter v. Cambra, Case No. 00cv02430. Petition for writ of habeas corpus. Respondent moved to dismiss on statute of limitations grounds. The court recommended dismissal. The district court declined to adopt the recommendation and remanded for further proceedings regarding the factual basis for petitioner's claim for equitable tolling of the statute of limitations.

Franco v. Massanari, Case No. 01cv00658. Review of denial for social security disability benefits. The court recommended that the case be remanded to the administrative law judge for further proceedings. The district court found, on objections, that there was no need for remand and adopted the remaining portions of the court's recommendation.

Copies of the above cases are at Exhibit 3.

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

Herrera v. Taylor, Case No. 01cv1065- BTM (JAH). Petition for habeas corpus. Petitioner asserted, among other things, the sentence, 25 years to life under the three

strikes law, constituted cruel and unusual punishment, in violation of the Eight Amendment to the United States Constitution. The court found the state court decision upholding the sentence was not contrary to clearly established Supreme Court law and recommended the district court deny the petition. On objection, the district court adopted the report and recommendation.

Birch v. Terhune; Case No. 99cv01605. Petition for writ of habeas corpus. Petitioner claimed, among other things, the jury instruction which defined reasonable doubt was unconstitutional. The court found petitioner presented no compelling reason to depart from clearly established precedent that using the words 'abiding conviction' to define reasonable doubt is proper. The court recommended the petition be denied in its entirety. The district court adopted the report and recommendation.

Guzman v. Adams; Case No. 02cv00648. Petition for writ of habeas corpus. Petitioner challenged the legality of his sentence of twenty-eight years to life for petty theft with a prior. The Court found, pursuant to Ninth Circuit case law, the state court decision upholding the sentence was contrary to clearly established Supreme Court law and recommended the district court grant the petition. The district court adopted the report and recommendation and granted the petition. Respondent filed a notice of appeal and an application to stay proceedings.

Watson v. Hickman; Case No. 99cv01467. Petition for writ of habeas corpus. Petitioner asserted an exception should be recognized to the federal habeas bar on review of Fourth Amendment claims. The court recommended denial of petitioner's request. The district court adopted the report and recommendation and denied the petition. The Ninth Circuit dismissed the appeal.

Copies of the above cases are at Exhibit 4.

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

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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; 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;

In January 1996, I was designated **Senior Financial Litigation Counsel, United States Attorneys Office, San Diego, CA** and assumed the responsibility of criminal judgment enforcement litigation in order to place into an affirmative mode the collection of criminal forfeiture and other judgments in favor of the United States. I directly supervised 5 attorneys and 23 paralegals and other support staff. These duties were in addition to my existing responsibilities as Senior Counsel For Asset Forfeiture, *infra*. I held this position until my appointment in April 1998.

In January 1994, I was designated **Senior Counsel For Asset Forfeiture, United States Attorneys Office, San Diego, CA**, expanding my civil forfeiture oversight to all civil and criminal forfeiture litigation in the district. In this capacity, I was responsible for the development of the district's civil and criminal forfeiture and money laundering policy, practice and procedure, including the coordination of investigations and decision making with prosecutors and law enforcement agencies as to the method of proceeding against seizable assets, and the training of the Southern District's prosecutors and federal, state and local law enforcement officers regarding money laundering and asset forfeiture investigations.

In September 1987, I was appointed **Chief of the Asset Forfeiture United States Attorneys Office, San Diego, CA**, after heading the unit since its inception. With a staff of seven prosecutors and up to 12 paralegals, I pursued the objective of

developing an innovative and results-oriented affirmative litigation model for handling of civil forfeiture matters in the Criminal Division.

Beginning in 1987 and continuing throughout my tenure, the Asset Forfeiture Unit was recognized for its innovative approaches of integrating civil asset forfeiture into broader law enforcement initiatives and was consistently ranked in the top ten percent of the ninety-four judicial districts in terms of productivity in seizures and forfeitures. From 1986 until my departure from the office, I participated in the formulation of nationwide forfeiture and money laundering policy, practice and procedures with the Asset Forfeiture Office (AFO), Criminal Division, DOJ, and as a member of the DOJ/AUSA Asset Forfeiture Working Group, reviewed and made recommendations upon federal forfeiture related legislative initiatives. I was a DOJ instructor of asset forfeiture and money laundering and worked with DOJ's Office of Legal Education in the development of training curriculums for DOJ personnel. I have trained literally hundreds of prosecutors, special agents of the FBI, INS, DEA, IRS, ATF, U.S. Customs, U.S. Border Patrol, Secret Service, and Food and Drug, and department executives on asset forfeiture, money laundering and related subjects throughout the United States.

I conceived and implemented training conferences and workshops in the Southern District as well, trained numerous state and local law enforcement officers and members of a number of task forces, and coordinated federal and state activities relating to money laundering and financial investigations.

From **August 1981 to 1986**, I was assigned as a *prosecutor* in the **Criminal Division, United States Attorneys Office, San Diego, CA**. My responsibilities included handling search and arrest warrants; initial appearances; misdemeanor pleas, trials and sentencing before magistrate judges); grand jury investigations; proactive and reactive felony cases and trials in district court; and appeals to the Court of Appeals for the Ninth Circuit.

From **1982 to the present**, I have served in the United States Army Reserve. See response to Question 8, below.

From **August 1978 to August 1981**, I was on active duty in Fort Leavenworth, Kansas, in the Judge Advocate General Corps (JAGC) of the United States Army. During my first year, I was assigned as

Legal Assistance Officer, and provided to soldiers and their dependents general legal assistance on matters such as wills, powers of attorney, landlord tenant, personal injury, contracts and dissolution of marriage. For the next six months, I was assigned as an Administrative Law Officer and Special Assistant United States Attorney (SAUSA). As Administrative Law Officer, I researched legal questions presented by the Commanding Officer and command staff and drafted responses in the form of legal opinions and recommendations for the signature of the Staff Judge Advocate (chief legal advisor to the commanding officer). As a SAUSA, I handled trials involving DUI and petty offenses committed by civilians and speeding violations before a United States Magistrate Judge.

During my last 18 months as a JAGC lawyer, I performed duties as a trial counsel (prosecutor) in military courts-martial. In this capacity, I advised commanders concerning procedural options for disciplining soldiers, coordinated with military police and civilian military criminal investigators concerning on-going criminal investigations, initiated criminal charges, and tried jury and non-jury trials involving assault and battery, rape, drug offenses, robbery, misappropriation, carnal knowledge with a minor, and a variety of purely military offenses.

While in college, I was employed as a Departure Gate Agent by Eastern Airlines, Inc., Greensboro, High Point, Winston Salem Regional Airport, in Greensboro, North Carolina. My responsibilities included accepting tickets and providing seat assignments at the departure gate, announcing flight arrivals and departures, and calculating weight distribution manifests for pilots' use during take offs and landings. I was also employed as a warehouse assistant at Computer Business Forms, a printing company, in Greensboro, North Carolina. There, I was responsible for stocking warehouse bins utilizing a fork lift, and moving printing paper to and from printing machines.

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

I appeared in court frequently between 1981 and 1986 on criminal matters and between 1986 and 1991 on civil matters. My practice was 100% devoted to litigation between December 1979 and April 1998, and 100% in federal court between August 1981 through

April 1998 [100% criminal from August 1981 to November 1985; 75% criminal and 25% civil from November 1985 to mid 1986; 85% civil and 15% criminal from mid 1986 to 1994; and, 60% civil and 40% criminal from 1994 to April 1998.

Between December 1979 to August 1981, I appeared in U. S. Magistrate Judge or before a military courts-martial 3-5 days a month. Between August 1981 to August 1982, I appeared in court or before the federal grand jury nearly each day. Between 1982 and 1985, I appeared in court 1-3 days a week and more often when in trial. Between 1985 and 1991, I appeared in court 1-3 days a week. Between 1992 and April 1998, I appeared in court 2-4 times a month.

(2) What percentage of these appearances was in:
 federal courts; 95%
 state courts of record; 0%
 other courts. 5% (military courts-martial)

(3) What percentage of your litigation was:
 (A) civil proceedings: 60%
 (B) criminal proceedings: 40%

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

Civil: 2 as lead counsel; 1 jury; 1 non-jury

Criminal: 25 trials - sole counsel;
 2 trials - lead counsel;
 2 trials - associate counsel

23 - jury trials
 6 - non-jury trials

(5) What percentage of these trials was:

Jury: 66%
 Non-Jury: 34%

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.

During the last five years in the United States Attorneys Office, I handled civil forfeiture cases and worked closely with criminal prosecutors and attorney supervisors on criminal forfeiture aspects of criminal investigations and indictments. As reflected in my discussion on prior legal experience in the response to Question 17, I oversaw and coordinated all financial litigations (primarily in the drugs and fraud areas) and thus was engaged, in a cross functional supervisory sense, in all investigations and litigation involving organized criminal activity or other criminal activity that involved the accumulation of proceeds of crime. Between 1994 and 1996, I was the district's principal architect of its litigation positions during the period of uncertainty after the Ninth Circuit held, *United States v \$405,089.23 in US Currency, et al.*, 33 F.3d 1211 (9th Cir. 1994), that the Double Jeopardy Clause was violated as a result of the civil forfeiture of property and the prosecution of the defendant. I participated in the development of DOJ policy to handle the implications of the decision nationwide and implemented litigation strategies for the entire Criminal Division in the Southern District of California to defend against an avalanche of double jeopardy challenges to subsequent prosecutions, convictions via habeas corpus proceedings, seizures and/or forfeitures. I disseminated litigation positions to criminal and civil attorneys, reviewed motion responses and appellate briefs prepared by all criminal prosecutors to insure adherence to my guidance, and argued criminal and civil motions and appeals. One such reported appellate case was United States v. Sardone,

94 F.3d 1233 (9th Cir. 1996). As a result of the positions taken, only one of dozens of cases challenged on double jeopardy grounds was held invalid by the district courts and the Ninth Circuit before the United States Supreme Court reversed the Ninth Circuit's ruling in \$405,089.23. See, e.g., USA v. Henry et.al., Criminal Case Number 94-0669 (Judge Brewster). C.A. No. 95-50012; USA v. Kahn, Criminal Case Number 94-0530 (Judge Keep), C.A. No. 95-55282; USA v. Sanchez-Cobarruvias, Criminal Case Number 94-0732 (Judge Gonzales), C.A. No. 94-50581; USA v. Kimmish, Criminal Case Number 94-0868 (Judge Turrentine), C.A. No. 94-50621; USA v. Lenz, Civil Case Numbers 92-0203, 93-0030, and 93-0062 (Judge Huff); USA v. Baramdyka, Criminal Number 86-1077 and Civil Number 94-1316 (Judge Turrentine), C.A. Nos. 94-50051 and 95-55066; USA v. Blue, Crim 93-1012 (Judge Gonzales), C.A. No. 95-50086, USA v. 9909 Hawley Road, Civil Number 91-1760 (Judge Porter), C.A. No. 94-55868.

In addition to the above cases, I handled the following significant matters:

- 1) United States v. Youn Hee Na, et.al. Criminal Case 82-0699 (Judge Enright). I handled the proactive, undercover investigation of this multi-defendant alien smuggling conspiracy. Persons were solicited by the lead defendant in Korea for smuggling to the United States through Mexico. CO-conspirators participating in the solicitation, bringing in and transporting of undocumented aliens within the United States were arrested and convicted. Case agent - Special Agent Don Hasson - INS. Defense counsel can not be identified at this time.
- 2) United States v. Benny Bullard, Criminal Case Number 82-0614 (Judge Enright). Convicted of Bank Robbery after jury trial. Defense counsel: Joseph Milchen, 136 Redwood Street, San Diego, CA 92103, (619) 574-1888.
- 3) United States v. Pablo Salamanca, Criminal Case 82-0884 (Judge Irving); United States v. Sherry Leone Salamanca, Criminal Case 82-0598 (Judge Irving). Defendant Pablo Salamanca convicted of importing marijuana by jury after conviction of wife, who alleged that husband (Pablo) tricked her into importing drugs and set her up for arrest in related case 82-0598 (Judge Irving). Defense counsel Floralynn Einesman

(Federal Defenders) for Pablo, CA Western School of Law, 225 Cedar Street, San Diego, CA 92101 (619) 525-1451.

4) United States V. Amelia Aispuro, et.al., Criminal Case Number 83-0263 (Judge Keep). I handled the proactive, undercover investigation and criminal proceedings in this 17 defendant alien smuggling conspiracy. The lead defendant and her defendant husband operated the Happy Landing Bar, Chula Vista, CA, which represented a harboring/staging area for the bartering of undocumented aliens. The smugglers (coyotes) brought aliens to the bar from Mexico and was paid \$10-15 per alien by the lead defendants. Thereafter second-tier smugglers, specializing in smuggling aliens through the San Clemente and Temecula Border Patrol Checkpoints, would negotiate with family members in Los Angeles, New York and Chicago to provide safe passage of their relatives through the checkpoints. Upon making arrangements with family members, the second tier smugglers would then negotiate a price to be paid to the bar owners for the release of the aliens from the bar, resulting in a profit for the bar owners. Defendants included a number of transporting smugglers and care takers in the bar. All defendants pled guilty and convicted. Defense counsel included Mark Adams, 964 Fifth Ave., Ste. 214, San Diego, CA 92101, (619) 239-4344; Frank Ragen, 105 West F Street, San Diego, CA 92101, (619) 231-4330.

5) USA v. Terry Joe Berryman, et.al., Criminal Case Number 83-0394 (Judge Enright) (related case No. 83-0346). An12 defendant alien smuggling conspiracy case assigned in May 1983. One defendant dismissed; three defendants went to trial. Defense Counsel: Edmundo Espinoza (no longer listed in attorney directory); Jim McCabe, 4817 Santa Monica Ave., Ste. B, San Diego, CA 92107 (619) 224-2848; Audrey Boyd; Frank Morell, 659 Third Ave. Chula Vista, CA (619) 498-0667; Jane Mobaldi, 1200 Carlsbad Village Dr., Carlsbad, CA 92008, (760) 434-8367; Michael Murray (no longer listed in attorney directory); William Quackenbush (Ret.), 625 J Ave., Coronado, CA (619) 437-8845; Frank Ragen, 105 West F Street, San Diego, CA 92101, (619) 231-4330; Dean Steward (no longer listed in attorney directory); John Blakely, 515 Glover Ave., Ste. 7, Chula Vista, CA 91910 (619) 420-4641; Bart Sheela III, 410 S. Melrose, Ste. 200, Vista, CA 92083 (760) 940-6453.

6) United States v. Reginald Tatlock, et.al., Criminal Case Number 84-0404 (Judge Keep). Bribery and Public Corruption

conspiracy case. Contractor at construction site for new Balboa Naval Medical Center conspired to bribe the government inspector for the project to facilitate a timely completion of contract and avoidance of contract penalties. Defense counsel: Richard Strauss (Now presiding judge, San Diego County Superior Court, (619)531-3434; Ronald Frant, 1754 Navaja Road, El Cajon, CA, 92020 (619) 440-6013.

7) United States v. Robert Dailey, Criminal Case Number 84-0310 (Judge Nielson, deceased). Failure to File /Tax Evasion case. A tax protestor case which was followed closely by fellow protestors at each stage of the proceedings. Defendant desired to represent himself but counsel appointed. Identity of counsel unknown.

8) United States v. RJM Laboratories, Inc. et al., Case No. 88-0922, and a number of related civil forfeiture cases (Judges Irving and Gonzales). This case involved a defendant, Robert J. Miskinis, who operated RJM Laboratories, a supply outlet-type entity which sold complete kits for the manufacture of methamphetamine. A long term criminal investigation (including undercover contacts) revealed that Miskinis supplied equipment to a substantial number of methamphetamine 'cooks' in this district when this district had the unwanted title as the 'methamphetamine capital' of the United States'. Along with the business, agents seized an unrelated business which supplied blown glass to large research and development companies and hospitals around the United States, homes, apartment complexes and bank accounts, all purchased and/or financed with the proceeds of the unlawful operations. A conservator was appointed to operate the unrelated business, which was ultimately forfeited and sold for a profit to the United States. The total value of the seizures and forfeitures totaled in the millions of dollars. I handled the financial investigation portion of the criminal investigation with agents of DEA and the San Diego County Narcotics Task Force, obtained seizure warrants and the conservatorship, filed civil actions, litigated the civil forfeiture cases to conclusion and assisted the prosecutor in pursuing criminal forfeiture. . . . Opposing counsel: John Mitchell, 2366 Front Street, San Diego, CA; (619) 237-9155.

9. United States v. Don Hernandez, Criminal Case Number 85-0536, and a number of civil forfeiture cases, including USA v. A Condominium Located at 4326 Rosemead Blvd, et.al. Civil Case

Number 86-1289 (Judges Thompson and Irving). These cases resulted from a proactive investigation into the drug smuggling activities of the defendant and his organization. During the investigation, which included the murder of a grand jury witness, the government seized \$250,000 in a suitcase found underneath the defendant's bed, three executive homes, 6-8 condos and a number of automobiles. I handled the financial investigation and litigated the forfeiture related matters to conclusion. Opposing Counsel; Mark O. Heaney, 9119 Sunset Blvd., North Hollywood, CA.

10. United States v. Sardone, aka New York John, Criminal Case Number 93-0597 (Judge Thompson); 94 F.3d 1233 (9th Cir. 1996) (see Double Jeopardy discussion above). The Ninth Circuit decision in this case permitted the sustainment of many convictions in this circuit and others pending the outcome of \$405,089.23 before the Supreme Court.

I have personally handled financial investigations in a number of other matters, including cases against the Hells Angels, gang members and various large scale drug smugglers prosecuted in the Southern District of California.

Again, I supervised the handling all such financial investigative and prosecutorial activities in the Southern District.

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 1997 and 1998, with the support of the United States Attorney and the Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, U.S. Attorney General Janet Reno approved a multi-million dollar pilot project I designed to capitalize on the on-going intensive investigative and prosecutive efforts targeting the Arrellano-Felix Organization (AFO), the largest and most dangerous Mexican drug cartel engaged in the interdiction of drugs into the United States. The AFO reportedly generated several billion dollars annually

on its marijuana, cocaine and methamphetamine importation and distribution networks throughout the United States. The plan contemplated the strategic use of specialized investigative and litigative resources, the extensive use of government and regulatory bodies, the coordination with Mexican authorities regarding the asset identification and forfeiture under as appropriate under Mexican law, the institutionalization of random outbound inspection procedures at ports of entry, the utilization of state prosecutive resources - all acting within a team context, to stimulate closer coordination and integration of investigative and regulatory processes and cripple the financial infrastructure of the AFO. The projects financial intelligence team would function as an information and action clearinghouse to compile, verify and validate intelligence from investigative and regulatory agencies, coordinate data exchanges with other intelligence gathering entities (e.g. EPIC and FINCEN), analyze and catalogue financial related collected by the other task forces and assist enforcement agents in the coordination of courses of action and operational plans.

The development of the proposal resulted from meetings and coordination with many government entities and department of Justice representatives. I was appointed as a U.S. Magistrate Judge several months before final approval of the project.

One of the larger litigation matters handled under my supervision as Chief of Financial Litigation was the seizure and ultimate forfeiture in July 1994 of approximately 2,000 acres of land owned by a subsidiary of Home Federal Savings and Loan, San Diego, CA, in United States .v. Approximately 2,000 Acres of Land, Civil Case Number 93-1033 (Judge Schwartz ,deceased). The property, which was valued at approximately \$60 million and located in an area identified as an integral part of a new and expansive residential community, was seized under the authority of the FIRREA [18 USC Section 981(d) and 18 USC Section 982(A0(1)®)] statute, which was responsive to insider dealing abuses on the part of officers and directors of banks and savings and loan institutions leading to the financial ruin of a number of financial institutions in Southern California. The seizure and f o r f e i t u r e involved environmental issues, in that the property was the home of endangered species, and issues concerning restitution to the FDIC.

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.

My involvement in community affairs has centered primarily around programs that enhance the abilities of children in underserved communities to prepare themselves to meet the challenges and demands associated with personal and economic achievement.

I was co-founder and committee member of the Continued Academic Excellence Program (CAEP) sponsored by the San Diego Chapter of Alpha Phi Alpha Fraternity, Inc.. From its inception in 1987, this program has centered on encouraging and assisting African American males having a 3.0 or higher GPA at Morse High School and Lincoln Preparatory High School to maintain high academic endeavors throughout high school and assisting in their development of other life skills to insure their successful completion of college and post-graduate programs and their maturation toward becoming productive and responsible adults. As a committee member over the years, I was instrumental in the development of workshops (e.g., college preparation and the college admission process, public speaking, interviewing skills, dealing with authority figures [teachers, parents, law enforcement, employers], financial planning, maintaining a healthy respect for women, and etiquette) and informal discussion sessions designed to allow the students to feel comfortable with and develop relationships with professional men in the community. High School seniors who successfully complete the program, enroll in and attend four year colleges/universities receive book awards. Since the inception of CAEP, the fraternity has provided over \$130,000 to more than 100 deserving CAEP graduates.

Another such program was the Expanded Turn Around Program sponsored by Alpha Pi Boule, San Diego. It was designed as an efficient and economically feasible method of providing hands-on assistance in enhancing and enriching the educational, economic and cultural development of children in minority and impoverished communities. Specifically, the program, operating via a partnership agreement between Oak Park Music Conservatory Elementary School and the Board of Supervisors of the San Diego Unified School District, entailed a hands-on relationship with a fourth and fifth grade student and his/her family designed to empower them toward enhanced achievement. I accompanied parents to parent/teacher meetings and worked with parents in handling and identifying community resources to assist with behavioral and academic challenges facing the student. Even though my student recently moved to the State of Georgia, I maintain regular telephone and e-mail contact with him. The program continues to include a speakers bureau. This component of the program involves appearances by fraternity members every other Monday at 7:30 a.m. (before the school day begins) to chat with school-selected students about excelling in education, being self-confident in their ability to achieve, making responsible decisions, and becoming solid, responsible citizens. I last made a presentation to the students in December 2002.

I have also been involved in the planning and execution of the Martin Luther King Day Parade in San Diego since 1982. The parade, which has been sponsored and conducted by the local chapter of the Alpha Phi Alpha Fraternity with the cooperation and support of the San Diego County Board of Supervisors, the San Diego City Council and the San Diego Police Department since 1984, has been one of the largest MLK parade celebrations in the country. In about 1987, while serving as President of the fraternity, the fraternity took the bold step of moving the venue of the parade from Imperial Avenue/Euclid Street (a community represented by underserved residents) to downtown San Diego. This action was based upon the conviction that the downtown venue would be more conducive to inclusion of all residents of San Diego County in the spirit of Dr. King's accomplishments and his vision of inclusive interaction among all citizens.

In January, 2002, I founded the Legal Ministry at my church, Bethel Memorial A.M.E. Church, 3085 `K' Street, San Diego, CA . Its objective is to assist church members and the surrounding community to be better informed about and more proactive in handling legal matters confronted in everyday life. The ministry has sponsored two legal seminars geared to lay persons: estate planning and public education law. For the latter seminar, I personally went door to door in the community surrounding the church and distributed over 200 information flyers printed in Spanish and English. I insured that a Spanish interpreter was available at the seminar in that the surrounding community is more than 60% Hispanic/Latino.

I also participate in the `Mens Reading Program' at Chancellor William McGill School of Success Academy, 3025 Fir Street, San Diego, CA 92102. McGill is a charter school in an underserved community focused upon stimulating children through education. The reading program brings selected male role models into the school to interact with and read to the students, impress upon them the importance of reading and studying, and encourage them to set high goals.

On several occasions, I have been a mentor in the `Links Achiever' program, which is designed to honor African American males who have excelled in high school, to prepare them for college life and beyond.

Lastly, one legal related community program is worthy of note. I also work with my colleagues in the Southern District to enhance and enrich the lives of our young citizens. I have participated in the `Judges in the Classroom' program for the last several years. Through this program, federal judicial officers go into San Diego classrooms, upon invitation, to speak to students on topics agreed upon by the judge and teacher. Through this program, I have had discussions with students on topics including civic responsibility, the jury system, national government institutions, the federal judicial system, American democracy, the criminal justice system, and steps to take to become an attorney and/or judge. I have also permitted public school students access to my courtroom for mock trials. My staff and the court discuss with the students the role of attorneys, the jury, the court and the court's

staff during trials, and the practice of law in general.

I support other community organizations having the objective of enriching and empowering the lives of the children of San Diego.

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, and have not belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies.

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).

The judicial position was publicly announced by the district court and the President's Federal Judicial Selection Committee in San Diego, CA, via a public forum for the heads of all bar associations for maximum dissemination (explaining the timetable and protocol for the selection process), newspaper articles, and the federal courthouse website, with each communication/notice inviting all potential aspirants to apply. After submitting the application, I was selected for an interview by the President's Federal Judicial Selection Committee in San Diego, CA. I thereafter interviewed with Mr. Gerald Parskey, West Hollywood, CA, (3) the Office of Counsel To the President in Washington, DC, (4) the Department of Justice and (5) the FBI.

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 the judicial officer is to resolve the dispute(s) presented by the pleadings of the parties to the action. The judicial branch's function is

interpreting the Constitution, the laws and/or following precedent as it relates to the factual dispute before it. Its role is not legislative in nature. The court should focus on the controversy at hand and avoid commenting upon or attempting to proactively resolve unsettled areas of law. I also believe that the parties, not the court, are responsible for the implementation of the court's orders.

Chairman HATCH. Thank you.
Judge Jones?

**STATEMENT OF ROBERT CLIVE JONES, NOMINEE TO BE
DISTRICT JUDGE FOR THE DISTRICT OF NEVADA**

Judge JONES. By way of introduction, Mr. Chairman, if I may, my companion and spouse is here, Anita Michele; and my youngest daughter, Kimberly Miller and her husband Ryan. Kimberly is a nursing student, graduating from Brigham Young. Ryan works for a nationwide CPA firm officed in Las Vegas.

Chairman HATCH. Delighted to have you with us.

Judge JONES. For the record, I can just mention we have three other children. They are here with us in spirit, my daughter JaNae and Mark Barrow reside in Phoenix. He works for a medical provider firm. JaNae is a prior teacher. They have three of our grandchildren. My son Justin and Jenn live in Las Vegas, Nevada. They have two children. Justin is an attorney and CPA, again in a large national firm. And Melissa Henrich and Jake. Melissa is a middle school math teacher in Phoenix, Arizona, and Jake is a graphic arts computer specialist. He is studying for his business degree in Mesa Community College and then on to ASU.

It is a great honor to be here. I am very much humbled, and appreciate the President for his nomination and the time of the Committee. Thank you.

[The biographical information of Judge Jones follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

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

Residence:	Office:
Las Vegas, NV	333 Las Vegas Blvd. South Las Vegas, NV 89101
3. Date and place of birth.

July 21, 1947
Las Vegas, Nevada
4. Marital Status: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Anita Michele Bunker Jones (married 3/26/70)
Dental Hygienist (Retired)
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Brigham Young University, 1965-66, 1969-71
B.S. Accounting, English, Business, 1971

University of California (U.C.L.A.), 1972-75, J.D., 1975
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.

1971	L.K.H. & H., CPAs, Las Vegas, NV
1973-75	Touche, Ross & Co., CPAs, Los Angeles, CA
1976	Deloitte, Haskins & Sells, CPAs, Las Vegas, NV
1977	Albright & McGimsey, attys, Las Vegas, NV
1977-82	Jones & Holt, attys, Las Vegas, NV (Partner)
1983-Pres	U. S. Bankruptcy Judge, Dist. of NV
1986-99	Ninth Circuit Bankruptcy Appellate Panel
1997-98	Opportunity Village - Board of Directors Clark County Bar Association - Board of Directors

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.

Nevada Army National Guard 7/71 - 9/72
 Calif. Air National Guard 9/72 - 9/77
 Staff Sargent, Honorable Discharge
 530-38-9888

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

Law School: Associate Editor, UCLA Law Review
 Order of the Coif (top 10% of graduating class)
 Order of Barristers (International Moot Court Society)
 Roscoe Pound Award (winner/school & regional
 moot court competition)
 Member of the Board, Moot Court
 National Moot Court competition, New York City, New York

Undergraduate: Honor Society
 Accounting Society
 Passed C.P.A. examination in Utah, 1971 (single sitting)
 Accounting Professor's Assistant
 Semester in Salzburg, Austria (University of Salzburg) 1966

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.

Nevada & California State Bar Associations
 Clark County Bar Assn, Board of Directors (approx. 1995)
 U. S. Judicial Conf. Committee on Codes of Conduct 1989-1995

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.

No lobbying organizations
 Opportunity Village (mental retardation) Board of Directors,
 approx. 1997-98
 Nevada & Calif. Bar Assns.
 Clark County Bar Assn.
 Church of Jesus Christ of Latter Days Saints,
 Lay Bishop of Canyon Gate Ward, 4/98-5/03
 Athletic Clubs:
 Las Vegas Athletic Club, 1995-pres.
 24-Hour Fitness, 2003

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.

Nevada 1976; California 1975; United States Tax Court 1978;
U. S. District Ct - Calif. 1975, Nevada 1976.

12. Published Writings: List the titles, publishers, and dates of books, articles, reporters, 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.

Estate and Income Tax: Claims Against the Estate and Events Subsequent to Date of Death, 22 UCLA L.Rev 654 (1975).

How Community Property Laws Affect Employee Benefit Plans.
3 Community Property Journal 3 (1976)

Numerous published opinions since appointment as U. S. Bankruptcy Judge (1983) and Ninth Circuit Bankruptcy Appellate Panel (1986-99). Available on Westlaw or Lexus.

Numerous panel presentations on bankruptcy law before local and state bar associations. No speeches on constitutional or nonbankruptcy legal policy.

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

Good. I run 3 or 4 miles three times per week. I have high blood pressure for which I take a prescribed medication: Last physical examination was 5/28/03.

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

United States Bankruptcy Judge, D. of NV, 1983-present,
appointed 2/83, 4/86, 4/00. General trial court in
the federal bankruptcy system.

Member, Bankruptcy Appellate Panel for the Ninth Circuit
Court of Appeals, 1986-99, appointed by the Court of
Appeals for consecutive 7 year terms. Sitting in panels
of 3 judges, this court hears appeals from decisions of the
bankruptcy courts in the Ninth Circuit; further review is
to the Ninth Circuit.

SUPPLEMENT TO PART I, QUESTION 12

Two published articles attached

-“Numerous panel presentations on bankruptcy law before local and state bar associations.”:

All of the above presentations were continuing law education (CLE) panel presentations for the benefit of the bar. I averaged two presentations per year for the last 20 years. As the judge/participant on each panel, I prepared none of the educational materials. I would have responded to questions and case hypotheticals dealing with bankruptcy issues only, including current bankruptcy court procedures. The CLE was sponsored by the state and county bar associations, the American Bankruptcy Institute and the Southwestern Bankruptcy Conference or comparable bankruptcy counsel associations. I do not have further record of those presentations.

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

1) citations for the ten most significant opinions you have written:

In re Auto Parts Club, Inc., 211 B.R. 29 (9th Cir.BAP 1997)
(Attorney fee award: when a court may abandon the lode star method).

In re Mehdipour, 202 B.R. 474 (9th Cir.BAP 1996)
(Real estate commissions in b'cy: conflicts of interests)

In re HAL, Inc., 196 B.R. 159 (9th Cir.BAP 1996)
(Set off rights in b'cy: government is single entity.)

In re Circle K Corp., 190 B.R. 370 (9th Cir.BAP 1995)
(Assumption of defaulted leases in b'cy)

In re Markair, Inc., 172 B.R. 638 (9th Cir.BAP 1994)
(Constructive trust claims defeated by trustee strong arm powers)

In re BFP, 132 B.R. 748 (9th Cir BAP 1991)
(Price received at foreclosure sale determined to be the reasonable
Equivalent value-rationale adopted by the Supreme Court)

In re Imperial Coronado Partners, Ltd.
(Pre-payment penalties in b'cy)

In re Dix, 95 B.R. 134 (9th C ir BAP 1988)
(Excusable neglect standard for late filing of claims - adopted by the
Supreme Court Pioneer decision.)

In re Krueger, 88 B.R. 238 (9th Cir.BAP 1988)
(Bankruptcy court jurisdiction to set aside foreclosure sales.)

In re Dougherty, 84 B.R. 653 (9th Cir.BAP 1988)
(12 factors in credit card fraud analysis - cited extensively)

LARGE IMPORTANT CASES HANDLED IN THE TRIAL COURT:

Aladdin Gaming, LLC, Case No. 01-20141
N&T Associates, Inc., A NV Corp., Case No. 84-20190
Riviera Hotel, Case No. 91-24940
Hotel Conquistador, Case No. 84-21334
The Resort at Summerlin, Case No. 00-18878
Baby Grand Corp, Case No. 98-24835
Max Gaming, Case No. 99-19904
Lemons & Associates, Inc., Case No. 85-30273

Landmark Hotel & Casino, Case No. 85-21113
 Western Consolidated Mortgage Corp., Case No. 87-21534

2) 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 ruling:

Bankruptcy Appellate Panel:

In re Colortran, Inc., 210 B.R. 823 (9th Cir.BAP 1997), affirmed in part, vacated in part by In re Colortran, Inc., 165 F.3d 35 (9th Cir. 1998). (Automatic stay violation sanction only available to individual debtors: rationale and result affirmed by the Ninth Circuit but remand for consideration was vacated).

In re American West Airlines, Inc., 164 B.R. 315 (9th Cir.BAP 1994), affirmed in part, vacated in part by In re American West Airlines, 40 F.3d 1058 (9th Cir. 1994). (No right of individual partner to appear pro se: Ninth Circuit affirmed rationale and result but portions of decision were vacated.)

In re Davenport, 1513 B.R. 551 (9th Cir.BAP 1993), vacated by In re Davenport, 40 F.3d 298 (9th Cir. 1994). (Ninth Circuit vacated the BAP decision since appeal had become moot.)

In re Mantz, 151 B.R. 928 (9th Cir.BAP 1993), reversed by In re Mantz, 33 F.3d 59 (9th Cir. 1994). (Late filed tax claims entitled only to lower priority in distribution: reversed; Ninth Circuit held late filed tax claims entitled to first priority release of untimely filings).

In re Milton Poulos, Inc., 107 B.R. 715 (9th Cir.BAP 1989), affirmed in part, reversed in part by In re Milton Poulos, Inc., 947 F.2d 1351 (9th Cir. 1991). (PACA trust assets to be shared pro rata among trust beneficiaries: Ninth Circuit affirmed rationale and result but reversed denial of attorney fees and costs.

In re Kincaid, 96 B.R. 1014 (9th Cir.BAP 1989), reversed by In re Kincaid, 917 F.2d 1162 (9th Cir. 1990). (ERISA deferred salary plan was property of the estate since it was a self-settled trust: Ninth Circuit reversed holding the trust was not self-settled under Oregon law and therefore exempt.)

Bankruptcy Court:

In re Endy, 166 B.R. 438 (Bankr.D.Nev. Apr 28, 1994), affirmed by In re Endy, 181 B.R. 526 (D.Nev.1995), reversed by In re Endy, 104 F.3d 1154 (9th Cir. 1997). (U.S. trustee Chapter 11 fees subordinate to Chapter 7 trustee fees: Ninth Circuit reversed finding equal priority in Chapter 7.

In re Barbier, 77 B.R. 799 (Bankr.D.Nev. 1987), affirmed by In re Barbier, 896 F.2d 377

(9th Cir. 1990). (IRS lien does not attach to debtor's household goods in bankruptcy since IRS cannot levy them: Ninth Circuit reversed.)

In re Western World Funding, Inc., 54 B.R. 470 (Bankr.D.Nev.1985), affirmed in part and reversed in part by District Court in Buchanan v. Henderson, 131 B.R. 859 (D.Nev. Oct 12, 1990), District Court decision reversed by Ninth Circuit and Bankruptcy Court decision reinstated in Henderson v. Buchanan, 985 F.2d 1021 (9th Cir. 1993).

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.

None

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

None

17. Legal Career:

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

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

J. Clifford Wallace, U. S. Court of Appeals, Ninth Circuit, 1/75 - 9/75

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;

Albright & McGimsey, 1976, associate
315 South Third Street
Las Vegas, NV 89101

Jones & Holt, 1977-82, partner
 515 South Third Street
 Las Vegas, NV 89101

- 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 1975-82, my law practice involved the following areas:

Tax: estate planning, pension & profit sharing

Real Property: developers, subdivisions,
 zoning, syndications

Bankruptcy & Commercial

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

1975-82: Tax: individuals & professional corporations

Real Property: developers, syndications

Bankruptcy: bankruptcy trustees

- 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.

Bankruptcy Court: frequent

State Court & State Supreme Court: occasional

Tax Court: occasional

2. What percentage of these appearances was in:

(a) federal court: 60%

(b) state courts of record: 35%

(c) other courts: 5%

3. What percentage of your litigation was:

(a) civil: 95:

(b) criminal: rare.

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 or associate counsel: 30, including bankruptcy trials

5. What percentage of these trials was:

- (a) jury: 5%
- (b) non-jury: 95%

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 names of the judge or judges before whom the case was litigated; and
 - (c) the individual names, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.
1. Transcontinental Oil, Case No. 77-730
U. S. Bankruptcy Court, District of Nevada, Judge Lloyd D. George
Represented the Receiver in a large oil company case.
Attorney for Debtor: Deanor, Deanor & Reynolds
720 South 4th Street, #300, Las Vegas, NV 89101
 2. Powder Mountain, Case No. 77-20896
U. S. Bankruptcy Court, District of Nevada, Judge Lloyd D. George
Represented the Receiver in a large ski resort and real property case
Attorney for Debtor: Deanor, Deanor & Reynolds
720 South 4th Street, #300, Las Vegas, NV 89101
 3. Vans Builders Supply, Case No. 82-472
U.S. Bankruptcy Court, District of Nevada, Judge Lloyd D. George
Represented the Trustee in bankruptcy liquidation of large
builder's supply company.
Attorney for Teamsters Local Union 421: Patricia S. Waldeck
Los Angeles, CA
 4. Commerce Commercial, Case No.
U.S. Bankruptcy Court, District of Utah, Judge John Allen
Represented the creditor's committee in large pyramid investment
case.
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).

U. S. Judicial Conference Committee on Codes of Conduct (1989-95): This committee is responsible for the drafting, adoption and interpretation of codes of conduct for U. S. judges and judicial employees. The committee drafts private and public opinions in response to ethical inquiries by federal judges.

Bankruptcy Appellate Panel, U. S. Court of Appeals, Ninth Circuit (1986-99): Appointed by the Ninth Circuit to consecutive seven year terms. I was one of seven judges appointed to hear appeals in panels of three from the bankruptcy courts in the Ninth Circuit. As the only active bankruptcy appellate panel in the country, this court settled substantial question of bankruptcy law and interpretation of the bankruptcy statute during the period of my tenure.

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.

Private practice 1976-82: Regular and consistent pro bono services.

(5-10 pro bono bankruptcy cases per year).

Bankruptcy Judge 1983-pres: Frequent and consistent public bankruptcy education efforts; promotion of state bar pro bono services in bankruptcy; prior service in charitable organizations (American Cancer Society, Opportunity Village, LDS Church)

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 which 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 interview in which you participated).

No selection commission. I was first contacted on May 14, 2003 by the Office of White House Counsel indicating that Senator John Ensign (NV) and the White House were working on a list of potential candidates to fill the office of a retiring U. S. District Court judge in Nevada. I was invited to an initial interview with White House deputy counsel on May 16, and with Senator Ensign the following week. Senator Ensign indicated that he had reviewed my name with Senator Harry Reid (NV), whom I have known for many years, and he supported my nomination. I completed required forms and was interviewed by the FBI and the Department of Justice.

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 the Federal Judiciary within the Federal government, and within society generally 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 problems-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.

I strongly believe in the rule of law, in constitutional government, and in democratic majority rule, as set forth in statutory law by the relevant legislature. In application of constitutional or statutory law, I believe that any interpretation must start with the language of the statute itself. Only if the language is unclear or ambiguous should a judge turn to further legislative history or interpretations of parallel statutes or common law. With regard to time-tested doctrines of ripeness and standing, federal courts are obliged to defer or dismiss lawsuits on non-ripe matters pending in state court or before administrative bodies or which are brought by inappropriate parties with no stake in the lawsuit.

I also believe in the judiciary principle of stare decisis; that is, the courts should give appropriate deference to prior decisions settling interpretation of constitutional, statutory or decisional law. Having been a member of an appellate court for thirteen years (Bankruptcy Appellate Panel for the Ninth Circuit Court of Appeals), I am keenly aware of the benefit and resulting predictability of settled law.

Chairman HATCH. Thank you, Judge Jones.
Mr. White?

**STATEMENT OF RONALD A. WHITE, NOMINEE TO BE DISTRICT
JUDGE FOR THE EASTERN DISTRICT OF OKLAHOMA**

Mr. WHITE. Good morning, Mr. Chairman. I would like to thank you for scheduling the hearing. The President has honored me with this nomination, and I also express deep appreciation to Senators Nickles and Inhofe for their support.

I only brought one friend for support today, but she is the best one I have, my beautiful wife, Lisa.

Chairman HATCH. We are happy to have you here, very much. That is a pretty good friend. That is all I can say.

[The biographical information of Mr. White follows:]

BIOGRAPHICAL INFORMATION (PUBLIC)

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

Response to Question 1: Ronald Allen White.

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

Response to Question 2:

Residence: Tulsa, OK
Office: 320 S. Boston Ave., Suite 400, Tulsa, OK 74103

3. Date and place of birth.

Response to Question 3: 1/27/61, Sapulpa, Oklahoma.

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

Response to Question 4: Married to Elizabeth S. White, formerly Elizabeth Moran. Homemaker.

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

Response to Question 5:

University of Oklahoma, 1979 – 1983; Bachelor of Arts in Letters, degree granted 1983.
University of Oklahoma College of Law, 1983 – 1986; Juris Doctorate, degree granted 1986.

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.

Response to Question 6:

Hall Estill Hardwick Gable Golden & Nelson, P.C., Tulsa, Oklahoma (1986 to Present)
1986 to 1992 – Associate Attorney
1992 to present – Shareholder

Margaret Hudson Program Board of Directors (2001 to present)
Member Human Resources Committee (non-profit organization)

Jones Givens Law Firm, Tulsa, Oklahoma (Summer 1985) (Law Clerk)

Boone Smith Davis & Hurst, Tulsa, Oklahoma (Summer 1985) (Law Clerk)

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.

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Response to Question 7: 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.

Response to Question 8:

Phi Beta Kappa Honor Society
Order of the Coif Honor Society

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.

Response to Question 9:

Oklahoma Bar Association
Tulsa County Bar Association
Fee Arbitration Committee (April 2003 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.

Response to Question 10:

Lobby:
National Rifle Association
Margaret Hudson Program Board of Directors

Other:
Philbrook Museum of Art Masters' Society
Tulsa Ballet Founders' 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.

Response to Question 11:

Oklahoma Supreme Court, 10/86
U.S. District Court for Northern District of Oklahoma, 11/86
U.S. District Court for Western District of Oklahoma, 6/87
U.S. District Court for Eastern District of Oklahoma, 12/87
U.S. Court of Appeals, Tenth Circuit 6/93

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

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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.

Response to Question 12:

"Divorce: Restricting Religious Activity During Visitation," 38 Okla. L. Rev. 284 (1985)

"Open Records in Oklahoma: Where Are We Now?" 57 Oklahoma Bar Journal 1831 (1986)

No speeches have been given, except as follows: (1) Approximately ten years ago, I spoke to a media group regarding the legality of "on air" contests. I have no copies of this speech. (2) I speak occasionally at Tulsa University School of Law regarding ERISA litigation. I have no notes of these lectures.

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

Response to Question 13: Good general health. Last complete physical examination approximately 10/02. I did undergo the judicial candidate medical exam on May 12, 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.

Response to Question 14: 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.

Response to Question 15: 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.

Response to Question 16: 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;

Response to Subpart (a)(1): No.

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

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Response to Subpart (a)(2): 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;

Response to Subpart (a)(3):

Hall Estill Hardwick Gable Golden & Nelson, P.C., 320 South Boston Avenue,
Suite 400, Tulsa, OK 74103 (1986 to Present)
1986 to 1992 – Associate Attorney
1992 to present – Shareholder

Jones Givens Law Firm, 15 E. 5th Street, Suite 3800, Tulsa, OK 74103 (Summer
1985) (Law Clerk)

Boone Smith Davis & Hurst, 100 E. 5th Street, Suite 500, Tulsa, OK 74103
(Summer 1985) (Law Clerk)

- 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?

Response to Subpart (b)(1): Generally, my practice has focused on litigation, especially tort and insurance defense, medical malpractice defense and corporate litigation. At the present time, my practice is evenly divided between ERISA litigation and telecommunications litigation.

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

Response to Subpart (b)(2): Typical former clients included Columbia/HCA, American Red Cross, CNA, and MCI/WorldCom.

- 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.

Response to Subpart (c)(1): Court appearances have been occasional to frequent.

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

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Response to Subpart (c)(2): Approximately 60% of court appearances have been in federal court, and approximately 40% in state court. Federal court appearances predominate in the last five years.

3. What percentage of your litigation was:

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

Response to Subpart (c)(3): Approximately 98% of my practice has been civil litigation, and approximately 2% criminal litigation.

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

Response to Subpart (c)(4): I have tried approximately fifteen (15) cases to judgment, all but one of which I was sole or chief counsel.

5. What percentage of these trials was:

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

Response to Subpart (c)(5): Approximately 90% were jury trials.

Response to Question 17: See responses after individual subparts above.

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.

Response to Question 18:

A. Herron v. Doctors Hospital and William Kok, M.D., Case No. CJ-1993-3129, District Court of Tulsa County. This case involved alleged medical negligence in the delivery of a baby by Dr. Kok at Doctors Hospital in Tulsa. I was lead counsel for the hospital. The case was pending before Judge Ronald Schaeffer. I was involved in motion practice and depositions of lay and expert witnesses. The case ultimately settled, with the majority of settlement monies being paid by the insurer of Dr. Kok.

Ronald A. White

Opposing Counsel:

Jennifer L. De Angelis
 Brewster & De Angelis
 2617 East 21st Street
 Tulsa, OK 74114
 Phone (918) 742-2021

Co-Defendant's Counsel:

Joseph M. Best
 Best & Sharp, P.C.
 100 W. 5th Street, Suite 808
 Tulsa, OK 74103
 Phone (918) 582-1234

- B. Wofford v. American Red Cross and Frank Fore, M.D., Case No. 96-CV-468H, United States District Court for the Northern District of Oklahoma. This case involved the alleged HCV infection of the Plaintiff from a blood transfusion. The case was pending before Judge Sven Holmes. The case was pending for approximately five (5) years, but I came into the case as lead counsel for ARC about one (1) year before trial. I was involved in numerous discovery issues, disputes and motions. I defended and took numerous depositions of lay and expert witnesses. I eventually tried the case to a defense verdict.

Co-Counsel:

Marshall Wells
 Hall Estill Hardwick Gable Golden & Nelson, P.C.
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 Tulsa, OK 74103
 Phone (918) 594-0630

Co-Defendant's Counsel:

Daniel S. Sullivan
 Best & Sharp, P.C.
 100 W. 5th Street, Suite 808
 Tulsa, OK 74103
 Phone (918) 582-1234

Plaintiff's Counsel:

Derek S. Casey
 Hutton & Hutton
 8100 East 22nd Street North
 Building 1200
 Wichita, Kansas 67226-2312
 Phone (316) 688-1166

- C. Provider Medical Pharmaceutica v. Don Allen, Kevin Tucker, Matt J. Lile and Choice Rx Inc., District Court of Tulsa County, Case No. CJ-1996-2290. The case was pending before Judge Thomas Thornbrugh. I represented the Plaintiff, which was a small, family-owned pharmacy benefit manager in Tulsa. The case involved allegations of breach of contract, breach of fiduciary duty and conversion against employees of PMP. The individual Defendants set up and operated a competing company (Choice Rx) while employed by PMP. I was lead counsel for Plaintiff and handled all motions, hearings, and depositions. I tried the case to a Plaintiff's verdict, with judgment totaling approximately \$300,000.00. Dates of representation were approximately 5/96 to 11/99.

Opposing Counsel:

Richard Comfort
 5517 S. Peoria Ave.
 Tulsa, OK 74105
 Phone (918) 747-3679

Opposing Counsel:

Stanley Dwight Monroe
 525 South Main, Suite 600
 Tulsa, OK 74103
 Phone (918) 592-1144

Ronald A. White

Opposing Counsel:
 William Kirk Turner
 Newton O'Connor Turner & Auer, P.C.
 15 W. 6th Street, Suite 2700
 Tulsa, OK 74119
 Phone (918) 587-0101

- D. Leggett v. Sinclair Oil Company, United States District Court for the Northern District of Oklahoma, Case No. 98-CV-143J. This case involved the Plaintiff accidentally stepping into a steam trap in the refinery parking lot and receiving severe burns. I was lead counsel for Sinclair and handled most discovery, motions and depositions. I tried the case before Magistrate Judge Sam Joyner. The trial resulted in a plaintiff's verdict.

<p><u>Co-Counsel:</u> Marshall Wells Hall Estill Hardwick Gable Golden & Nelson, P.C. 320 South Boston, Suite 400 Tulsa, OK 74103 Phone (918) 594-0630</p>	<p><u>Opposing Counsel:</u> R. Scott Savage Moyers Martin Santee Imel & Tetrick 320 South Boston, Suite 920 Tulsa, OK 74103 Phone (918) 582-5281</p>
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- E. Sparks v. Continental Casualty Co., United States District Court for the Eastern District of Oklahoma, Case No. CIV-01-574-S, Judge Frank Seay. This case involved alleged breach of insurance contract and bad faith. I was lead counsel for Continental and handled all depositions and hearings. The case settled on the eve of trial after a jury was selected. Dates of representation were 10/01 – 1/03.

<p><u>Co-Counsel:</u> Marshall Wells Hall Estill Hardwick Gable Golden & Nelson, P.C. 320 South Boston, Suite 400 Tulsa, OK 74103 Phone (918) 594-0630</p>	<p><u>Opposing Counsel:</u> Mark S. Thetford Stipe Law Firm P. O. Box 1038 Muskogee, OK 74402 Phone (918) 683-5050</p>
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Opposing Counsel:
 Kent McGuire
 Whitten, Nelson, McGuire, Wood, Terry, Roselius & Dittrich
 Suite 400, One Leadership Square
 211 North Robinson
 Oklahoma City, OK 73102
 Phone (405) 239-2522

- F. Foundation Drillers, Inc. v. Martin K. Eby Construction Co., et al., District Court of Tulsa County, Oklahoma, Case No. CJ-1993-1518, Judge Ronald Shaffer. This case involved the breach of a construction subcontract. I was lead counsel for Foundation, a small family-owned

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company, and handled all aspects of the case, including the jury trial resulting in a plaintiff's verdict. Dates of representation were approximately 4/93 to 5/94.

Opposing Counsel:

Gerald G. Stamper
Nichols Wolfe Stamper Nally Fallis & Robertson, Inc.
124 E. 4th Street, Suite 400
Tulsa, OK 74103
Phone (918) 584-5182

- G. MCI v. Ozzie's Directional Drilling, Third Judicial District Court County of Salt Lake, State of Utah, Case No. 010904429, Judge William B. Bohling. This case involves the damage inflicted by Ozzie's on one of MCI's backbone fiber optic cables. I am lead counsel in the case and have handled most depositions and all hearings. The case is still pending. Dates of representation are 5/01 to present.

Co-Counsel:

James J. Proszek
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Phone (918) 594-0529

Opposing Counsel:

Stephen J. Trayner
Kevin D. Swenson
Strong & Hanni
600 Boston Building
#9 Exchange Place
Salt Lake City, UT 84111
Phone (801) 532-7080

- H. Church v. Hofer, Inc., 844 P.2d 887, 1992 OK CIV APP 148, appeal from the District Court of Tulsa County, State of Oklahoma, Judge David L. Peterson. I represented Hofer, Inc., a small family-owned trucking company that was sued in several negligence and wrongful death actions in federal court. Hofer's insurance company retained attorney Donald Church to represent Hofer in the federal actions. Prior to Church being paid for his services, the insurance company went into receivership. Church then sued Hofer for the legal services rendered. I filed a motion for summary judgment on behalf of Hofer and prevailed. I was lead counsel, and handled depositions, hearings, and motions, and the final appeal.

Co-Counsel:

Robert P. Fitz-Patrick
Hall Estill Hardwick Gable Golden & Nelson, P.C.
320 South Boston, Suite 400
Tulsa, OK 74103
Phone (918) 594-0400

Plaintiff, Donald Church, appeared pro se.
Donald C. Church
3715 S. Granite Ave.
Tulsa, OK 74135
Residence Phone Number (918) 627-6595

- I. Curt Massengale, O.D. v. Oklahoma Board of Examiners in Optometry, 29 P.3d 558, 2001 OK 55, appeal from the District Court of Oklahoma County, State of Oklahoma, Case No. CJ-1998-597, Judge Daniel L. Owens. I was one of three attorneys for this firm that represented the individual optometrist, Dr. Massengale, (and two other optometrists) in an appeal regarding the suspension of his license. I handled depositions and briefs during this case's four to five year length. The appeal resulted in the doctors' licenses being reinstated.

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Co-Counsel:

Graydon Dean Luthey, Jr.
Mark K. Blongewicz
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Phone (918) 594-0400

Opposing Counsel:

Daniel J. Gamino
3315 N.W. 63rd Street
Oklahoma City, OK 73116
Phone (405) 840-3741

Todd Markum
6801 Broadway Ext., Suite 205
Oklahoma City, OK 73116
Phone (405) 843-1493

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.)

Response to Question 19:

The most significant legal matters I have pursued not involving litigation have involved advising insurance companies, self-funded health plans and third-party administrators on compliance and operational issues associated with ERISA-governed employee benefit plans.

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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.

Response to Question 1: As one of the attorneys at my firm engaged in a tort practice, I am often referred "cold calls" by potential personal injury and small business clients who have no realistic financial expectation of being able to retain me or my firm. I am always willing to give advice to these individuals over the phone without charge and have often conducted free one-on-one office meetings with them as well. Sometimes these interactions grow into full-scale representation without charge. My most satisfying pro bono case was in successfully appealing the decision of a self-funded health plan administrator in denying benefits for a life-saving surgical procedure for a plan participant. This case consumed approximately 60 hours. Also, I regularly perform pro bono legal work for a local charity – the Margaret Hudson Program – an alternative school for pregnant and parenting teens.

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?

Response to Question 2: 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).

Response to Question 3: There is no selection commission. I was contacted by Senator Nickles' office and asked if I would like to interview for the position. I eventually interviewed with both Senators Nickles and Inhofe. Both interviews were similar in that I was questioned about my experience, my vision of a competent judge, why I wanted the position, and the characteristics I possessed which would make me a good judge. I was subsequently invited to an interview with Deputy White House Counsel David Leitch, who asked questions similar to those asked by the Senators. I also completed various questionnaires and was interviewed by the Federal Bureau of Investigation and the U.S. Department of Justice. I was nominated on May 15, 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.

Response to Question 4: No.

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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.

Response to Question 5: A court must interpret the law and not let its acts of interpretation encroach onto the proper roles of the legislature (drafting the law) or the executive (enforcing the law). The principles of standing and ripeness, as well as the requirement of an existing “case or controversy,” must be effectively utilized by a court.

Strict adherence to the doctrine of *stare decisis* ensures that we remain a nation governed by laws and not by men. Following existing precedent ensures more certainty in the law, and consistency in legal outcomes. Such certainty and consistency provide the quintessential foundation for a democratic society: citizens (or litigants) knowing what is legal and what is not, rather than facing the uncertainty of rule by judicial fiat.

Chairman HATCH. If you would all stand, I will swear you all in. Do you solemnly swear that the testimony you are about to give before this Committee will be the truth, the whole truth and nothing but the truth, so help you God?

Judge CRONE. I do.

Mr. FIGA. I do.

Mr. HAYES. I do.

Judge HOUSTON. I do.

Judge JONES. I do.

Mr. WHITE. I do.

Chairman HATCH. Let us start with you, Judge Crone. You have already had a distinguished career as both an attorney and as a United States Magistrate Judge. Obviously, you have gained some insight from your professional experience on both sides of the docket which will influence your judicial temperament as a Federal District Court Judge.

Having had the experience as both a judge and an advocate, would you speak just briefly about the role and significance of your experience, and maybe the role and significance of judicial temperament, and state what elements of judicial temperament you consider to be the most important.

Judge CRONE. Thank you, Mr. Chairman. Yes, having been a practitioner—I've practiced law for 14 years in a variety of capacities. I worked in labor and employment areas, products liability, commercial litigation, and have a good grasp of many of those areas, which I found very useful when I moved to be the magistrate judge, or one of the magistrate judges in Houston.

In that capacity my knowledge of the law has greatly expanded. It has been a true challenge to master the law and also to understand the litigants, what's really driving the litigants. I enjoy the exposure to the criminal law which I did not have as a practitioner. That was strictly civil. It's, I think, caused me to have much greater insight into what's valuable in this country, what people think is important, and really an insight into some of the problems plaguing the society that I've seen through the criminal docket. It's been an eye-opening experience, and I think it's been very helpful to me to be understand and empathize, but also realize the very serious and significant difficulties in many areas that are challenges to the country, to the viability and stability of our country.

I think that combining those two areas of experience will help me tremendously on the District Court Bench. I welcome the opportunity to handle felony criminal matters. To date I have only handled pretrial matters on the felony side. Of course I've done misdemeanor cases and things like that, that we do have jurisdiction of.

I think judicial temperament is key. What is brought forth to me is the very importance of these cases to the litigants. I think judicial temperament, you need to be very serious about the matter at hand. This is an important decision in these people's lives, whether it's civil or criminal, and to treat the litigants with the utmost respect, courtesy, dignity to which they're entitled. We are very fortunate in the United States to be able to resolve the problems in the courtroom, not in a battlefield and not in a back alley. And I think

the judicial role is to see that that privilege is afforded to all citizens, residents of the United States.

Chairman HATCH. Thank you. That is helpful. One of the things we worry about here is that, I have often said that being a Federal Judge, District, Circuit or Supreme Court Justice, is the closest thing to godhood in this life, because once you are there, the only way they can remove you is for really bad action. Unfortunately, there are some judges, who once they get on the bench, allow it to go to their head and become very dictatorial and temperamental.

I would caution each of you to try and realize that you are dealing with human beings. You are dealing with attorneys, some of whom are highly skilled, some of whom are just learning, and you are dealing with various witnesses and so forth, and it is good to be humble on the bench if you can, and I just mention that to all of you. It is tough to be a judge, because once you start making decisions, you are going to irritate somebody all the time, and somebody is going to call you arrogant no matter what you do. But just keep that in mind, that you are servants of the public, and I sure hope that you can be humble servants of the public and do everything you can.

Judge Crone, you have served as a magistrate judge for more than 10 years, and I have been impressed by your commitment to serve your country in that capacity, and I am sure it was somewhat of a transition to adjust to work after your career as an attorney. You have talked a little bit about that transition. As a magistrate judge, how do you believe that has prepared you to serve as a Federal District Court Judge?

Judge CRONE. I've been very fortunate as a magistrate judge to have a number of consent cases where I really fit in the same capacity as an Article III District Judge, and have handled those cases in their entirety, a number of them. And I think that has prepared me by basically doing many of the same duties as a District Judge would do.

Also, seeing the pretrial part of the criminal aspect, the District Judges often don't see the pretrial work that we do, initial appearances, bond hearings and things like that. It gives me a good grasp on that entire procedure, because then moving into the felony trials, I think I'm prepared for that. I know that there will be additional issues that come up that I have not been dealing with, but I have basically become familiar with suppression issue and the like.

In the Southern District of Texas we have a large habeas docket, so I've dealt with many criminal issues, handling innumerable petitions for writs of habeas corpus. I think that that has been the best training ground as a Magistrate Judge for a District Judge position that one could really imagine, because I would be dealing with the same type of issues, the lawyers' understanding of the sensitivities that are required, the amount of preparation that's required. One really needs to know the law and the different areas of each case before you to really understand what the legal issues are as well as the factual dynamics of the case. So I think it has been just invaluable experience, and I want to continue my education in that area.

What I've enjoyed about the job is I'm learning something new all the time, and I think that's going to continue throughout because every case always presents something different. There's a new twist, there's a new issue, there are new laws that are passed, when we're looking at that, and it's just always been a very challenging and dynamic environment, and I look forward to hopefully being able to continue that.

Chairman HATCH. Thank you.

Mr. Figa, in 1995 you created a Federal pro bono mentor program for Colorado. This program assists Colorado's Federal Trial Bench in providing counsel for pro se litigants, in whose civil cases the judges determine are in need of appropriate counsel. Can you elaborate on the program's significance and purpose?

Mr. FIGA. Yes, sir, Mr. Chairman. I was delighted, as State Bar President of Colorado to institute this program that would enable junior and senior lawyers to work together to handle cases that the Court believed needed attention by representation for pro se litigants, mostly prisoners, some civil cases. Where there was some plausible merit to the plaintiff's claim, the Court felt it was important to have someone learned in the law handle those individuals' cases and as it turned out, we were able to get the support of the court and the bar to enlist a number of junior and senior lawyers to work together, which would help the litigants of course, which would help the court, and which would help junior lawyers develop the skills and values they need by being mentored by a senior lawyer in working on such cases, and I was appointed to one of them and actually won a judgment and was able to donate a sizable amount of the proceeds from the recovery of that case to the program to finance others who would be going forward in representation of clients under the program.

Chairman HATCH. Our District Court are overburdened with litigation. How do you feel about mediation and arbitration as maybe forms of alternative dispute resolution?

Mr. FIGA. I think those are significant advances in terms of dispute resolution. I have participated in numerous arbitrations and mediations over my 27 years of trial practice, and I would try to encourage that to the extent possible. It seems to me that the court itself can be a significant participant in encouraging alternative uses of judicial resources and non-judicial resources to help resolve disputes and to ease the congested dockets in our Federal Courts today.

Chairman HATCH. Thank you.

Mr. Hayes, what do you believe will be your biggest challenges in assuming the role of a Federal Judge in California and how are you going to address them?

Mr. HAYES. Thank you for your question, Mr. Chairman. As you're aware, I've spent the last 17 years as a prosecutor for the United States, and so I look forward to the challenge to again, reacquainting myself with civil practice. I spent 3 years in civil practice in Colorado, and have some taught some law school classes dealing with civil practice. Although that's certainly the area that I need to reacquaint myself with, I've begun that process and will continue to reacquaint myself with civil practice to complement my extensive criminal experience.

Chairman HATCH. How are you going to balance the interests of the prosecution and the defense in criminal trials?

Mr. HAYES. Senator, I will be able to do that, as in civil practice we represented both plaintiffs and defendants. When I was in civil practice I did represent a criminal defendant. I represented, obviously, the United States for the last 17 years. I've litigated before the—for the United States and against the United States. I certainly understand the difference between being an advocate and a judge. I've been fair and evenhanded as a prosecutor, and I would be as a judge if I am fortunate enough to be confirmed.

Chairman HATCH. You've taught a variety of legal and business courses at four different academic institutions. Could you elaborate just a little bit on the courses that you teach and what you have learned from these experiences?

Mr. HAYES. I've taught the legal and ethical environment of business in business law at the University of Colorado. I've taught an accounting class at National College in Colorado. I've taught a number of law school classes at Thomas Jefferson Law School in California. Those were criminal procedure, white-collar crime. I also taught tax fraud at the University of San Diego College of Law. It has given me a wide background in a number of areas. I've enjoyed interacting with a variety of students both in the graduate business schools and in law schools. It's been a very professionally rewarding experience and has motivated me to obtain some expertise in a number of legal areas.

Chairman HATCH. Thank you.

Judge Houston, you have given numerous speeches on the progress that African-Americans have made in the last century and the challenges that they face in the 21st century, and you have noted a number of historical contributions of such prominent African-Americans, Homer Plessy, Olivia Brown, Rosa Parks, Dr. Martin Luther King, Jr., and as a matter of fact you have been a member of the Martin Luther King Day Parade Committee in San Diego for more than 20 years, I believe.

Can you tell the Committee how the experiences of these individuals have influenced the decisions that you have made throughout your career and what role this influence will play after you are confirmed as a Federal District Court Judge?

Judge HOUSTON. Thank you for the question, Senator. The role these individuals have played in my mind to make me a better judge has been the attribute primarily of courage. If you look at Plessy in the late 1900's, Mr. Plessy had the audacity to challenge the system because he felt that he could, he should be able to ride in a railroad car on the railroad line on which he worked and sit with anyone else. That was a hard task for him to do I'm certain in the late 1900's, and to pursue his dream that the American system was for everyone, and that his rights were that as—worth as much as those of any other citizen, and pursuing his dream through the courts.

Certainly Dr. King has been very instrumental in American history. Dr. King also exhibited the courage and the belief that the Constitution has meant what it said, that America is to treat all members of the society in an equal and fair-handed manner.

The other individuals, the other civil rights leaders I've mentioned have all had the same common thread, courage to believe that the system is there to work for each and every person. I've participated in the Martin Luther King Parade over the years because it's been my view that to bring a parade to the city of San Diego, with the assistance of the City Council and the San Diego County Commissioners, along with the San Diego Police Department is only a testament of Dr. King's interest in ensuring that this is a free and open society to everyone.

Every dealing I've had in the public sector has surrounded the issue of open access and freedom for everyone, and that the Constitution and the laws of the United States apply to each and every one.

How do I bring that into the courtroom? In the courtroom I look at every litigant in a fair and equal manner. Every litigant walks into the courtroom on the criminal side innocent until proven guilty regardless of the charges. And on the civil side, I've learned as a Magistrate Judge that litigants come to court seeking justice for the wrongs that have been done against them, whether it's in a discrimination area, breach of contract, it could be a business venture between one corporation and another. They come to see justice and redress in our legal system, and I have learned through the course of my responsibilities as a Magistrate Judge that every litigant in a courtroom seeks the same thing. They want a fair, timely ruling from a court, and regardless of whether they win or lose, when they leave that courtroom they should feel that justice has been done and they've had their day in court.

My judicial philosophy is to that end, that every person who approaches my courtroom with a case will know that they will receive a fair and impartial hearing, that I will keep an open mind, that I will listen and not make a decision until the end of the day, until the evidence is closed, and that I will give 150 percent to every matter that comes before the court to ensure access to the courts. In my view, these factors lead to public confidence in the integrity of the judicial system, and it's my aim and goal to continue to proceed, if I'm confirmed as District Court Judge, to ensure that my courtroom is open to the public in such a matter.

Chairman HATCH. Thank you, Judge. One other thing, in your question there you said your involvement in your community has centered primarily on children who are under served. I take a great interest in that, among many other things, but certainly in children. But you cited several programs, but one in particular is called Judges in the Classroom. Would you please tell the Committee just a little bit about this program?

Judge HOUSTON. Certainly, Senator, and I appreciate that question as well. As is indicated in my application, the children in our communities is our—you know, they represent our future. We must, as judges, as all respectable members of our society, reach out and assist these children to be the best adults that they can be by providing tools to them during their childhood, and resources during their childhood, so that they can grow into responsible and productive citizens of the United States.

The Judges in the Classroom program is actually a program that was created by the current presiding Magistrate Judge, and in this

program Federal District Court Judges, Magistrate Judges and Bankruptcy Judges, have volunteered to make themselves available to the classrooms in the public school system in the city of San Diego.

Teachers contact us individually to ask us to come to their classrooms. We coordinate with the teacher as to the subject matter for the day, and the subjects include: government, the jury system, trial practice, what it takes to be a lawyer or a judge, and what it takes to be a responsible citizen, and the duty of all citizens to vote once they become of age. We instill these values and thoughts in the children's minds at a very early age through this particular program.

This program also entails a component wherein students come to the classroom for mock trials, Goldilocks and the Three Bears. Criminal trials, 100 Dalmatians, there's a skit for that. So that they can experience being participants in the courtroom proceedings as lawyers, judges, as a lawyer, defense counsel, prosecutor, witnesses, jurors and judge and bailiff, and it has been a very well-recognized program in the city of San Diego, and I'm very pleased to be a part of it.

Chairman HATCH. I compliment you for being part of it and for the good work that you have done. You are clearly qualified for this position, as all of you are, and I am very proud of you.

Mr. Jones, let me take a moment with you. You have served on the Federal Bankruptcy Court for 20 years. You are used to being punished and beaten up I am sure.

[Laughter.]

Judge JONES. That is right, Senator.

Chairman HATCH. What skills have you mastered during your tenure that you think would be helpful in serving on the Federal District Court Bench, which naturally has a broader jurisdiction?

Judge JONES. Two decades have taught me some of the skills of judging. I consider the most important to be temperament. I think of course high on the list of functions of a judge are determine and resolve disputes. But certainly a very important part of that is simply to listen. Aside from evidentiary objections that you are making decisions on quickly, probably the greatest function of a judge, either a Bankruptcy Judge or a District Court Judge is to listen to the dispute and to allow the parties, as well as the attorneys, to feel like they have had their day in court.

I had a great experience, Mr. Chairman, on the Bankruptcy Appellate Panel, some 13 years listening to appeals from Bankruptcy Courts throughout the Ninth Circuit. It's given me a great perspective in analyzing decisions, evidentiary decisions, bankruptcy law decisions. It was a wonderful experience for a long time. Our bankruptcy appellate panel was the only panel that was functioning throughout the country. Now, of course, most of the circuits do have functioning bankruptcy appellate panels, but for those few years it was a great experience to help settle bankruptcy law throughout the country and consequently, many of those decisions are cited throughout the country. That has brought to my mind a very, an additional very important quality of a judge, and that is fairly, analytically determining the law and its application to the facts in front of you. When you do have to—hopefully we don't have

to publish so often on the District Court as you might have to as an appellate judge, but when you do publish, being sure that your interpretations of the law are correct and fair. So I would say in summary, temperament, being a long listener, a fair and impartial, unbiased determiner, when you have to make decisions, those are some of the greatest qualities that I think hopefully I've learned a little bit about and would bring to bear.

Chairman HATCH. Thank you. In your questionnaire you have mentioned a number of boards upon which you have served. One in particular, a charitable organization called Opportunity Village, I believe, assists the mentally disabled. Could you please tell that Committee a little bit more about that particular group?

Judge JONES. I served on that board for a couple of years, Mr. Chairman. A great jurist in our community, Judge Lloyd George, has a son who receives the services at Opportunity Village. That's a great organization in our State and certainly in our community. They have several formal places of conducting business there. They entertain throughout the day a large group of mentally challenged, mentally retarded persons. They give them employment. They do actual projects and help to earn a living for themselves. In addition, they perform educational functions, and finally, they perform housing functions under State and Federal grant programs providing housing for those who are in need. It was a great opportunity to serve in that capacity for a couple of years.

Chairman HATCH. Thank you.

I failed to turn to my colleague from Texas who probably would like to say a few words about the Texas nominee here. I apologize.

PRESENTATION OF MARCIA A. CRONE, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TEXAS, BY HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Not necessary, Mr. Chairman. I do want to thank you for chairing these important hearings. I do not think there is anything more important that we do in the United States Senate than hold confirmation hearings for members of the Federal Bench. I am slightly prejudiced, given my 13 years as a State District Court Judge, but all we have to do is to read the newspaper or watch television to see that the framers' concept of what a judge should be and how a judge should act still remains controversial, as crazy a notion as that may seem. I have got to say that without exception, that President Bush's judicial nominees have not only all been well qualified, including this panel and the one that preceded them, but also committed to the role that judges should play under our Constitution, that is, not as lawmaker, but as someone who interprets the law, not as a alternative legislative branch or a super legislature or someone who wears a black robe and legislates from the bench, but someone who understands that their job is to interpret the law and to render judgment based on a set of facts determined by the fact finder in accordance with the legislature and apply the laws determined by the legislature or by some appellate court or appellate precedent.

That is an honorable, a tough job sometimes, but it is always important, and I want to congratulate each one of you for your will-

ingness to take on this important job and just reinforce in your own minds something you already know, and that is the tremendous gravity and importance of the role that you have agreed to accept.

In particular I wanted to be here for Judge Marcia Crone's confirmation, Mr. Chairman, because I had the pleasure along with Senator Hutchison, who I know was able to be here earlier, to recommend her to the President, and the President did see fit to accept that recommendation, and as well I think as he should because of her distinguished service already as a magistrate, Federal magistrate, working in 1992 in one of our busiest districts in the United States Southern District of Texas, there in the Houston Division. She has distinguished herself as an outstanding jurist. She has authored approximately 700 opinions already as a Federal Magistrate, over 130 of which have been published. I am sorry I was not able to be here earlier when the official introductions were being made, but I will ask that the remainder of my introduction be made part of the record of the hearing.

Chairman HATCH. Without objection.

Senator CORNYN. And did want to come to congratulate Judge Crone and her family for this tremendous honor and commend her for accepting this tremendous responsibility that she has demonstrated her willingness to take on, and with that, Mr. Chairman, I thank you very much and pass it back to you.

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

Chairman HATCH. Thank you, Senator.

Mr. White, let us just finish with you, and then if Senator Cornyn has any questions, we will turn to him.

Just one. In your questionnaire you mentioned the pro bono case in which you successfully appealed the decision of a self-funded health plan administrator in denying benefits for a life saving surgical procedure to a plan participant. Tell us about that case and your view on the importance of pro bono work.

Mr. WHITE. Thank you, Mr. Chairman. I think those are all very important issues because they do involve both pro bono and the health care system as we have in our country now.

A substantial part of my practice is in ERISA benefits litigation, and that's afforded me the opportunity to appear in Federal Court on those issues quite frequently, and it's also a rather, some would say obtuse area of the law, and I've enjoyed learning that area. Because it is not widely practiced, I receive a lot of questions from other clients of my firm, from other lawyers in the community, and cold calls off the street because they've heard my name and they think maybe I can help them with a problem they're having with their health plan or their health insurance, and I'm always pleased to take those calls and meet with those people if I can because it is a very complex area.

This particular situation was a gentleman who had a aortic aneurism, and he was an employee—he was disabled so he's no longer working, but he was a former employee of a major Tulsa employer, one that my firm had done work for previously a few years before but we no longer represented. He needed surgery to repair that aneurism and he needed it quickly. At the time the introduction of stent technology, where a wire mesh tube is put into the aneurysm

and then the aneurysm cut away was brand new, brand new technology, and as most health plans do, this particular major employer's health plan had an exception, an exclusion for experimental procedures. Without this procedure this man would die.

I convinced my firm to allow me to take a case against a major Tulsa employer and former client and possibly a client in the future, to attempt to convince them through the administrative appeals process for that plan to change their mind.

We went through the administrative appeals process. I gathered evidence from his physicians, from experts across the country, and with his help, and by taking an approach, not a confrontational approach, but a reasoned and persuasive approach, we were able to convince the appellate panel of that health plan to change their minds and approve that surgery in a timely manner, and to that extent it had a very happy ending.

Chairman HATCH. Thank you.

There are a lot of questions we could ask all of you, but you are all qualified, and I know that, and I think everybody else knows it too, so I am going to do everything in my power to get all of you confirmed as soon as possible. I just appreciate your willingness to serve because these are among the most important positions in our society, and they should be venerated by every person in our society because of the great work the Federal Bench does. I do not care whether you are Democrats or Republicans, we have had great people in both parties, people from all persuasions who have become great judges. We have had people from all persuasions who have been less than great judges too. But I am counting on all six of you, and of course, Mr. Bea as well, to be great judges. We look forward to seeing you work on the bench and look forward to getting you through the Senate.

With that, I am going to recess until further notice. Thank you all for your service.

[Whereupon, at 11:22 a.m., the Committee was recessed until call of the Chair.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Carlos Bea
#514, 400 McAllister Street
San Francisco, California
94102, USA
415-551-3788

September 10, 2003

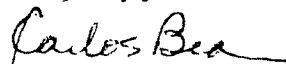
The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C.

Dear Chairman Hatch,

Attached are responses to written questions submitted by Senator Patrick J. Leahy to me on September 9, 2003.

Thank you again for your courtesies toward me and my family last Wednesday at the hearing.

Very truly yours,


Carlos Bea

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary

**Responses of Judge Carlos Bea to the Written Questions of
Senator Patrick Leahy**

1. At your recent Committee hearing it was noted that you were nominated to the district court by former President George Bush at the very end of 1991. At that point in your career you had only been a judge for about a year and there was some local opposition to your nomination from individuals and organizations. For example, the Bar Association of San Francisco rated you "Not Qualified" for the district court in 1991 and the ABA gave you a partial "not qualified" rating the same year.

Now, you appear before the Senate as the current President Bush's nominee to the Ninth Circuit Court of Appeals. In the time that has transpired since your district court nomination, you have served on the Superior Court for thirteen years and have earned significant bipartisan support from local leaders such as Senator Feinstein and Mayor Willie Brown and organizations such as MALDEF and La Raza.

I am heartened by the support that your current nomination has garnered but am nonetheless troubled by attorney surveys published in two local newspapers that reflect an impression in the San Francisco legal community that you have a big-business bias in civil cases and have poor judicial temperament. I am also concerned that in two different peer review ratings, some members of the ABA Standing Committee have concluded that you are "not qualified" for the federal bench.

- a. Do you have any insight on why you have received such negative attorney reviews and 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 political or philosophical goals?

Response:

Unfortunately, I am not aware of the basis for the comments in the attorney reviews, as they are done anonymously. The newspaper did not provide me with any circumstances or particular cases, therefore, it is difficult to respond. Likewise, the ABA does not provide background information on its ratings. However, I was honored to have received a rating of "Qualified" from a substantial majority of the standing committee.

I can assure you that fairness and impartiality are extremely important to me as a judge. I believe that the cases I outlined in my Senate Questionnaire, Question 16, are representative of my rulings as a trial court judge. Of the 10 examples I cited, on 6 occasions I ruled in favor of the plaintiffs and against large corporations, such as Avis-Rent-A-Car, Empire Insurance, Abex Corporation (an asbestos defendant), and Aetna Insurance Company. In each of these cases, I ruled on the merits of the case and clearly stated the grounds for my rulings, which I would continue to do on the federal bench if I am fortunate enough to be confirmed.

- b. As you are no doubt aware, many people's only interaction with the Federal government is in our nation's courtrooms. Accordingly, it is very important that federal officials treat all people with patience and dignity. When Strom Thurmond was Chair of this Committee he would ask judicial nominees if they would promise to be courteous if confirmed as a judge. He said that the more power a person has, the more courteous a person should be. Please describe your thoughts on the importance of treating all persons who appear before you with courtesy and how you intend to instill public confidence in our federal government and our federal justice system.

Response:

No more important an attribute exists for a judge than an appropriate temperament. I have always believed that a proper, respectful temperament is essential for a judge. This is true for at least two reasons. First, for the litigants, their lawsuit is often a central point in their lives. It is important not only that justice be done, but that both parties perceive that they are being treated fairly. Second, it is essential that a judge treat the attorneys with respect, in order for them faithfully and energetically to represent their clients.

This subject is very important to me. Since 1997, I have been a member of the California Judicial Council's Advisory Committee on Access and Fairness in the Courts. I have worked with other Committee members on programs to educate trial judges on issues such as diversity, disabilities, and language in order to assure that all litigants feel comfortable in the courtroom. Our programs emphasize that it is important to treat all people with dignity and respect.

In the San Francisco state court system, we have two entities that have oversight authority with respect to claims regarding judicial temperament. On the city and county level, there is a Judicial Fairness Committee made up of three judges and two members of the San Francisco Bar Association. At the state level, there is the Commission on Judicial Performance. Neither of these entities has received a complaint, nor held a proceeding, regarding my judicial temperament. If fortunate enough to be confirmed, I can assure the Committee that I would continue to treat all litigants and attorneys with respect.

2. Judge Bea, I notice that you were a member of the Olympic Club in San Francisco for 30 years when membership was available only to men. After you were appointed to the bench, you resigned from the club and rejoined once women were allowed to become members. Please share with the Committee any efforts you made to encourage a change in membership policies and what led you to resign from the club in 1990.

I encouraged the admission of women to the Olympic Club prior to 1990 by speaking with my fellow club members, both in private conversations and club meetings. I tried to impress upon them that the Olympic Club should admit women because the club would be a better organization with both male and female members.

The Olympic Club was moving in the direction of admitting women at the time I was appointed to the bench in 1990. However, I did not believe that it would be appropriate for me, as a judge, to be a member of an organization that did not permit women. Therefore, I resigned from the Olympic Club when I was appointed to the bench. The Olympic Club changed its membership policy in 1991 to allow women to join. My wife was one of the first women to join the Olympic Club after the policy was changed. Thereafter, I re-joined the Olympic Club.

SUBMISSIONS FOR THE RECORD

Wayne Allard**U . S . S E N A T O R • C O L O R A D O**For Release:
September 3, 2003Contact: Dick Wadhams
(202) 224-5941
John Wood
(202) 224-5946**PHIL FIGA CONFIRMATION HEARING**

Mr. ALLARD. Thank you, Mr. Chairman, for allowing me the opportunity to be here this morning and for holding this timely hearing. It is a great honor to introduce Phil Figa to the Judiciary Committee. Judge Match's departure leaves big shoes to be filled. However, by the end of this hearing today, I am sure you will understand why I believe Phil Figa is the right person for the job. I also want to thank Senator Campbell, my colleague and family member from Colorado, for working with me to help expeditiously fill this important vacancy.

Before I go any further, I would like to welcome Phil's wife, Candy, and his children, Ben and Lizzie, to the hearing. Candy, Ben and Lizzie, I bet you never thought you would be able to attend one of Phil's job interviews. Earlier this summer, I had the privilege of having Ben Figa serve in my office as an intern. Through this experience, I learned to admire the strong family values so apparent in every member of the Figa family. I have warned Phil that the nomination process is a grueling one, but I know his family's continued support and encouragement will provide the strength and energy he needs in order to stand steadfast in pursuit of this most worthy endeavor.

Senator Campbell has mentioned the strong and outstanding academic and community credentials that Phil will bring to the bench. Indeed, his keen intellect and ideal temperament is no secret. In a letter dated June 10, 2003, Senator Campbell and I wrote to the committee, "Mr. Figa is highly qualified and will ably serve the people of the United States...he is well known throughout the Colorado legal community for his credibility, integrity, hard work and firm grasp of the law." His supporters hail from across party lines and include a variety of elected officials from all levels of local, state, and federal governments.

Phil and Candace have been married for thirty years. They met in college at Northwestern, where he received his degree in 1973, Phi Beta Kappa. Candy then put Phil through law school at Cornell, paying for his education by teaching English at a nearby New York high school. Twenty seven years ago, they moved to Boulder, Colorado, where Phil began a clerkship at Sherman and Howard. Eventually, the firm hired him as a full time attorney. While in Boulder, Candy decided to attend law school at the University of Colorado. I had to laugh when he mentioned that, between college and law school, they had 10 years of study dates together!

At Sherman and Howard, Phil worked with his mentor, Hugh Burns, a Rhodes Scholar and well-known attorney. Eventually, the two would form their own law firm, known today as Burns, Figa and Will. The Figa doesn't just stand for Phil - Candy also works at the firm. Together, they have partnered for twenty five years in the successful and prestigious practice. I have a similar experience - my wife Joan and I owned and operated the Allard Animal Hospital together for twenty years. I got a good laugh when Phil said his "work relationship" with his wife may have been aided by the fact that they were on different floors and that they had to communicate via email. Joan never had that luxury!

Mr. Chairman, when considering the nominee, please know that Mr. Figa has my unequivocal support. The confirmation of his nomination by the Senate will prove to be a great service to the people of the United States. As I have mentioned, his nomination has enjoyed broad and bipartisan support - support from judges, colleagues, and both Democrat and Republican members of Congress. Of the many gracious comments I have heard about Phil, none characterize him better than a statement made by the managing partner at his firm. "He's a very gracious fellow...a very likeable person. He's a gentlemanly character."

Phil is well grounded in family values. He enjoys the Colorado outdoors, spending his free time hiking and biking in the mountains. According to Criminal defense lawyer Gary Lozow, Figa is a "thoughtful and bright person who will make a good federal judge and is mindful of the awesomeness of taking on that responsibility." As the Rocky Mountain News noted, Phil has achieved a rare balance in his life of family, law practice and community activities. The Denver Post, in an endorsement earlier this year, noted that Figa is a good, solid choice for the bench. The Post was encouraged by the fact that Figa's background is in civil litigation, which makes up a high percentage of the cases handled by federal judges. Mr. Chairman, I ask that the editorial be entered into the record.

Phil Figa will serve our nation with the utmost of respect to our country and our constitution, and for this, I urge you to forward his nomination to the Senate with a favorable recommendation. He is, in a word, ideal, for the federal bench.

Thank you, Mr. Chairman.

**Introduction of Judge Carlos T. Bea,
Judge John Houston, and William Hayes
to the Senate Judiciary Committee**

Chairman Hatch, Senator Leahy, and other members of the Committee, thank you for allowing me to introduce Judge Carlos T. Bea, the nominee for the Ninth Circuit Court of Appeals.

In addition, I want to introduce two nominees for the Southern District Court of California, William Hayes and John Houston.

Let me begin by introducing Judge Bea.

He was born in Spain but has lived in California for most of his life.

He received both his undergraduate and law degrees from Stanford University.

Judge Bea has an impressive legal career. He practiced law in the San Francisco area for over thirty years before he was appointed a judge on the San Francisco Superior Court. He was elected to the seat in 1990 and has been reelected twice by the voters of San Francisco.

He has also taught at Stanford and Hastings law schools.

As a judge, he is widely respected for his keen intelligence. As one reporter noted "he has received high marks for his specialty, handling complex civil litigation disputes."

Another reporter who spoke with numerous lawyers wrote that he "is at his best handling monster-sized cases that pose difficult legal questions presented by sophisticated lawyers."

In addition to his accomplishments in the legal community, Judge Bea is also an Olympic athlete. He played on the Cuban national basketball team during the 1952 Olympic Games.

I want to share some of the comments that I have received from Californians in support of his nomination.

The San Francisco Labor Council states that Judge Bea "is eminently qualified."

The San Francisco La Raza Lawyers Association notes that Judge Bea appreciates the "obligation of judges to ensure that the courts serve the needs of all citizens, irrespective of their ethnic or economic backgrounds."

The Mexican American Legal Defense Fund, headquartered in Los Angeles, states that "Judge Bea has extensive legal experience and a proven record and respect for the rights of Latinos."

I am pleased to introduce Judge Bea to the Committee.

Turning to the District Court nominees from California, I want to comment on the process that brought these two accomplished individuals before you today.

In a truly bipartisan fashion, the White House Counsel, Senator Feinstein and I worked together to create judicial advisory committees for the State of California, one in each federal judicial district in the state.

Each committee has a membership of six individuals: three appointed by the White House, and three appointed jointly by Senator Feinstein and me. Each member's vote counts equally, and a majority is necessary for recommendation of a candidate.

Both Judge Houston and Mr. Hayes were reviewed by the Southern District Committee and strongly recommended for these positions.

Judge Houston had extensive experience as a federal prosecutor before his appointment as a magistrate judge.

Mr. Hayes had extensive civil experience as a private attorney before becoming a federal prosecutor, rising to the position of head of the criminal division in the U.S. Attorney's office.

I continue to support this excellent bipartisan process and the high quality nominees it has produced, including the two before you today.

Again, Mr. Chairman, I am pleased to introduce Judge Bea, Judge Houston, and Mr. Hayes to the Committee and look forward to hearing more from all of these nominees.

OFFICE OF THE MAYOR
SAN FRANCISCO



WILLIE LEWIS BROWN, JR.

April 29, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Hatch:

The President has recently nominated Judge Carlos Bea of our San Francisco Superior Court to the Ninth Circuit Court of Appeals.

It is a pleasure for me enthusiastically to endorse the President's nomination and strongly support the confirmation by the U.S. Senate of Judge Bea.

I had the opportunity to work with Judge Bea before his appointment to the Bench in 1990 as associate counsel in a number of cases. I witnessed at first hand his ability and intelligence as well as his dedication to the vindication of individual rights.

Since his appointment to the Bench, Judge Bea's abilities have been recognized by the people of San Francisco. He won a contested election in 1990 by a margin of 59-41%, and was unopposed in the following two elections. He has handled tough and complex cases in the field of insurance coverage for environmental pollution; he presided over the first MTBE pollution case tried in this country. Lawyers have been unanimous in praising his handling of these novel and challenging issues.

I would like to add my voice to those requesting an early hearing and confirmation of this outstanding judge.

Very truly yours,

A handwritten signature in cursive script that reads "Willie L. Brown, Jr.".

Willie L. Brown, Jr.
Mayor

CB/EJ/rw

Cc: Honorable Patrick J. Leahy
Office of Legal Policy

TESTIMONY OF U.S. SENATOR JOHN CORNYN

**BEFORE THE UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY**

**Nomination of Marcia A. Crone to be
U.S. District Judge for the Eastern District of Texas**

Wednesday, September 3, 2003, 10:00 a.m.
Dirksen Senate Office Building Room 226

Thank you for calling this hearing, Mr. Chairman, and for providing me with the opportunity to introduce Judge Marcia A. Crone, nominated to be United States District Judge for the Eastern District of Texas.

Judge Crone is an outstanding nominee with a fine legal mind and fair judicial disposition. If confirmed, she would be a welcome addition to the Eastern District of Texas.

Judge Crone has served as a U.S. Magistrate Judge in the Southern District of Texas since 1992. Throughout her tenure on the federal bench, she has authored approximately 700 opinions, over 130 of which are published.

Judge Crone is an active member of several legal organizations in the Houston area. She has served as President, National Delegate, and Member of the Board of Directors of the South Texas Chapter of the Federal Bar Association. She has also been an active member of the Houston Bar Association, the American Inns of Court, the Federal Magistrate Judges Association, and both the Houston and Texas Bar Foundations.

Prior to her service as a U.S. magistrate judge, she practiced law for fourteen years.

Judge Crone is a native Texan. Born in Dallas, she received her undergraduate degree from the University of Texas and her law degree from the University of Houston. A mother of two, Judge Crone is also an active member of her community. She is a member of Chapelwood United Methodist Church, the Houston World Affairs Council, and the P.T.A. at Second Baptist School, and a former member of the Board of Directors of the National Multiple Sclerosis Society.

In short, Judge Crone is an outstanding nominee with solid credentials and a reputation for fairness and impartiality. I support her nomination and hope the committee will give her every consideration.

What to Drink in Denver



*Please include in the cmte record per. Sen. Campbell's request.
Thank. 4-0509
James*

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DENVERPOST.com

Friday, August 22, 2003
Denver, CO

- NEWS
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EMAIL ARTICLE LINK TO ARTICLE PRINT ARTICLE
Article Published: Friday, June 13, 2003 - 12:00:00 AM MST

editorial **A win-win judicial pick**

Phillip Figa, the civil litigator that President Bush nominated this week to replace retiring U.S. District Judge Richard Matsch, seems to be a good, solid choice for the upcoming judicial vacancy.

His name was chosen from a list of five possible candidates submitted to the White House by Sens. Ben Nighthorse Campbell and Wayne Allard, both Colorado Republicans.

Several Bush nominations have been mothballed in the Senate, but Figa's selection isn't likely to be held up by controversy because he's a well-respected lawyer with a moderate reputation.

"In the legal community, he's very well thought of," said Mike Feeley, a lawyer and former Democratic state senator from Lakewood. "He's a good guy."

Also, Figa has lots of federal court experience and is likely to "hit the ground running," according to Miles Cortez, a former president of the Colorado Bar Association. Figa himself served as president of the state Bar Association in 1995 and 1996.

Figa, 51, is described as a highly competent and very smart lawyer by several observers. He's also known for being fair and thoughtful - two qualities that are very desirable in a federal judge.

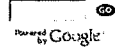
We also like the fact that Figa's background is in civil litigation, which makes up a high percentage of the cases handled by federal judges. (Four of the eight full-time federal district judges in Colorado - including Matsch - have served as prosecutors in their careers, so another civil lawyer would give the local federal bench more balance.)

Also, because Figa served as chairman of the board of the Anti-Defamation League's Mountain States Region, it's likely he'd bring due regard for civil

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liberties to the job.

In recent years, judicial appointments have become political footballs, to the detriment of the public, which often must wait years to get justice in overloaded federal courts.

President Bush's district court nominations have usually won Senate confirmation, but the same can't be said of the appellate bench. Liberals, resurrecting an old tactic that segregationist Southerners used in the bad old days to block civil rights legislation, have used filibusters in the Senate to prevent confirmation of two Bush nominees that the Democrats consider too conservative.

Although Democrats shouldn't usurp the president's prerogatives in making judicial appointments, there might be less opposition if Bush picked conservatives who aren't extreme right wingers.

From all we've heard, that's not an issue with Figa. We urge the Senate to promptly confirm him and help ease the caseload of Colorado's federal district judges.

Editorials alone express The Denver Post's opinion.

The members of The Post editorial board are William Dean Singleton, chairman and publisher; Bob Ewegen, deputy editorial page editor; Todd Engdahl, assistant editorial page editor; Peter G. Chronis, Angela Cortez, Dan Haley and Penelope Purdy, editorial writers; Mike Keefe, cartoonist; Barbara Ellis, news editors; and Fred Brown and Barrie Hartman, associate members.

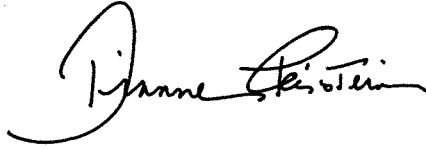
funny

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- National parks not for profit
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Senator Dianne Feinstein
9/3/03

**Judicial Nominations Hearing
Statement for the Record
for Southern District Nominees William Hayes
and John Houston**

Mr. Chairman, I am pleased to have the opportunity today to introduce two nominees for the Southern District of California – William Hayes and Magistrate John Houston.

Last year, the Committee authorized five new judgeships for the Southern District. With today's nomination of Judge Houston and William Hayes, these desperately needed judgeships are moving closer to being filled.

As the Committee is well-aware, nowhere are judges needed more than in the Southern District of California. It is the most-overworked, understaffed court in the country.

The Southern District of California has a weighted caseload average of approximately 1000 cases per judge. This is the highest in the country and more than twice the national average.

Given the incredible need for judgeships on the Southern District, it is my hope that the Committee can quickly expedite these nominations as well as the nominations of Dana Sabraw and Larry Burns who had hearings on July 30th.

I am extremely pleased with the selection of Judge Houston and William Hayes for the Federal bench.

Both nominees competed in a field of more than 50 candidates for their respective spots. Their extraordinary qualifications are reflected in the unanimous 6-0 vote each nominee received from the California Judicial Selection Committee.

William Hayes:

William Hayes is currently chief of the Criminal Division of the U.S. Attorney's Office in San Diego.

His prosecutorial career has focused on Racketeer Influenced Corrupt Organization (RICO) fraud, but he also has tried a variety of criminal cases involving child abuse, bank robbery, and smuggling offenses. He has handled a number of high profile cases, including the prosecution of a group called the "Alliance" which involved certain lawyers defrauding insurance companies of \$50 million.

When the bipartisan Judicial Selection Committee evaluated candidates this Winter and Spring, Mr. Hayes emerged as the top candidate out of the San Diego U.S. Attorney's Office.

Born in Bronxville, New York, Mr. Hayes obtained an undergraduate degree, a law degree, and a business

degree from Syracuse University. As an undergraduate at Syracuse, Mr. Hayes earned the Phi Kappa Alpha award, which is given to only eight members of the graduating class.

For his first three years out of law school, he practiced as a civil litigator in Denver, Colorado.

In 1987, Mr. Hayes joined the San Diego United States Attorney's office, where he has been ever since. Since 1999, Mr. Hayes has served as chief of the criminal division, where he supervises approximately 100 lawyers.

He has received a number of awards for his service in the U.S. Attorneys office including a Director's Award in 1999 and a USA Special Act award in 1990, 1991, and 1995-2002.

Mr. Hayes also has experience as an adjunct faculty member, teaching law and business courses at four different academic institutions including seven years as

adjunct faculty member of the Thomas Jefferson School of Law.

Magistrate John Allen Houston

I am equally pleased to introduce Magistrate John Allen Houston. Judge Houston has served as a Magistrate Judge for the Southern District of California for the past five years.

He earned his law degree from the University of Miami School of Law in 1977, after earning his undergraduate degree from North Carolina A&T in 1974.

After law school, Judge Houston served in the Army Judge Advocate General's office for three years. He then moved over to the San Diego U.S. Attorney's office, where he stayed for 17 years until his appointment as a magistrate in 1998.

Judge Houston had a varied and successful career in the U.S. Attorney's office. During his 17 year tenure in the office, he worked in the criminal division and asset forfeiture division. In 1994, he was designated Senior Counsel for Asset Forfeiture. Two years later he was designated the U.S. Attorney's Office Senior Financial Litigation Counsel.

He received a number of awards for his service as a U.S. Attorney including awards for Outstanding Service from the FBI, IRS, and U.S. Customs Service. He also received a Director's Award for Superior Performance from then Attorney General Janet Reno, in 1996.

During his five years as a magistrate judge in San Diego, Judge Houston has earned the wide respect of the San Diego legal Community. The La Raza Lawyers Association, for example, has endorsed his nomination and praised him for ***"his keen intellect and strong work ethic"*** as well as his ***"reputation for treating all parties***

in his court with fairness and courtesy.”

I would also note Magistrate Houston's impressive record of public service. He is a member and founder of the Legal Ministry at his church, Bethel AME Church. He is a former President of the Alpha Pi Boule and the Alpha Phi Alpha Fraternities. He helped found the Continued Academic Excellence Program at Morse and Lincoln Preparatory High Schools and has actively participated in mentoring programs at a number of area schools.

Judge Houston is a Lieutenant Colonel in the Army Reserve and is under consideration for promotion to the rank of Colonel.

I would conclude by expressing my strong support for both Judge Houston and William Hayes. These are two exemplary nominees who will make fine Federal judges. I strongly urge the Members of this Committee to support their nominations.

G. MICHAEL GERMAN
1839 15TH Street - Apt. 451
San Francisco, CA 94103-2280
415-552-3645

May 15, 2003

Honorable Orrin G. Hatch
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Ninth Circuit Nomination of Carlos Bea

Dear Senator Hatch:

I write to strongly recommend your support of the nomination of Judge Carlos Bea for appointment to the Ninth Circuit Court of Appeals. I have known Judge Bea for over a decade, both personally and professionally, and am certain that he would be a valuable addition to the Ninth Circuit bench.

By way of background, I have been an active member of the California Bar since 1982. I am currently a Deputy Attorney General in Bill Lockyer's Department of Justice and was in private practice before then. My work as a litigator has me in court often and I have observed Judge Bea preside over matters, allowing me to compare him with other judges before whom I have appeared. I am also active politically as the General Counsel of Log Cabin Republicans of California and am the former president of Log Cabin's San Francisco Chapter.

In addition to his well-known skills as a master of evidence law and courtroom management, Judge Bea has that unique combination of composure, astuteness and sensitivity which every judge should emulate. Early on he demonstrated this in his dealings with Log Cabin, a group from which some in the Republican Party have stood apart. Not so with Judge Bea; he was and remains an early and consistent supporter of our efforts to gain equality for gays and lesbians within the framework of Republican politics. He is no fair-weather friend in this regard, but has stood by us for even longer than I have known him. Because he knew many of Log Cabin's leaders from the time of our founding in San Francisco in 1977, he was able to appreciate the void they left when many of them succumbed to AIDS. This has not been lost on him and he continues to display knowledge and understanding of what it means when whole communities lose their leaders. In short, his learning is supplemented by his experience and his position is not compromised by bias.

Judge Bea would be an excellent appointment to the Ninth Circuit Court of Appeals and I respectfully request that you give him your strongest support in that regard.

Sincerely,


G. Michael German

cc: DOJ Office of Legal Policy

803

Judge Ernest H. Goldsmith

May 15, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C.

Re: Hon. Carlos T. Bea, Nominee
9th Circuit Court of Appeal

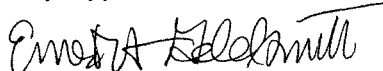
Dear Mr. Chairman,

Enclosed with this letter is an endorsement letter signed by thirty six of our judges strongly recommending that the Senate confirm our colleague, Judge Carlos T. Bea, to be a Judge of the U.S. Court of Appeal for the Ninth Circuit. Another five of our colleagues, Judges Tang, Lam, Jackson, Haines and Mahoney, have written to you directly.

Judge Bea has served on the Superior Court of California for San Francisco since 1990, handling both civil and criminal matters.

We urge you and the Committee to give Judge Bea an early hearing so that his nomination can be promptly sent to the Senate for confirmation.

Very truly yours,



Ernest H. Goldsmith
Judge of the Superior Court of California, in and for the
City and County of San Francisco

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

400 McAllister St., San Francisco, CA 94102

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

April 28, 2003

Dear Mr. Chairman,

We, the undersigned Judges of the Superior Court of the State of California, in and for the City and County of San Francisco, write to enthusiastically support the nomination of our colleague Carlos Bea to be a Judge of United States Court of Appeals for the Ninth Circuit.

Judge Bea was appointed to our Bench in 1990. Shortly thereafter he was retained in a city-wide contested election which he won with a 58-42% margin.

Judge Bea has served both in the Civil and Criminal trials, together with occasional assignments in the Law & Motion and Appellate Department. He has also served on many of our committees, including the Executive, Budget and Courthouse Construction committees. Before he took the Bench, Judge Bea was considered by the legal community to be one of the finest civil trial lawyers in San Francisco.

Judge Bea has distinguished himself in presiding over groundbreaking complex litigation in the insurance coverage and environmental areas, as well as handling many asbestos trials.

Throughout his years on our Bench Judge Bea has always been available to us to share his great trial experience and thorough knowledge of the law.

We thoroughly commend the President's nomination of Judge Bea and request that your committee provide for an early confirmation hearing so that Judge Bea can be promptly confirmed by the Senate.

CC: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C.

(signature lines).

Cheri L. Jackson _____
North _____
Julie Tang _____
Chad Hance _____

CC: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C.

Ellen Chaitin

Ernest A. Goldsmith

John Dearman

Wallace P. Douglas

The names of Judges who signed as above

ELLEN CHAITIN

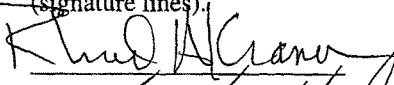

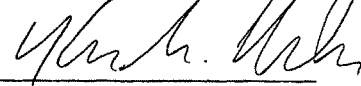

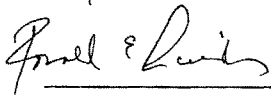
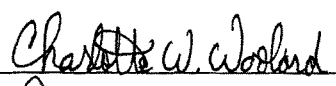
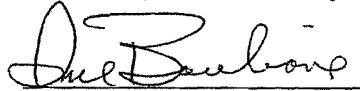
JOHN DEARMAN

ERNEST GOLDSMITH

WALLACE DOUGLASS

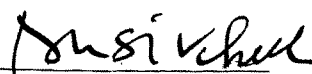
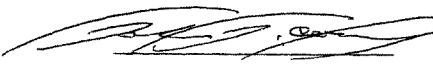
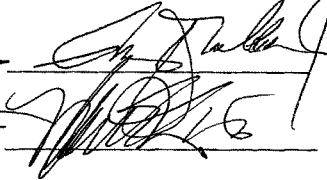
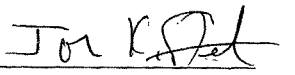
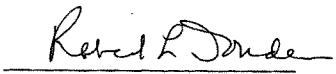

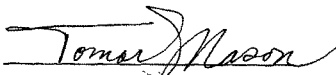

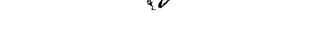

CC: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C.

(signature lines)

The names of the Judges who signed as above
RICHARD KRAMER
KEVIN MCCARTHY
RONALD QUIDACHAY
CHARLOTTE WOOLARD
ANNE BOULIANE
ALEX SALDAMANDO
DIANE WICK

CC: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C.

The names of the Judges who signed as above

DONALD MITCHELL

JOHN CONWAY

JOHN STEWART

ROBERT DONDERO

TOMAR MASON

THOMAS MELLON, JR.

DIANE WICK

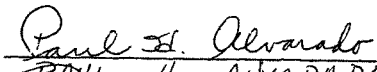
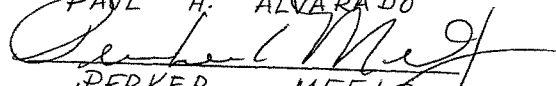
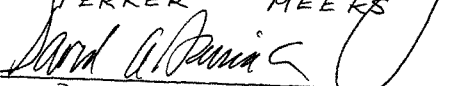
DAVID BALLATI

JAMES MCBRIDE

JAMES ROBERTSON 11

CC: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C.

(signature lines).


PAUL H. ALVARADO

PERKER MEEKS

DAVID GARCIA

The names of the Judges who signed as above

PAUL ALVARADO

PERKER MEEKS

DAVID GARCIA

CC: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C.

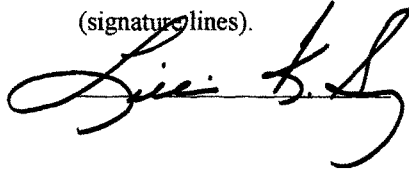
(signature lines).

John E. Munter _____

The names of the Judges who signed as above
JOHN MUNTER

CC: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C.

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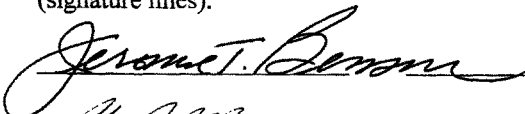
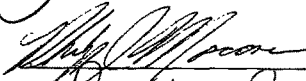
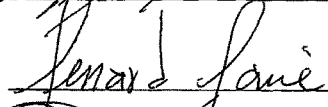
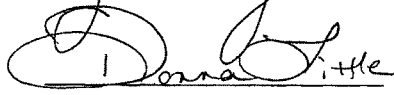

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The names of Judges who signed as above

LILLIAN SING

CC: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C.

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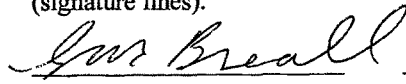

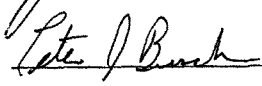
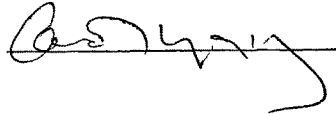






The names of Judges who signed as above

JEROME BENSON
PHILIP MOSCONE
LENARD LOUIE
DONNA LITTLE
JAMES WARREN

CC: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C.

(signature lines).

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The names of Judges who signed as above

SUSAN BREALL

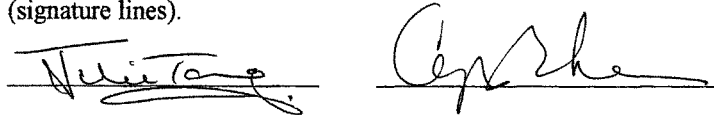
GAIL DEKREON

PETER BUSCH

CAROL YAGGY

CC: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C.

(signature lines).

The image shows two handwritten signatures on horizontal lines. The signature on the left is 'Julie Tang' and the signature on the right is 'Cynthia Lee'. Both are written in black ink.

The names of Judges who signed as above

JULIE TANG; CYNTHIA LEE

815

Member, Board of Supervisors
District 7



City and County of San Francisco

TONY HALL

April 24, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Hatch:

I write to you today to urge you to confirm the nomination of Judge Carlos T. Bea to the Ninth Circuit Court of Appeals. Prior to my tenure on the San Francisco Board of Supervisors, I had the honor and privilege of working with Judge Bea at the San Francisco Superior Court as Executive Assistant to the Presiding Judge. I observed Judge Bea for approximately fifteen years. He consistently proved himself as an impartial and fair jurist. His knowledge of the law was, and remains, unquestioned. Professionally, I highly recommend Judge Bea. On a personal note, let me also say that Judge Bea is a man of great integrity and honor. Without question, Judge Bea will be a valued addition to the Ninth Circuit Court of Appeals.

If you have any questions about Judge Bea, please do not hesitate to contact me at (415) 554-6516.

Sincerely,

A handwritten signature in cursive script that reads "Tony Hall".

Tony Hall
Supervisor, 7th District

CC: Honorable Patrick Leahy
Ranking Member, Committee on the Judiciary
Office of Legal Policy



SIGN DISPLAY

& ALLIED CRAFTS LOCAL UNION NO. 510

Michael E. Hardeman
Business Representative

Robert L. Owen
Business Representative

Leo Michael Pointer
Business Representative

April 29, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Hatch:

My dear friend, Judge Carlos Bea, is being considered for a judgeship in the 9th Circuit Court of Appeals.

He has great credentials as a San Francisco Superior Court judge (with support from many Labor friends including myself) since his election in 1990.

The San Francisco Labor Council, following our Executive Committee (of which I am a member) recommendation, has unanimously endorsed him.

Senator Hatch, I'm sure Judge Bea will serve our country and judicial system with intelligence and integrity, but he needs your support for confirmation.

Sincerely,

Michael E. Hardeman
Business Representative

MEH/eb-opeiu-3-af1-cio(147)

cc: The Honorable Patrick J. Leahy
Office of Legal Policy



News Release
JUDICIARY COMMITTEE

United States Senate • Senator Orrin Hatch, Chairman

September 3, 2003

Contact: Margarita Tapia, 202/224-5225

**Statement of Senator Orrin G. Hatch, Chairman
Before the United States Senate Committee on the Judiciary
Hearing on the Nomination of**

**CARLOS T. BEA
TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT**

Today the Committee has the privilege of considering the nominations of seven outstanding lawyers to be federal judges. I commend President Bush for nominating each of them, and I look forward to hearing their testimony.

The first nominee from whom we will hear is Judge Carlos Bea, our nominee for the Ninth Circuit Court of Appeals. He has had an exemplary legal career in California as a successful attorney and an impartial jurist. Following his graduation from Stanford University Law School in 1958, Judge Bea began his legal career as an associate at the San Francisco law firm of Dunne, Phelps & Mills. Beginning in 1975 and continuing until his appointment to the San Francisco Superior Court in 1990, he was president and principal of his own law practice in San Francisco. Judge Bea also served on the Board of Directors of Hastings College of Advocacy from 1974 to 1980, and was on the teaching staffs of Hastings College of the Law from 1980 to 1989, and Stanford University Law School from 1982 to 1985. While in private practice, Judge Bea appeared in court on a regular basis and was lead counsel in approximately 125 jury trials.

In 1990, Judge Bea was appointed and subsequently elected to his current position as a judge on the San Francisco Superior Court. He was re-elected—without opposition—to the Superior Court bench in 1996 and 2002. In this capacity, he has handled literally thousands of cases and hundreds of trials. He has also served on the Judicial Council's Advisory Committee on Access and Fairness, which addresses courthouse access for the disabled and gender, race and sexual orientation fairness in the courtroom. President George H.W. Bush nominated Judge Bea for a federal district judgeship in 1991; however, no hearing was held

on his nomination during the 102nd Congress. His long wait for a fair and well-deserved hearing before the Senate Judiciary Committee ends today.

As with other nominees to the Ninth Circuit that this Committee has considered this year, Judge Bea's colleagues overwhelmingly support his confirmation to the federal appellate bench. Thirty-seven judges of the San Francisco Superior Court, who serve with Judge Bea and work with him every day, sent a letter to the Committee praising his skills as a jurist. They wrote, "Judge Bea has distinguished himself in presiding over ground-breaking complex litigation in the insurance coverage and environmental areas, as well as handling many asbestos trials." The letter also recognizes his service on many of the Superior Court's management committees, and the fact that before becoming one of their colleagues, "Judge Bea was considered by the legal community to be one of the finest civil trial lawyers in San Francisco." I would ask that a copy of this letter be placed in the record.

Judge Bea has a deep commitment to public and community service. He has reached out to Hispanic communities in the San Francisco area, and to various institutions in Central and Latin America, sharing his knowledge of the U.S. legal system, participating in moot court competitions, counseling small Latino businesses, and litigating *pro bono* on behalf of indigents and immigrants. Not surprisingly, Judge Bea has received three prestigious *pro bono* awards: The State Bar Governor's Award from the California State Bar in 1989, and, in 1980 and 1993, the Knight's Cross Order of *Isabela la Catolica* and the Knight's Emblem, Civil Order of Merit, respectively, from the King of Spain in connection with his representation of Spanish and Spanish Basque immigrants. Also, in 2002, Judge Bea received the Distinguished Judge Award from La Raza Lawyers of San Francisco.

In addition to his Superior Court colleagues, California Supreme Court Justice Carlos Moreno, San Francisco Mayor Willie Brown, and representatives of the San Francisco Bay Area's Hispanic community have all written to this Committee expressing enthusiastic support for Judge Bea's confirmation to the Ninth Circuit. I hope my colleagues will join me in supporting him as well, and I look forward to hearing his testimony this morning.

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News Release
JUDICIARY COMMITTEE

United States Senate • Senator Orrin Hatch, Chairman

September 3, 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**

**Marcia Crone to be U.S. District Judge, Eastern District of Texas;
Philip S. Figa to be U.S. District Judge, District of Colorado;
William Q. Hayes to be U.S. District Judge, Southern District of California;
John A. Houston to be U.S. District Judge, Southern District of California;
Robert Clive Jones to be U.S. District Judge, District of Nevada; and
Ronald A. White to be U.S. District Judge, Eastern District of Oklahoma**

I am pleased now to turn to the district court nominees on today's agenda.

Our first nominee, **Marcia Crone**, is a graduate of the University of Houston Law Center. She worked as an associate and later as a partner at the prestigious law firm of Andrews and Kurth before being appointed as a federal magistrate judge in 1992. I have no doubt that her elevation to the district court will greatly benefit the Eastern District of Texas.

Phillip Figa, our nominee for the District of Colorado, has been actively involved in the Colorado legal community since the beginning of his legal career. A graduate of Cornell Law School, Mr. Figa has been a partner at a Colorado litigation firm for the past 20 years. He currently serves on the Board of Directors of the Anti-Defamation League for his region and has assumed various leadership roles in the American Bar Association and the Colorado Bar Association. I look forward to confirming this very accomplished and community-oriented practitioner to the federal bench.

Robert Clive Jones is our nominee for the District of Nevada. Judge Jones graduated from UCLA School of Law in the top 10 percent of his class, a member of the Order of the Coif, and having served as an associate editor of the UCLA Law Review. He clerked for Ninth Circuit Judge J. Clifford Wallace before

entering private practice. In 1983, he was appointed to the U.S. Bankruptcy Court for the District of Nevada, where he currently serves. Nevada is fortunate to have such an outstanding individual to serve on its federal district court.

William Hayes has been nominated to the Southern District of California. Mr. Hayes received his B.S., J.D. and M.B.A. degrees from Syracuse University. He began his legal career as a civil litigation associate, then in 1987 joined the United States Attorney's Office for the Southern District of California, where he currently serves as criminal division chief. Mr. Hayes is an extremely accomplished trial lawyer, and I believe his extensive civil and criminal legal experience will serve him very well when confirmed to his new position.

John Houston is our nominee for the Southern District of California. Judge Houston entered public service after law school when he joined the U.S. Army Judge Advocate General Corps. He then joined the U.S. Attorney's Office for the Southern District of California before his appointment in 1998 as a federal magistrate judge. Judge Houston has been recognized repeatedly for his outstanding legal skills over the course of his career, and I have no doubt that he will continue to serve the Southern District of California well upon his elevation to the district court bench.

Our nominee for the Eastern District of Oklahoma, **Ronald White**, is a distinguished litigator. After graduating from the University of Oklahoma Law School in 1986, Mr. White joined the law firm of Hall, Estill, Hardwick, Gable, Golden & Nelson in Tulsa. His practice has focused on litigation in the areas of tort and insurance defense, medical malpractice, corporate litigation, ERISA, and telecommunications. Mr. White is a well respected legal practitioner in Oklahoma and he will make a fine addition to the federal bench there.

I want to welcome these very impressive nominees to the Committee, and I commend the President for nominating them.

###

U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693

VERMONT

**Statement of Senator Patrick Leahy
Senate Judiciary Committee
Judicial Nominations Hearing
September 3, 2003**

Today the Committee will hear from seven judicial nominees, including another nominee to a Court of Appeals. For the record, this hearing is the 16th judicial nominations hearing held so far this year. This pace stands in sharp contrast to the way President Clinton's nominees were treated by the Republican majority. Chairman Hatch never allowed the number of hearings to get that high in any comparable time period during his six years as chairman during the Clinton Administration. In most of those years, there were far fewer hearings and far fewer nominees.

For example, I recall that during the *entire* year of 1996, when the vacancy rate was higher and rising, the Committee held a mere six hearings all year, and those hearings included only five Circuit Court nominees. During 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. During the entire year of 2000, only eight judicial nominations hearings were held.

In 1999, the Committee did not have a hearing to consider a single judicial nominee until June 16th, and during the rest of 1999, it held only seven hearings to consider judicial nominees. That was the third year of President Clinton's second term. Like 1999, this year, 2003, is the third year of this President's term. By contrast, Chairman Hatch has already held 11 hearings by the time Chairman Hatch held his first hearing in 1999.

It is clear from these statistics that 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 President Bush's judicial nominees.

This morning we will consider the testimony of Judge Carlos Bea, who is nominated to the Ninth Circuit Court of Appeals. I sincerely hope that no one claims that Judge Bea has been awaiting confirmation for 13 years. In fact, Judge Bea was nominated by former President Bush to the *district court* at the very end of 1991 -- just a year after he was appointed to the Superior Court bench in San Francisco. At that time his nomination was strongly opposed by several local organizations including the Bar Association of San Francisco and certain individuals. In contrast to that earlier nomination, Judge Bea now has 13 years of judicial experience and the support of local leaders such as Senator Feinstein and Mayor Willie Brown and organizations such as MALDEF and La Raza.

senator_leahy@leahy.senate.gov
<http://leahy.senate.gov/>

I am troubled by the fact that at least some of the members of the ABA standing committee remain of the opinion that Judge Bea is “not qualified” for a position on the federal bench. After reviewing this nomination for over three months, the ABA peer review report included a partial “not qualified” rating. This rating is but one of almost two dozen “not qualified” or partial “not qualified” ratings for this President’s nominees already. Unfortunately, the ABA does not share with us the basis for its concern, so we are not in a good position to evaluate it or whether we concur. I hope that today’s hearing will shed some light on his suitability for this lifetime appointment to a very important circuit court and I look forward to receiving his testimony.

Today we will also hear from two nominees to newly-created seats in the Southern District of California. Mr. William Hayes and Magistrate Judge John Houston were both recommended by the bipartisan selection commission established by Senators Feinstein and Boxer. The senators from California have worked hard to maintain this local mechanism that recommends consensus nominees for the district courts in their state and we welcome these two nominees.

We also welcome Judge Robert Jones, nominated to the District Court of Nevada who also enjoys the bipartisan support of both of his home state senators. We will also hear today from Magistrate Judge Marcia Crone, nominated to the U.S. District Court for the Eastern District of Texas. Magistrate Judge Crone has served as a U.S. Magistrate Judge for the Southern District of Texas for 11 years and has the support of both of her home-state Senators. Finally, we will hear from Mr. Phillip Figa, nominated to the District Court of Colorado and Mr. Ronald White, nominated to the U.S. District Court for the Eastern District of Oklahoma.

Notably, all of these nominees have the support of their home state senators. As I have repeatedly remarked throughout the last three years, the Senate is able to move expeditiously when we have consensus nominees. I look forward to receiving testimony from the seven nominees on today’s hearing and hope that we can continue to act in a bipartisan manner in considering these lifetime appointments to our federal courts.

#####

Superior Court of California
County of San Francisco



PATRICK J. MAHONEY
JUDGE

May 12, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

My colleagues recently wrote to you expressing support for the nomination of Carlos Bea to the Ninth Circuit. At the time the letter was circulated, I was unavailable. I write to join in the expression of support for Judge Bea and whole-heartedly agree with the comments of my colleagues.

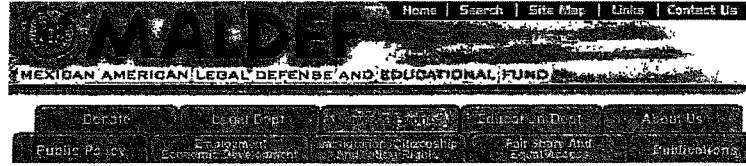
Before joining the bench, I was a litigator in the San Francisco Bay Area, first with a major firm and then as Chief Trial Deputy for the City and County of San Francisco. It was my privilege to practice in federal and state courts throughout this country and to observe countless lawyers and judicial officers. On all counts, Carlos Bea is truly outstanding and justly deserves this appointment. I urge the Senate to promptly confirm this appointment.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Patrick J. Mahoney".

Patrick J. Mahoney

CC: The Honorable Patrick J. Leahy



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MALDEF SUPPORTS THE NOMINATION OF JUDGE CARLOS BEA TO THE NINTH CIRCUIT COURT

July 11, 2003

Authored By: Mane Watteau

(WASHINGTON, D.C.) MALDEF, the nation's premier Latino civil rights organization, supports the nomination of Judge Carlos Bea after a review of his career highlights and believes he is well-qualified to serve on the Ninth Circuit Court of Appeals, which covers California, Arizona, Nevada, Oregon and Washington, among other states, and hears a variety of cases on issues affecting Latinos.

"Judge Bea has extensive legal experience and a proven record and respect for the rights of Latinos, and MALDEF believes that he will be an asset to the court," said Marisa Demeo, Regional Counsel for MALDEF.

In the 1990's as a San Francisco Superior Court Judge, Judge Bea delivered a precedent-setting injunction against Avis Rent-a-Car at the San Francisco International Airport, requiring the company to stop engaging in the persistent use of derogatory racial and ethnic epithets directed at 17 Latino employees. He also oversaw an environmental case that resulted in major oil companies paying a multi-million dollar price tag for the cleanup of local drinking water wells that improved the health of Latinos dependent on the water source.

A national non-profit organization, MALDEF promotes and protects the rights of Latinos through advocacy, community education and outreach, leadership development, higher education scholarships and when necessary, through the legal system.

#

For more information contact:
 Mane Watteau: (202) 293-2828, ext. 16
 J.C. Flores: (213) 629-2512, ext. 124

825



CAROLE MIGDEN
CHAIRWOMAN
STATE BOARD OF EQUALIZATION

April 24, 2003

Senator Orin Hatch
United States Senate
104 Hart Office Building
Washington, DC 20510

Dear Senator Hatch:

I am writing you to express my full support for the confirmation of San Francisco Superior Court Judge Carlos Bea's nomination to the Ninth U.S. Circuit Court of Appeals.

Judge Bea has proven to be a hard working and intelligent individual. His record on issues of civil equality, the environment, and corporate accountability are outstanding. His five decades of experience in the field of law would prove to be a valuable asset to the Ninth Circuit Court of Appeals.

Again I would like to put forward my full support of Judge Bea's nomination and hope that he be confirmed. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Carole Migden".

Carole Migden
Chairwoman, California State Board of Equalization

ALIFORNIA ST., STE. 830
SAN FRANCISCO, CA 94104
557-3000
288-8873 FAX

WEBSITE: www.boe.ca.gov/members/migden/
E-MAIL: carole.migden@boe.ca.gov



450 N STREET, M/C:
SACRAMENTO, CA 958
(916) 445-40
FAX (916) 324-201



Supreme Court of California

350 McALLISTER STREET
SAN FRANCISCO, CA 94102-4783

April 23, 2003

CARLOS R. MORENO
ASSOCIATE JUSTICE

Hon. Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Judge Carlos Bea

Dear Chairman Hatch:

I am proud to add my support for the appointment of Judge Carlos Bea to the United States Court of Appeal for the Ninth Circuit.

Judge Bea has served with distinction as a San Francisco Superior Court since 1990, following over thirty (30) years as a highly successful and highly regarded trial lawyer. He is devoted to the rule of law and its fair application to all issues and all people who come before him.

In addition to this active role in the courtroom over the last forty years, he has lectured extensively throughout the state of California and in some foreign countries on various legal issues. For several years he appeared on local Spanish television programs explaining legal issues of interest to the Hispanic community.

Please give Judge Bea your full support in the confirmation process.

Very truly yours,

A handwritten signature in cursive script, reading "Carlos R. Moreno".

CARLOS R. MORENO

CRM:pcs
cc: Hon. Patrick J. Leahy

SENATOR HARRY REID

Mr. President, I am pleased to introduce Robert Clive Jones to the U.S. District Court for the District of Nevada. I want to thank my friend, Chairman Hatch, for holding this hearing today.

As this Committee's work is vitally important to gathering a record upon which each Senator may rely in voting on judicial nominees, it pleases me greatly that Mr. Jones will be given an opportunity to discuss his excellent legal qualifications with the members of this Committee.

Mr. Jones has been an active member of the Las Vegas legal community since his graduation from UCLA's law school in 1975.

Among his many professional accomplishments, Mr. Jones was a partner in the law firm of Jones & Holt for five years prior to being chosen for the U.S. Bankruptcy Court for the District of Nevada.

Today, Mr. Jones has been a federal bankruptcy judge for over 20 years, served as chief judge of that court from 1984 to 1993, and was appointed to the only active bankruptcy appellate panel in the country for thirteen years.

In addition to managing a successful legal career, Mr. Jones has a wonderful family.

He has been married to his wife, Michele, over 30 years, and they have raised four children -- three daughters and a son.

His daughters Janea and Melissa are both teachers while Kimberly, the youngest, just received her degree in nursing. His son, Justin, followed his father's footsteps and earned both law and accounting degrees.

Mr. Jones is also a proud grandfather, avid runner, and active volunteer with the Boy Scouts of America. Both he and Michele are former members of the singing group, *Bluthe Chorale*, and Michele is a talented pianist.

It is with great pleasure that I introduce Mr. Jones to the Committee, and I commend the Committee members for their very important work.



1188 FRANKLIN STREET, SUITE 203, SAN FRANCISCO, CALIFORNIA 94109 • 415/440-4809 • FAX 415/440-9297
 email: sfic@sbcglobel.net

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 Inland Waters District
CLAIRE ZVANSKI
 IFTTE 81

April 29, 2003

The Honorable Orrin G. Hatch
 Chairman, Committee on the Judiciary
 United States Senate
 224 Dirksen Senate Office Building
 Washington, DC 20510

Dear Chairman Hatch:

This communication will serve as the San Francisco Labor Council's endorsement of Judge Carlos Bea's nomination to the Circuit Court of Appeals for the Ninth District.

This recommendation is based on the actions of our Executive Committee and our Delegates meeting. During both meetings, the approval of the appointment of Judge Bea to the Ninth Circuit was unanimous. I am sure an objective review of Judge Bea's history as a judge would clearly reveal he is eminently qualified to fulfill the vacant position and he would fulfill all responsibilities inherent in the position. I have known Judge Bea for a long period of time and I send this recommendation with full and complete confidence he will be a credit to our society. Please feel to contact me if further information is needed.

Thank you for your consideration of this recommendation.

Sincerely,

 Walter L. Johnson
 Secretary-Treasurer

cc: The Honorable Patrick J. Leahy, Committee of the Judiciary
 Office of Legal Policy, Department of Justice

WTJ kmz
 opens3office



SAN FRANCISCO LA RAZA LAWYERS ASSOCIATION

P.O. Box 192241 • San Francisco, CA 94119-2241 • www.larazalawyers.org • e-mail: vive_con_ganas@hotmail.com

December 20, 2002

Senator Dianne Feinstein
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Feinstein:

On behalf of the San Francisco La Raza Lawyer's Association ("La Raza Lawyers"), we are writing to express our enthusiastic support for Judge Carlos Bea's nomination and appointment to the U.S. Court of Appeals for the Ninth Circuit.

We have conducted a personal interview and reviewed the qualifications of Judge Bea and find him to be eminently well qualified to serve on the U.S. Court of Appeals. For the past eleven years, Judge Bea has served with distinction on the Superior Court for the City of San Francisco. Prior to his appointment to the Superior Court, Judge Bea practiced law in San Francisco for thirty years. Throughout his legal career Judge Bea has distinguished himself as an insightful, committed, and conscientious lawyer. On the bench, Judge Bea has earned a reputation as an evenhanded judge committed to excellence in scholarship and the administration of justice.

La Raza Lawyers seeks to endorse candidates for appointment to the bench who are outstanding lawyers and who have also demonstrated commitment to the Latino community. In evaluating a candidate we consider, among other things, the following factors: (i) the extent to which a candidate has been supportive of and responsive to the needs and concerns of the Latino community; (ii) demonstrated commitment to the concept of equal opportunity and equal justice under the law; (iii) scholarship and communication skills; and (iv) integrity, character and common sense. Our policy requires all candidates requesting an endorsement to submit a copy of their Personal Data Questionnaire (PDQ) or resume and a writing sample to the La Raza Lawyer's Judiciary Committee (the "Committee"). Prior to interviewing the candidate, the members of the Committee review the PDQ and writing sample, and evaluate the qualifications of the candidate for appointment to the bench. Following the interview, the Committee checks references as necessary. Finally, the Committee determines whether or not the candidate meets the criteria for endorsement by the La Raza Lawyers Association and submits a recommendation to the Board of Directors of the La Raza Lawyers Association. Only after the Board meets and approves the request for endorsement is the process final.

In evaluating Judge Bea's application for endorsement the Committee was very impressed with his credentials, intellect, and temperament. His extensive experience as a civil litigator and a jurist has made him very aware of both the successes and shortcomings of our courts. We were extremely impressed with Judge Bea's commitment to administering equal justice, and with his appreciation of the obligation of judges to ensure that the courts serve the

needs of all citizens, irrespective of their ethnic or economic backgrounds.


On a personal level, Judge Bea is bilingual in Spanish with a bicultural background having grown-up in Cuba before immigrating to the United States. His continued support for and involvement with the La Raza Lawyers Association and other organizations dedicated to helping the Latino community evidence his strong commitment to promoting equal justice under the law.

We are confident that Judge Bea would be an excellent appellate court judge and we hope that you will give favorable consideration to his appointment. He has our unqualified support.

Thank you for your consideration. If we can be of further assistance, please feel free to contact Suzanne Ramos at 415/436-7102 or Susan Lew at 415/551-3983.

Sincerely,

Susan Lew
President



Suzanne G. Ramos
Chairperson, Judiciary Committee

CHRIS CUNNIE
President
GARY DELAGNES
Vice President
TOM SHAWYER
Secretary
JACK MINKEL
Treasurer



May 22, 2003

Senator Patrick Leahy
United States Senate
433 Russell Senate Office Building
United States Senate
Washington, DC 20510

Dear Senator Leahy:

I am writing to express the support of the San Francisco Police Officers' Association for the confirmation of San Francisco Superior Court Judge Carlos Bea's nomination to the Ninth Circuit Court of Appeals.

Our members, the rank and file officers of the Police Department, share a respect for Judge Bea's fair mindedness in the handling of difficult cases, and we have no doubt that he will bring credit to the Ninth Circuit Court of Appeals and to his community.

Again, we strongly endorse Judge Bea's nomination and hope that he will be confirmed.

Sincerely,

SAN FRANCISCO POLICE
OFFICERS' ASSOCIATION

Chris Cunnie, President

CC:kod



April 26, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

JOSIE MOONEY
Executive Director

MARY ANN TURLEY
Deputy Executive Director

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(916) 568 2000
Fax: (916) 568 0710

37 Hunter Square Plaza
Stockton, CA 95202
(209) 463 3283
Fax. (209) 946.1382

Dear Mr. Chariman:

It is an honor and a pleasure for me to write this letter to convey our wholehearted support for the nomination of Judge Carlos Bea of San Francisco Superior Court to the position of Federal Justice for the Ninth Circuit U.S. Court of Appeal.

I personally know Judge Bea and he has been recognized as a leading member of our local bench and has always been very supportive of Latino Community affairs.

In addition, he was once challenged in a countywide election and won convincingly, in part because of his wide acceptance by the Latino community.

In closing, I would like to add that Judge Bea possesses superior qualifications and a wonderful ability to deal with people. He will be an asset to the Ninth Circuit U.S. Court of Appeal.. We highly recommend Judge Bea as a Justice for the Ninth Circuit United States Court of Appeal.

If you wish further information, please write or phone me at (707) 765-2784.

Sincerely,

Ricardo Lopez
Chair SEIU Local 790 Latino Caucus

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

cc: Office of Legal Policy

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**NOMINATIONS OF MARGARET CATHARINE
RODGERS, OF FLORIDA, NOMINEE TO BE
DISTRICT JUDGE FOR THE NORTHERN DIS-
TRICT OF FLORIDA; ROGER W. TITUS, OF
MARYLAND, NOMINEE TO BE DISTRICT
JUDGE FOR THE DISTRICT OF MARYLAND;
AND GEORGE W. MILLER, OF VIRGINIA,
NOMINEE TO BE JUDGE FOR THE UNITED
STATES COURT OF FEDERAL CLAIMS**

WEDNESDAY, SEPTEMBER 17, 2003

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

The Committee met, pursuant to notice, at 10:03 a.m., in room SD-226, Dirksen Senate Office Building, Hon. John Cornyn, presiding.

Present: Senators Cornyn and Craig.

**OPENING STATEMENT OF HON. JOHN CORNYN, A U.S.
SENATOR FROM THE STATE OF TEXAS**

Senator CORNYN. Good morning. This hearing of the Senate Judiciary Committee will be convened, and I know we have a number of Senators who are going to make some introductions, and, of course, I will recognize Senator George Allen from Virginia. We will recognize you for your comments and introduction, Senator Allen, in just a moment.

The purpose of today's hearing is to consider the nominations of Margaret Catharine Rodgers to be United States District Judge for the Northern District of Florida; Roger W. Titus to be United States District Judge for the District of Maryland; and George W. Miller to be Judge for the United States Court of Federal Claims.

I want to thank Senator Hatch, who could not be here today, for scheduling this important hearing. I believe that considering the confirmation of judicial nominees is among the most important duties that the United States Senate has. Obviously, these are very important positions. And it is with great pleasure that I welcome the nominees this morning, and we will get a chance to hear from you and hopefully have a chance for you to introduce your family and friends who accompanied you on this wonderful occasion.

But at this time I would like to recognize my colleague, the junior Senator from Virginia, Senator George Allen, for any comments he might care to make.

Senator Allen?

PRESENTATION OF GEORGE W. MILLER, NOMINEE TO BE JUDGE FOR THE UNITED STATES COURT OF FEDERAL CLAIMS, BY HON. GEORGE ALLEN, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator ALLEN. Thank you, Mr. Chairman, and thank you for having this hearing. And I know this Committee goes through many candidates, and I know you as Chairman and as a member of this Committee have worked to make sure that we as a Senate have the advice of the Judiciary Committee and move forward on these qualified nominees. And while you may be the junior Senator from Texas, you have hit the road with strong force, and you have just been truly a tremendous asset to the Senate and to America with your knowledge, your experience, your expertise, and also your commitment for equity and fairness and consideration of judicial nominees.

Mr. Chairman, I am here this morning to speak to you and members of the Committee to support and introduce the nomination of a fellow resident of the Commonwealth of Virginia, George W. Miller, to be a judge on the United States Court of Federal Claims. His wife, Kay, and son, George III, are back towards the back there, if they would please rise.

Senator CORNYN. Why don't you stand and be recognized, if you would, please. Thank you. Thank you for coming.

Senator ALLEN. I would say, Mr. Chairman, that Mr. Miller has exceptional legal expertise that has prepared him very well for being a judge on the Court of Federal Claims. He has through his years, as you can see from his resume, served in the U.S. Navy Judge Advocate General Corps, served in the United States Naval Reserve. He served as a law clerk for Hon. Bruce Forrester on the United States Tax Court. From 1968 to 1970, Mr. Miller was in the Office of the Assistant General Counsel for Logistics for the United States Department of Defense.

Since 1970, George Miller has been with the law firm of Hogan and Hartson here in Washington, D.C., becoming a partner in 1977. Mr. Miller also served the Commonwealth of Virginia for several years as an eminent domain counsel in the Northern Virginia District for the Virginia Department of Transportation. Most importantly and relevant to your consideration of his capabilities and experiences, he has been admitted to several courts of the U.S.: the Tax Court of the United States, the U.S. Court of Federal Claims, and he is also admitted to the bar in Virginia, New York, and the District of Columbia. He has spent much time as a lawyer handling a broad range of civil litigation, takings litigation, and commercial arbitration matters. His cases have been heard in the U.S. Court of Federal Claims, the very court that he has been nominated to serve. And, in fact, I asked Mr. Miller, "What percentage of your cases are in that court?" He said, "Fifty percent or more." So that is a fairly unique Federal court, and so he has the experience of how it ought to operate and operate well.

Indeed, he is on the Advisory Council for the U.S. Court of Federal Claims as well, and I am very confident, Mr. Chairman and members of the Committee, that you will find him to be an outstanding nominee and, more importantly, an outstanding judge.

So I would ask you in the most respectful way to examine this gentleman, and when you examine George Miller's record, his exceptional record, in particular in the Court of Federal Claims, you will find, I think, Mr. Chairman, an outstanding candidate that we would want to move forward with, with all deliberate speed—to the extent there is deliberate speed in the Senate, but as quickly as possible.

I thank you for having this hearing and also for your perseverance in making sure our nominees get prompt and fair consideration. Thank you, Mr. Chairman.

Senator CORNYN. Thank you very much for your comments, Senator Allen. We are delighted to have you here today.

Senator Warner sent along some written comments, and they will, without objection, be made part of the record, as will the complete written statements of each of our Senators who are making statements here today. Thank you very much for being with us.

Senator ALLEN. Thank you, Mr. Chairman.

Senator CORNYN. At this time it is my pleasure to recognize Senator Sarbanes for purposes of any comments he would like to make relative to the nomination of Roger Titus, and then we will recognize Senator Mikulski. Thank you very much for being here.

PRESENTATION OF ROGER W. TITUS, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF MARYLAND, BY HON. PAUL SARBANES, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator SARBANES. Thank you very much, Mr. Chairman. I am very pleased to come before the Committee today, along with my colleague, Senator Mikulski, to introduce a very highly respected leader in Maryland's legal community, Roger Titus, who has been nominated to serve on Maryland's Federal district court.

Roger Titus received his undergraduate degree from Maryland's Johns Hopkins University and then his law degree from Georgetown University Law Center. While he was at law school, he worked as a claims adjuster for Allstate Insurance, and I just mention that to just sort of show he has had some real grass-roots experience if he is going to go on the Federal bench and understand the problems of ordinary litigants.

He went on to a very distinguished legal career. He was in a small firm in private practice, was a city attorney for the city of Rockville for a number of years, but then joined Venable, Baetjer and Howard, which is one of our State's absolutely leading law firms, has been with them now for a number of years and, of course, is a partner.

He has had a range of experience in private practice. I think it will serve him well on the Federal bench. He has concentrated in litigation. He has had significant experience in State and local government law, in general litigation, constitutional litigation. He has handled a wide range of complex commercial litigation matters

and, in addition, has had a very successful career in the appellate courts.

He has also—and I want to stress this—been a leader in our legal community. He has been very active in a range of bar activities, including serving as president of the Maryland State Bar Association. We have a very strong, active State Bar Association in the State of Maryland. We are very proud of it. It has a whole range of programs committed to enhancing the professionalism of the legal profession in our State. They do not give the presidency of that organization out very lightly, and Roger has served as its president and has been a member of its Board of Governors for a number of years. He has also been head of the Maryland Municipal Attorneys Association, the Trial Court Judicial Nominating Commission. There are a whole range of bar activities, all of which I think reflect his own personal commitment to elevating the standards of legal practice and legal service in this country.

He is a member both of the American College of Trial Lawyers and the American Academy of Appellate Lawyers. And I think it is fair to say that within his profession he is regarded as pre-eminent amongst his colleagues at the bar. In fact, the Montgomery County Bar Association just a few years ago gave him the Century of Service Award. They picked 15 people who had been the best attorneys and judges in the 20th century in terms of legal excellence and service to the bar and community in Montgomery County, which is his home, and he was amongst the 15 selected. I think that is quite a high honor.

He has also been involved in a number of civic activities, most importantly heading up the Board of Trustees of Suburban Hospital, and we know, of course, what is involved if you head up a major hospital board and the significance of that.

So this is a man of wide experience, breadth and depth of a very strong commitment to the best principles of the legal profession. I think he will be a stellar addition to our Federal district court. We are proud of our court in Maryland. We think it does a very good job, and I think Roger Titus brings to it the kind of qualities that we look for in a judge: excellent intellectual credentials, the breadth and experience to understand the situations confronting litigants who will come before his court, active participant in our legal community, high contribution to the legal discourse of our State, participation in Maryland's civic community, and he really is a person who commands respect and esteem in our State. His nomination by President Bush has been received with great favor throughout both the profession and the broader community in our State, and I am delighted to come today and introduce him to the Committee and to urge his favorable consideration upon you.

Thank you.

Senator CORNYN. Thank you very much, Senator Sarbanes. We appreciate your comments and your presence here today, as we do Senator Mikulski, and we are delighted to have you here. We would be happy to hear any comments you would like to make with regard to this nomination.

PRESENTATION OF ROGER W. TITUS, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF MARYLAND, BY HON. BARBARA MIKULSKI, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator MIKULSKI. Thank you very much, Mr. Chairman. I appear before the Committee today with great enthusiasm to recommend to the Committee the nomination of Roger Titus to be on the Federal district court in Maryland. Senator Sarbanes has elaborated on this in great detail, but let me just say from my perspective, when I look to moving a judge from our community and voting for them on the floor from other communities, I look for three tests: one, judicial competence, as verified by peers and the legal community itself; second, high integrity and kind of a pattern of community service, public service; and, number three, dedication to core constitutional principles and guarantees.

Judge to-be, I hope, Mr. Titus meets these tests well and beyond the norm. First of all, on judicial competence you will note from the record that he received a unanimous "well qualified" from the ABA. In our own community, he is regarded as a lawyer's lawyer, heading up the bar association, and, again, the outstanding way in which he practiced law. If we talk about Mr. Titus, one word if you had to describe him was "distinguished." He has been distinguished in every undertaking he has pursued.

When it comes to high integrity and community service, yes, he was a city attorney and has done public law. He has been on the Board of Trustees of Suburban Hospital. But one case in particular I would like to bring to your attention. As a practicing attorney, he undertook representing on a pro bono basis something called Mobile Medical Care. This is a program that provides free medical care to poor and homeless people, and they wanted to have a headquarters in Montgomery County. Well, zoom, zoom, we got into the NIMBY, the "not in my back yard."

Mr. Titus threw himself into this case with all the vigor and intellectual capacity and legal competency that he could, and as you know, zoning can be arcane. The community was enormously prickly. It took great negotiation skills. And, you know, he has been with pretty feisty law firms, but he gave it all that he had and treated them like they were a blue-ribbon or a blue-chip client. That is the kind of man that is coming before you today.

By the way, he won that case.

That just kind of tells you something about the man and something about the character. We are very proud of him. Though he was born in Washington, D.C., he is truly a son of Maryland, being raised in our own Montgomery County and attending our schools, like Johns Hopkins and, of course, Georgetown Law. His wonderful wife, Catherine, is with him, and we are so pleased that they have really been Team Maryland in many of their community services.

He was the first in his family to go to law school. In fact, he started out as an electrical engineer, and now he is one of many of a family of lawyers. Two of his children are lawyers.

Again, Senator Sarbanes has outlined really the legal career of Mr. Titus and how he had his own firm in Montgomery County, in Rockville. Then that firm merged with one of the two law firms in the United States, Venable, Baetjer and Howard. We might note to

the Committee one of its partners is Ben Civiletti, former U.S. Attorney General, and it is just one of the most prestigious law firms in our State.

So when we go through, you can just see the outstanding way that Mr. Titus has practiced law, lived in his community, and we believe that he deserves the support that the Committee should have, and we should move him expeditiously. This is an outstanding appointment. This Committee and the Senate will be proud of the job that Mr. Titus will do as a Federal district court judge.

Thank you.

Senator CORNYN. Thank you very much, Senator Mikulski and Senator Sarbanes, for your presence and participation here today.

I see Senator Nelson in his usual just-in-time fashion is here, and we would be delighted to hear from you, Senator Nelson, with regard to any comments you would like to make about the nomination of Margaret Catharine Rodgers.

PRESENTATION OF MARGARET CATHARINE RODGERS, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF FLORIDA, BY HON. BILL NELSON, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator NELSON. Mr. Chairman, thank you, and it is my delight. You know, one of the great things about the Senate is you get to meet all of these nominees, and sometimes it is three for a particular vacancy, and we have kind of worked out a deal with the White House where Bob Graham and I will interview all the nominees, and then let the White House know if we have an objection. So we get to interview quite a few, as you can imagine, with the size of Florida and all of the vacancies that occur. And I must say that as I have not only interviewed Casey Rodgers but I have had other people tell me about her, I have received more good comments about this nominee than is usually the case. And it is with a great deal of pleasure that I come here to welcome her along with you, Mr. Chairman, and her husband, James, and their children, and they are here to support her.

The judicial appointees are charged with making important decisions that greatly impact the daily lives of our citizenry, and so we want the nominees to possess a great deal of knowledge and experience, and we want that judicial temperament of being impartial and fair and compassionate. And I think that Mrs. Rodgers possesses these traits, and she passes the test with flying colors with regard to her professional experience, and she will be an excellent judge.

She is a graduate of California Western School of Law, was sixth in her class. She has been a lawyer, and most recently she has been a magistrate judge in the Northern District. And that, by the way, is another interesting fact that I have found since Senator Graham and I have interviewed so many nominees. You usually do not have to worry about the magistrate judges, that they have the—first of all, they have passed the test to be selected by the judges, and then they have that great experience.

Prior to her service on the bench, she had her own law firm. She served as general counsel for the Better Business Bureau, and she

has been a member of the United States Army. She is active in her community through a number of civic organizations, and it is her hometown of Pensacola that have spoken out so vigorously on her behalf. And based on her professional success and my observations, I believe that she will be an excellent judge, and I highly commend her to the Committee, Mr. Chairman.

Senator CORNYN. Senator Nelson, thanks for those comments and for your participation during this important confirmation hearing for Ms. Rodgers, and the insights that Senators provide about their home State nominees is immensely valuable to the Committee, and I want to say thanks again for being here.

Senator CORNYN. If I may ask the nominees, please, to come forward and be sworn, we will be glad then to proceed with any statements you might care to make.

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

Judge RODGERS. I do.

Mr. TITUS. I do.

Mr. MILLER. I do.

Senator CORNYN. Thank you very much. Please have a seat. Looks like, Judge Rodgers, you are on this end. We can either move you or move the—

Well, thanks to each of you for being here today. And Chairman Hatch does send his regrets. He is unavoidably absent from the hearing. But I know each of you know enough about the operation of the Senate to know that there are other eyes and ears observing and listening to the proceedings here today. And, of course, each one of you has already been through quite an examination before you get to this point, through groups like the American Bar Association, through Federal agencies like the FBI, not to mention the evaluation process leading up to your nomination by the President. And so we know you have been scrutinized and analyzed, and your records combed with a fine brush.

But we would be delighted to hear any comments you might have to make in terms of any opening statement. And it is entirely appropriate—and we are not too formal here—if you would like to introduce members of your family or friends who happen to be accompanying you on this important day, recognizing the significance that this day must have in your life and the life of those who love you and support you in what you are doing.

So, Judge Rodgers, please proceed with any comments you would like to make.

**STATEMENT OF MARGARET CATHARINE RODGERS, NOMINEE
TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF
FLORIDA**

Judge RODGERS. Thank you, Mr. Chairman. Is this on?

Senator CORNYN. Now it is.

Judge RODGERS. Thank you. It is indeed an honor and a privilege for me to be here today. And I want to thank you, Mr. Chairman, and the other members of the Committee for scheduling this hearing and giving me the opportunity to address the Committee.

I also want to thank Senator Nelson for being here today and for his kind words of support on behalf of my nomination.

While I don't have an opening statement per se, I would like to take the opportunity to introduce some special people who are here with me today for support.

First, I have my husband Jim; I have my daughter Hannah Rodgers, my stepdaughter Maggie Pschndl, stepdaughter Jamie Lajter, daughter Maggie Rodgers. I would say that Maggie and Hannah are not unhappy about having to miss school this week. And I don't know if they're more happy about, or more excited about being here today or being able to attend the World Cup game on Sunday. I just told them they have to hold their cheers until Sunday.

My long-term secretary, Kathy Rock, and her husband Bob. They've come all the way from Pensacola. My mother, Jane Hubbard, and my uncle, John Morris, who I know my father, who's deceased, is pleased to have my Uncle John here today in his place. My sister, BJ Greer, from Pensacola; and my dearest and closest friend, Susan Fisher, who resides here in the Washington area with her husband and children.

And I want to tell them that I am very grateful to all of them for being here, and grateful for all their support. And thank you.

[The biographical information of Judge Rodgers follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)
Margaret Catharine ("Casey") Rodgers
M. Casey Rodgers
Margaret Catharine ("Casey") Hubbard
2. Address: List current place of residence and office address(es).

Residence: Gulf Breeze, Florida 32561

Office: United States Courthouse
One North Palafox Street
Pensacola, Florida 32502
3. Date and place of birth.
August 13, 1964
Pensacola, Escambia County, Florida
4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

James Joseph Pschandi
Neuromuscular Rehabilitation Therapist, Soft Tissue Therapies, Inc.
The Avery Clinic
1120 East Avery Street
Pensacola, Florida 32503
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

1/90-12/91 California Western School of Law, San Diego, CA
• Juris Doctorate, Magna Cum Laude - 1/15/92

1/85-12/89 University of West Florida, Pensacola, FL
• B.A., Political Science, Magna Cum Laude - 12/16/89

5/84-12/84 University of South Florida
• non-degree seeking, left to join military

- 9/83-3/84 University of West Alabama *f/k/a* Livingston University
 • transferred to U.S.F. in Tampa
- 7/83-8/83 Pensacola Junior College
 • attended briefly in Summer of 1984 but studies became too difficult with father's illness
- 8/82-7/83 University of West Alabama *f/k/a* Livingston University
 • returned home after father was diagnosed with terminal cancer
6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.
- 5/02-Present United States District Court, Northern District of Florida
 Magistrate Judge
- 2000-Present ARC-Gateway *f/k/a* Association for Retarded Citizens-Escambia
 Director
- 3/00-3/02 Bates & Rodgers, L.L.P.
 Limited Partner, M. Casey Rodgers, P.A.
- 3/99-3/02 M. Casey Rodgers, P.A.
 President, Solo Practitioner
- 6/98-3/99 West Florida Medical Center Clinic, P.A.
 General Counsel and Director of Human Resources
- 1996-2002 Better Business Bureau of Northwest Florida
 General Counsel, Chair and Vice Chair, Board of Directors
- 1999-2001 Pensacola Museum of Art
 Secretary, Board of Trustees
- 9/94-6/98 Clark, Partington & Hart, P.A.
 Associate Attorney
- 1/92-9/94 United States District Court, Northern District of Florida
 Law Clerk to the Honorable Lacey A. Collier

8/90-12/90 United States Court of Appeals, Ninth Circuit
Judicial Intern to the Honorable David R. Thompson

10/89-12/89 Young Men's Christian Association
Membership Coordinator

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.

5/85-5/87 - United States Army - Active, E-4, 261536336

1987-1993 - United States Army - Inactive Reserve

Honorable Discharge - 1993

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

Board Certified - Florida Supreme Court - Labor and Employment Law - 2001

Law School Graduation Ranking - 6/296

Academic Scholarship, 2nd/3rd year law school

Judicial Internship, U.S. Court of Appeals, Ninth Circuit, Honorable David R. Thompson

Staff Writer, California Western School of Law, Law Review - 1990

Staff Editor, California Western School of Law, Law Review - 1991

American Jurisprudence Award:

- 1) Legal Skills II (research & writing)
- 2) Evidence
- 3) Business Corporations
- 4) Constitutional Law II

Army Commendation Medal - 1987

Army Good Conduct Medal - 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.

The Florida Bar - 1992 to present
 American Bar Association - 1994-2002
 Federal Magistrate Judges Association - 2002 to present
 American Inns of Court - 1993-1996 & 2002 to present
 Escambia-Santa Rosa Bar Association - 1992-present
 (Young Lawyers Division, Executive Council - 1994-1995,
 President - 1994-1995, Secretary - 1995-1996, Treasurer - 1992-1993)
 Law Day Chairperson, 1994
 Escambia-Santa Rosa Bar Foundation, Director - 1994-1995
 Civil Justice Reform Act Committee, Northern District of Florida - 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.

Better Business Bureau of Northwest Florida, General Counsel, Chair
 & Vice-Chair - 1996-2002
 ARC-Gateway f/k/a Association for Retarded Citizens-Escambia, Director
 - 2000 to present
 Pensacola Museum of Art, Secretary - 1999-2001
 Gulf Breeze Rotary, Member - 1996-1998
 Pensacola Five Flags Rotary, Member - 1998-2002
 Society for Human Resources Management, Member - 1996-2002
 Leadership Pensacola, Pensacola Area Chamber of Commerce, Member - 1998
 Pensacola Runner's Association, Member - 2000 to present
 The Club Family Sports Complex (fitness club open to public), Member - 1999 to 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.

Florida Supreme Court - 1992
 United States District Court, Northern District of Florida - 1994
 United States Court of Appeals for the Eleventh Circuit - 1995

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.

Subjective Pain Testimony In Disability Determination Proceedings, Can Pain Alone Be Disabling? 28 CAL. W. L. REV. 173 (1991).

Speech - Memorial Service - Pensacola Police Department on May 8, 2003 - "Heroes"

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

Excellent health. Last physical examination was 6/12/03.

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 currently serve as a Magistrate Judge of the United States District Court, Northern District of Florida. The Northern District of Florida is a court of the Eleventh Circuit Court of Appeals and covers a geographical area from Pensacola, Florida east to Gainesville, Florida. I was appointed to this position and took the oath of office on May 9, 2002. As a magistrate judge, I hear cases assigned to me by the district court judges of this district under 28 U.S.C. § 636. Magistrate judges in our district are fully utilized and handle both civil and criminal docket.

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) Danny E. White v. Jo Anne B. Barnhart, 3:01cv455/MCR

Carol J. Sumblin v. Jo Anne B. Barnhart, 3:01cv433/RV/MCR

Roger M. Smith v. Jo Anne B. Barnhart, 3:01cv491/RV/MCR

United States of America v. Richard Anthony Thomas, 5:94cr5026/LAC;
5:00cv14/LAC/MCR

Kevin Tracy v. Sheriff Jim Lowman, et al., 3:01cv371/LAC/MCR

Coy Wyche v. Michael W. Moore, 4:01cv70/LAC/MCR

United States of America v. Michael Sean Grantham, 3:99cr1111/LAC;
3:01cv118/LAC/MCR

Bernard P. Griffin v. William Gaskin, et al., 3:00cv362/LAC/MCR

Tracy L. Collier v. Corrections Corporation of America, et al., 5:01cv205/MCR

Johnny J. Union v. Michael W. Moore, 5:01cv76/SPM/MCR

- (2) To my knowledge, all of my reports and recommendations have been adopted by the assigned district court judge, and, with the exception of the following case, all such decisions have been affirmed on appeal. Also, to the best of my knowledge, I have not been reversed on any final judgment I have entered in a case before me on consent of the parties.

Keith D. Barclay v. James Crosby, 3:00cv404/LAC/MCR. In this habeas corpus case filed under 28 U.S.C. § 2254, the petitioner sought relief based on a claim that his due process rights had been violated at trial due to an erroneous jury instruction on an entrapment defense and that he received ineffective assistance of counsel on appeal. I recommended denial of the petition to the district court on both grounds, and this recommendation was adopted. On appeal, the Eleventh Circuit Court of Appeals affirmed in part and vacated and remanded in part. The court agreed with the district court's conclusion regarding the due process violation; however, it remanded the case for further consideration of the ineffective assistance of counsel claim. On this claim, the district court concluded that appellate counsel was not ineffective for failing to raise this issue on appeal because trial counsel failed to preserve an objection to the entrapment instruction for appeal. The Eleventh Circuit disagreed and remanded the case for an evidentiary hearing on this issue.

- (3) Pate v. Peel, 256 F.Supp.2d 1326 (N.D. Fla. 2003)

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.

Not applicable.

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;

1/92-9/94 - Law Clerk to the Honorable Lacey A. Collier
United States District Court, Northern District of Florida
One North Palafox Street
Pensacola, Florida 32502

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

3/99-3/02 - Attorney / Solo Practitioner
M. Casey Rodgers, P.A.
25 W. Cedar Street, Suite 550
Pensacola, Florida 32501

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;

9/94-6/98 - Associate Attorney
Clark, Partington & Hart, P.A.
125 W. Romana Street, Suite 800
Pensacola, Florida 32501

- 6/98-3/99 - General Counsel and Director of Human Resources
West Florida Medical Center Clinic, P.A.
8333 N. Davis Highway
Pensacola, Florida 32514
- 3/00-3/02 - Limited Partner
Bates & Rodgers, L.L.P.
25 W. Cedar Street, Suite 550
Pensacola, Florida 32501
- 5/02-Present - Magistrate Judge, United States District Court, Northern District of
Florida
One North Palafox Street
Pensacola, Florida 32502

- 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 private practice consisted primarily of civil litigation with an emphasis on medical malpractice and employment-related claims. During the years 1999-2002, my practice was heavily concentrated in the employment area.

As a magistrate judge, I have responsibility for both a civil and criminal docket. My civil docket includes responsibility for the preparation of Reports and Recommendations to the district court judges on all habeas corpus matters under 28 U.S.C. §§ 2241, 2254 and 2255, social security appeals under 42 U.S.C. § 405(g), prisoner cases under 42 U.S.C. § 1983 and 28 U.S.C. § 1331 (Bivens actions), and other pro se matters. In addition to the preparation of Reports and Recommendations on these cases, I also conduct evidentiary hearings and settlement conferences, where appropriate. Also, in cases where all parties have consented to magistrate jurisdiction, I handle the case from the date of filing through entry of final judgment, including ruling on all non-dispositive and dispositive motions and presiding over any trials. On all other civil matters, I have responsibility for discovery motions. My criminal docket includes all misdemeanor cases brought under the United States Code, the Code of Federal Regulations, and state law pursuant to the Assimilated Crimes Act, 18 U.S.C. § 13, as well as all initial proceedings in felony cases. In connection with the misdemeanor docket, I have responsibility for accepting pleas, conducting jury and non-jury trials and evidentiary hearings, and imposing sentences. In felony cases, I have responsibility for all initial pretrial matters, including initial appearances, detention and probable cause hearings, arraignments, and pleas

(done on a Report and Recommendation basis). Also, in felony cases, I issue criminal complaints and appropriate arrest warrants or summons; issue search warrants; authorize the installation of pen registers and direct telephone company assistance to the government for such installations; and receive the return of indictments by the grand jury and issue process thereon.

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

In private practice, I mostly represented employers/management in defense of employment discrimination and harassment claims; however, there were a few occasions when I represented the plaintiff in an employment case. My client base was primarily comprised of large and small businesses, as well as some individual business owners, principals and managers. I also represented several large health care facilities and a university.

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

I appeared in court as an attorney for my clients regularly.

I also appear in court regularly as a magistrate judge.

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

- (a) 70% in federal court appearances
- (b) 30% in state court appearances

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

My practice was exclusively devoted to civil matters.

As a magistrate judge, I handle both a civil and a criminal docket.

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 an attorney, I tried one case as lead counsel and four as associate counsel.

5. What percentage of these trials was:
 - (a) jury;
 - (b) non-jury.
- (a) 4 jury trials
- (b) 1 non-jury trial

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) **William O. Watkins & William R. Mallory v. Sverdrup Technology, Inc.**
Case No. 3:94cv30401

Reported: 153 F.3d 1308 (11th Cir. 1998)

- (a) Trial dates - 11/4/96-11/20/96
- (b) United States District Court, Northern District of Florida
Chief District Court Judge Roger Vinson

- | | |
|---|--|
| <p>(c) <u>Counsel for Plaintiffs</u>
 John Barry Kelly, Esquire
 15 W. Main Street
 Pensacola, FL 32501
 850-434-3527</p> | <p><u>Co-Counsel for Defendant</u>
 Michael A. Perkins, Esquire
 6723 Plantation Road
 Pensacola, FL 32504
 850-477-7022</p> |
|---|--|

Represented Defendant, Sverdrup Technology, Inc., a defense contractor engaged in weapons systems development for the United States Air Force. This particular law suit involved claims for age discrimination filed by two former software engineers employed by the company at its facility on Eglin Air Force Base who were terminated as part of a reduction-in-force. I was heavily involved in both the discovery and summary judgment stages of the case, as well as the trial. The case was tried to a jury before Chief Judge Roger Vinson and resulted in a hung jury. During trial, I had the responsibility for several witness examinations, both direct and cross, and I also had sole responsibility for the Rule 50 Motion For Judgment As A Matter Of Law both at the close of Plaintiff's case and at the close of all the evidence. The court took the Defendant's Rule 50 motion under advisement. The motion was subsequently granted and judgment entered in Defendant's favor. Plaintiffs appealed the judgment to the Eleventh Circuit Court of Appeals. Briefs were submitted and oral arguments heard. I was lead counsel on appeal, with sole authorship on the brief and sole appearance before the Eleventh Circuit for oral argument. The Eleventh Circuit affirmed the district court's judgment in a reported decision as noted above.

This case was significant in two respects. First, the Eleventh Circuit held that a plaintiff in an employment discrimination case cannot rely simply on evidence submitted in support of its prima facie case to defeat a motion for judgment as a matter of law at the close of all the evidence at trial where the defendant has offered powerful evidence justifying the employment decision. Second, the court determined that a plaintiff cannot use statistical data as circumstantial evidence of pretext without first establishing the statistical significance of the data.

- (ii) **Vicki McClurg v. Santa Rosa Golf & Beach Club**
 Case No. 3:98cv1
- (a) Trial dates - 3/15/99-3/26/99
 (b) United States District Court, Northern District of Florida
 Chief District Court Judge Roger Vinson
- (c) Co-Counsel for Plaintiff
 Dennis K. Larry, Esquire
 P.O. Box 13010
 Pensacola, FL 32591-3010
 850-434-9200

Counsel for Defendant

Gary J. Anton, Esquire
211 E. Call Street
Tallahassee, FL 32301
850-222-1236

Co-Counsel for Defendant

Stephen L. Spector, Esquire
P.O. Box 10095
Tallahassee, FL 32302-2095
850-222-3533

Represented Plaintiff, Vicki McClurg, a female golf professional, in a gender discrimination law suit against her former employer, Santa Rosa Golf and Beach Club, where she worked as head golf professional. This case was tried to a jury before Chief Judge Roger Vinson and resulted in a defense verdict. During the trial, I had responsibility for presenting the opening statement and examining several witnesses (both direct and cross), including the Plaintiff. I made the presentation to the Court opposing Defendant's Rule 50 Motion For Judgment As A Matter Of Law. I solely handled the appeal to the Eleventh Circuit Court of Appeals; however, the case was settled on appeal.

This case was significant for employers because, contrary to general opinion among management attorneys, a case involving serious claims of discrimination with strong circumstantial evidence can nonetheless be successfully defended in front of a jury where there is evidence of a personality conflict between the plaintiff and the decision-maker.

- (iii) **Harvey Shelley v. Magic Living Homes, Inc. d/b/a Timberland Homes, a subsidiary of Palm Harbor Homes, Inc.**
Case No. 3:98cv320

(a) Trial Dates - 10/18/99-10/20/99

(b) United States District Court, Northern District of Florida
District Court Judge Lacey Collier

(c) Counsel for Plaintiff
Joseph L. Hammons, Esquire
17 W. Cervantes Street
Pensacola, FL 32501
850-434-1068

Counsel for Plaintiff
Diane M. Longoria, Esquire
17 W. Cervantes Street
Pensacola, FL 32501
850-434-0076

Co-Counsel for Defendant
Chad A. Shultz, Esquire
1275 Peachtree Street, NE, Ste. 600
Atlanta, GA 30309
404-888-3800

Co-Counsel for Defendant
Patrick Clark, Esquire
1275 Peachtree Street, NE, Ste. 600
Atlanta, GA 30309
404-888-3800

Represented Defendant, Palm Harbor Homes, Inc. in an age discrimination law suit filed by a former employee of the company. I was retained by the law firm of Ford & Harrison as local counsel on the case; however, I played an active role as local counsel

and was involved in discovery and at the summary judgment stage, as well as the trial. The case was tried to a jury before Judge Lacey Collier and resulted in a judgment as a matter of law for the Defendant at the close of Plaintiff's case. I had responsibility for several witness examinations. The judgment was appealed to the Eleventh Circuit, and was reversed and remanded in part. The case subsequently settled.

The case was significant because of the Eleventh Circuit's ultimate disagreement with the district court judge's analysis of direct evidence in a case under the Age Discrimination In Employment Act.

(iv) **Shneirdre Neal v. Manpower International, Inc. & Wayne-Dalton Corporation**
Case No. 3:00cv277

(a) Trial dates - 12/10/01-12/12/01

(b) United States District Court, Northern District of Florida
District Court Judge Lacey Collier

(c) Counsel for Plaintiff
John Barry Kelly, Esquire
15 W. Main Street
Pensacola, FL 32501
850-434-3527

Counsel for Plaintiff
Richard D. Barlow, Esquire
15 W. Main Street
Pensacola, FL 32501
850-434-3527

Co-Counsel for Defendant
Christopher J. Freeman, Esquire
P.O. Box 2985
North Canton, OH 44720
330-497-2886

Counsel for Co-Defendant
Christopher B. Lunny, Esquire
P.O. Box 1877
Tallahassee, FL 32302-1877
850-224-9634

Represented Defendant, Wayne-Dalton Corporation in a sexual harassment law suit filed by a former employee of the company. I was retained by the law firm of Zollinger, D'Atri, Gruber, Thomas & Company as local counsel on the case; however, I played an active role as local counsel and was involved at the summary judgment stage, as well as the trial. The case was tried to a jury before Judge Lacey Collier and resulted in a defense verdict. I had responsibility for the examination of several key witnesses at trial. The case was not appealed.

The significance of this case had more to do with the importance of investigating witness credibility than the actual merits of the plaintiff's claim. The plaintiff introduced some fairly damaging evidence at trial on her sexual harassment claim; however, the defense on cross examination showed that she had lied on her employment application regarding her previous work experience and criminal history. Upon hearing this evidence, the jury undoubtedly concluded the plaintiff was lying about the facts in support of her claim.

(v) **Elton Creighton v. Fluor Daniel Corporation**
Case No. 97-CA-597

(a) Trial dates - 7/23/01-7/26/01

(b) In the Circuit Court in and for Escambia County, Florida
Chief Circuit Court Judge John Kuder

<p>(c) <u>Counsel for Plaintiff</u> Ross Goodman, Esquire P.O. Box 12308 Pensacola, FL 32581-2308 850-232-9574</p>	<p><u>Co-Counsel for Defendant</u> James Rebarchak, Esquire P.O. Box 46 Mobile, AL 36601 334-432-1414</p>
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Represented Defendant, Fluor Daniel Corporation in a law suit by a former employee alleging retaliation under Florida's Whistle Blower's Act. I was retained by the law firm of Miller, Hamilton, Snider & Odom as local counsel on the case. I attended court hearings in the early stages of the case and played an active role both before and during the pretrial phase of the case. I attended the trial as local counsel but my involvement in the presentation of evidence was limited. The trial was non-jury before Chief Judge Kuder.

This case was most significant for the legal question of whether an employee of a site contractor who was terminated after reporting violations of the Occupational Safety and Health Act at the site can sue the contractor under Florida's Whistle-Blower's Act when the site was owned, operated, and controlled by a separate company. The state court judge concluded the site contractor was an "employer" under the statute.

(vi) **GJR Investments, Inc. v. County of Escambia, Florida, et al.**
Case No. 3:95cv30380

Reported: 132 F.3d 1359 (11th Cir. 1998)

(a) Trial dates not applicable.

(b) United States District Court, Northern District of Florida
District Court Judge Lacey Collier

<p>(c) <u>Counsel for Plaintiff</u> Marvin D. Nathan, Esquire Robert S. Duboise, Esquire 2700 Post Oak Blvd., Suite 2500 Houston, TX 77056-5705 713-960-0303</p>	<p><u>Co-Counsel for Plaintiff</u> Paul M. Harden, Esquire 2601 Gulf Life Tower Jacksonville, FL 32207 904-396-5731</p>
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Co-Counsel for Defendant

Donald H. Partington, Esquire
P.O. Box 13010
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850-434-9200

Counsel for Co-Defendant

James M. Messer, Esquire
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850-436-5450

Counsel for Co-Defendant

James S. Alves, Esquire
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850-222-7500

Counsel for Co-Defendant

Robert P. Smith, Esquire
P.O. Box 1532
Tallahassee, FL 32302-1532
850-284-7436

Counsel for Co-Defendant

Paula G. Drummond, Esquire
P.O. Box 2637
Pensacola, FL 32501
850-432-7555

Represented Defendant, Wiley Page, former Director of Growth Management Services for Escambia County, Florida in a law suit filed by out-of-state interests against the county and several employees alleging due process and equal protection violations in connection with a zoning decision on Perdido Key. I was retained by the county to represent Mr. Page. I filed a Motion to Dismiss for failure to state a claim as well as on qualified immunity grounds, which was denied. I then took an interlocutory appeal to the Eleventh Circuit Court of Appeals. I had sole responsibility for the appeal, which included briefing and oral argument. The district court's decision was reversed by the Eleventh Circuit in a reported decision as noted above and the case was dismissed against Mr. Page.

The significance of this case is twofold. First, it was a reaffirmation by the Eleventh Circuit of the principle in civil rights cases under 42 U.S.C. § 1983 involving a qualified immunity defense that a plaintiff must, as a threshold matter, plead the violation of a constitutionally protected right by the official before the court need consider whether that right was clearly established at the time of the alleged incident. Second, the case stands for the proposition that a court must apply a heightened pleading standard in § 1983 cases when considering whether a plaintiff has adequately alleged in its complaint the violation of a constitutionally protected right.

- (vii) **Susan Doe and Jane Doe vs. David Eugene Norwood, Joy M. Andrews, and Everett B. Andrews**
Case No. 94-1022-CA-01; DCA No. 95-147

(a) Trial dates not applicable.

(b) In the Circuit Court in and for Santa Rosa County, Florida
Chief Circuit Court Judge Paul Rasmussen

<p>(c) <u>Counsel for Plaintiff</u> Samuel W. Bearman, Esquire 1015 N. 12th Avenue Pensacola, FL 32501 850-4381000</p>	<p><u>Co-Counsel for Defendant</u> Michael A. Perkins, Esquire 6723 Plantation Road Pensacola, FL 32504 850-477-7022</p>
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Retained by insurance company to represent a homeowner on an intentional tort claim arising out of an alleged sexual battery of a minor that occurred during a party of teenagers while the homeowner was out of town. Defendant filed a motion to dismiss for failure to state a claim because the complaint failed to allege facts sufficient to show that the homeowner had prior notice of the risk. The trial court judge granted the motion and Plaintiff appealed to the First District Court of Appeal (DCA). I had sole responsibility for the brief on appeal as well as oral argument. The First DCA affirmed in a per curiam decision.

This case was significant because of the posture of the case at the trial level. The First DCA agreed that the Plaintiff had to plead some facts in support of the element of notice in order to survive a motion to dismiss.

- (viii) **Jackie R. Layden v. Sverdrup Technology, Inc. and Neal Tuggle**
Case No. 3:94cv30309

(a) Trial dates not applicable.

(b) United States District Court, Northern District of Florida
Chief District Court Judge Roger Vinson

<p>(c) <u>Counsel for Plaintiff</u> Lawrence Keefe, Esquire 909 Mar Walt Drive, Suite 1014 Fort Walton Beach, FL 32547 850-863-4064</p>	<p><u>Counsel for Co-Defendant</u> Matthew W. Burns, Esquire P.O. Box 1226 Destin, FL 32540 850-837-8445</p>
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Co-Counsel for Defendant
 Michael A. Perkins, Esquire
 6723 Plantation Road
 Pensacola, FL 32504
 850-477-7022

Represented Defendant, Sverdrup Technology, Inc., in a law suit involving claims for sexual harassment and negligent retention and supervision by a former employee against the company and its former Director of Security, Neal Tuggle. I also represented Sverdrup on a cross claim filed by Neal Tuggle for breach of employment contract stemming from his termination. After discovery, a settlement was reached between Plaintiff and Sverdrup; however, the cross claim continued to the summary judgment stage. The district court judge granted Sverdrup's Motion For Summary Judgment on the ground that the cross claim was not a proper cross claim under Rule 13(g) of the Federal Rules of Civil Procedure, and Tuggle appealed the decision to the Eleventh Circuit Court of Appeals. I had sole responsibility for the appeal, which included briefing and oral argument. The Eleventh Circuit affirmed the district court's judgment in a per curiam decision.

The most significant aspect of this case was the Eleventh Circuit's analysis of Rule 13(g) and resulting conclusion that Tuggle's claim for breach of his employment contract did not arise out of the same transaction or occurrence as the plaintiff's original claim for sexual harassment.

(ix) **Patrick A. Henderson v. Sacred Heart Hospital of Pensacola**
 Case No.: 3:99cv468

- (a) Trial dates not applicable. Summary Judgment Granted 12/8/00.
- (b) United States District Court, Northern District of Florida
 Chief District Court Judge Roger Vinson
- (c) Counsel for Plaintiff
 R. John Westberry, Esquire
 1108-A N. 12th Avenue
 Pensacola, FL 32501
 850-434-7694

Represented Defendant in a Title VII civil rights claim brought by Plaintiff on the basis of gender discrimination and retaliation. The case progressed through discovery to court-ordered mediation, which ended in an impasse. I filed a Motion For Summary Judgment on Defendant's behalf, which was granted by the Court. No appeal was taken.

The most significant aspect of this case was the district court judge's application of the "after acquired evidence" rule and his conclusion that notwithstanding the court's finding of a lack of sufficient evidence to create jury question on the matter of pretext the Plaintiff's damages were cut-off as of the date Defendant discovered that Plaintiff had lied on his employment application.

- (x) **Cindy W. Trahan v. The Animal Park, Inc.**
Case No.: 3:00cv343

(a) Trial dates not applicable. Summary Judgment Granted 8/22/01.

(b) United States District Court, Northern District of Florida,
Chief District Court Judge Roger Vinson

<p>(c) <u>Counsel for Plaintiff</u> Bradley S. Odom, Esquire 15 W. Main Street Pensacola, FL 32501 850-434-3527</p>	<p><u>Counsel for Plaintiff</u> Stephen G. West, Esquire 15 W. Main Street Pensacola, FL 32501 850-434-3527</p>
---	---

Represented Defendant in a Family and Medical Leave Act case, in which the Plaintiff alleged retaliation. The case progressed through discovery to court-ordered mediation, which ended in an impasse. I filed a Motion For Summary Judgment on Defendant's behalf, which was granted by the Court. No appeal was taken.

The most significant aspect of this case was the district court judge's decision on the legal issue of whether plaintiff suffered from a "serious health condition" as defined by the Family and Medical Leave Act. The court concluded she did not because the evidence showed that despite her physician's recommendation that she take leave from work to rest due to anxiety and depression plaintiff chose instead to use this leave time to travel to another state to visit her mother and go shopping.

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) **Served as General Counsel for West Florida Medical Center Clinic, P.A.**

From 1998 through 2003, I served as General Counsel for West Florida Medical Center Clinic, P.A., a large multi-specialty physician-owned group medical practice. For the first

eight months, I served as both in-house General Counsel and Director of Human Resources. After leaving the in-house position, I continued to represent the group on a wide range of legal matters until my appointment to the bench, including attendance at all board meetings, by laws interpretation and revision, contract formation and review, hospital relationships, physician discipline matters, fraud and abuse investigations, compliance issues, risk management issues, and significant litigation matters.

- (ii) **Rosanna Seawright v. Peter M. Szmoniak, M.D., Berryhill Orthopaedics, P.A., Jeffery M. Cox, M.D., Sunset Anesthesiology, P.A., West Florida Medical Center Clinic, P.A., Thomas R. Syverson, M.D., A.E. Parker, M.D., West Florida Radiology Association, P.A., and Paracelsus Santa Rosa Medical Center, Inc. d/b/a Santa Rosa Medical Center**
 In the Circuit Court in and for Santa Rosa County, Florida
 Circuit Court Judge Terry Terrell
 Consolidated Case Nos. 98-1819 & 99-1326

Represented Defendants, West Florida Medical Center Clinic, P.A. and Thomas R. Syverson, M.D., a neurologist employed by the group, in a medical malpractice action in which the Plaintiff claimed that Dr. Syverson and the Clinic were negligent in failing to diagnose a subarachnoid hemorrhage following hip replacement surgery. Dr. Syverson was initially called in on the Plaintiff's medical case as a consulting neurologist due to Plaintiff's worsening neurological deficits; he later became a treating physician. Discovery was intense and protracted and included document requests as well as both fact witness and expert depositions. Plaintiff's claims against the Medical Center Clinic and Dr. Syverson were settled at mediation.

- (iii) **Norman P. Autin Sr., as the Personal Representative of the Estate of Myrtle Autin v. Sacred Heart Hospital of Pensacola, George Ricketson, III, M.D., Daniel Carey, M.D. and E. Coy Irvin, Jr., M.D.**
 In the Circuit Court in and for Escambia County, Florida
 Circuit Court Judge Mike Jones
 Case No. 99-1404-CA-01

Represented Defendant, Sacred Heart Hospital of Pensacola, Inc., in a wrongful death medical malpractice action in which the Plaintiff claimed that hospital nurses were negligent in failing to detect changes in Plaintiff's medical condition post-operatively which would have alerted them to her risk for cardiac arrest. Plaintiff died of a massive cardiac arrest following thyroid surgery. Discovery was intense and protracted and included document requests as well as both fact witness and expert depositions. Plaintiff's claims against the other defendants were either settled at mediation or dismissed. The case against the hospital was prepared for trial. The case settled the week before jury selection.

- (iv) **Patricia Heptinstall v. Wendco of Alabama, Inc., d/b/a Wendy's, et al.**
United States District Court, Southern District of Alabama
Senior District Court Judge Brevard Hand
Case No. 00-0880-BH-L

Represented Defendants on a Title VII action filed by Plaintiff for employment discrimination and harassment on the basis of race, national origin, and gender, as well as claims for retaliation and constructive discharge. Additionally, Plaintiff filed state law claims for invasion of privacy, intentional infliction of emotional distress, and negligent retention, hiring, and supervision. The case was settled at mediation after discovery.

- (v) **Kelvin Barkley v. Wendco, Inc.**
United States District Court, Northern District of Florida
District Court Judge Stephan Mickle
Case No. 5:00cv114

Represented Defendant, Wendco, Inc. on a Title VII civil rights claim filed by Plaintiff on the basis of religious discrimination. The case progressed through discovery to court-ordered mediation, which ended in an impasse. I filed a Motion For Summary Judgment on Defendant's behalf, which was denied by the Court. The case was prepared for trial. However, at the pretrial conference, a second mediation was ordered and settlement was reached.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

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

I currently participate in the Judicial Retirement System for Magistrate Judges.

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 sitting judge, I have followed the procedure employed at our courthouse for identifying potential conflicts of interest. This procedure requires the judge to answer questions on a document entitled "Checklist For Financial Conflicts, Other Conflicts, and Conflict List", which elicits information about the judge's personal financial investments, as well as those of his or her spouse, resident minor children, and third degree relatives and their spouses. The document also seeks information about the judge's personal involvement in legal matters, as well as the involvement of his spouse, third degree relatives and their spouses in such matters, and about the potential for a former law partner to serve as either an attorney or a material witness in a case before the judge. The document also requires the judge to list all companies or organizations in which the judge or a relative has a financial interest and all matters in which the judge has a disqualifying nonfinancial interest. Additionally, our courthouse procedure requires each judge to identify any significant former clients that may pose a conflict of interest for the judge.

During my initial service in the judicial position I now hold, I included one former client and a former law partner on my conflict list. I have insisted upon a permanent recusal in any case involving this former client and a one year recusal in any case involving the former law partner.

In addition to the above procedure, as a sitting judge I am bound by Canon 3 of the Code of Conduct for United States Judges which directs that a judge perform the duties of the office impartially and diligently. This rule provides that a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. Alternatively, the judge may disclose on the record the basis of

disqualification and allow the parties and their lawyers an opportunity to confer and agree as to whether or not the judge should be disqualified.

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.

No.

AO-10 (w)
Rev. 12/02

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)

1. Person Reporting (Last name, first, middle initial) Rodgers, Margaret C.		2. Court or Organization Northern District of Florida	3. Date of Report 07/15/2003
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time) Magistrate Judge - Full-Time		5. Report Type (check type) X Nomination, Date 07/14/2003 Initial _____ Annual _____ Final _____	6. Reporting Period 01/01/2002 to 07/14/2003
7. Chambers or Office Address United States District Court One North Palafox Street Pensacola, Florida 32501		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 section where you have no reportable information. Sign on the 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 Officer/Director	Pensacola Museum of Art
2 Director	ARC - Gateway
3 Director	Better Business Bureau of Northwest Florida

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

DATE	PARTIES AND TERMS
<input type="checkbox"/> NONE (No reportable agreements.)	
1 3/1/2000	Bates & Rodgers, LLP - partnership agreement with former law partner, Philip A. Bates (dissolved)
2	
3	

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

DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
<input type="checkbox"/> NONE (No reportable non-investment income.)		
1 12/31/01	M. Casey Rodgers, P.A. - business income (profit & wages)	158,078
2 04/30/02	M. Casey Rodgers, P.A. - business income (profit & wages)	93,229
3 07/14/03	Neuromuscular Rehabilitation Therapy	
4		

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Rodgers, Margaret C.	07/15/2003

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	Capital One Bank	Credit Card	J
2	SunTrust Bank	Credit Card	J
3	Citibank - Student Loan Corporation	Student Loan	K
4	Sallie Mae	Student Loan	J
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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Rodgers, Margaret C.	Date of Report 07/15/2003
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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 "X" 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) 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 Sun Trust Bank (savings)	A	Interest	J	T	EXEMPT				
2									
3									
4									
5									
6									
7									
8									
9									
10									
11									
12									
13									
14									
15									
16									
17									

1 Inc/Gain Codes: A=\$1,000 or less (Col. B), 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 H2=\$5,000,001 or more D=\$5,001-\$15,000 E=\$15,001-\$50,000

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

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Rodgers, Margaret C.	07/15/2003

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.

(Indicate part of report.)

III. Non-Investment Income

Nominee has no reportable income for the current year as she has been employed by the United States Courts since May 9, 2002.

There is no non-investment income for Neuromuscular Rehabilitation Therapy which is reportable for the preceding year as nominee married in 2003.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Rodgers, Margaret C.	07/15/2003

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

PART 1. POSITIONS (cont'd.)

Line	Position	Name of Organization/Entity
4	President	M. Casey Rodgers, P.A.
5	Limited Partner	Bates & Rodgers, L.L.P.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Rodgers, Margaret C.	07/15/2003

IX. CERTIFICATION

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

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

Signature Margaret C. Rodgers Date 7/15/03

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	\$2,500	Notes payable to banks-secured **	144,244
U.S. Government securities-add schedule	- 0 -	Notes payable to banks-unsecured	- 0 -
Listed securities-add schedule **	\$96	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 **	\$193,569
Real estate owned-add schedule **	\$360,000	Chattel mortgages and other liens payable	- 0 -
Real estate mortgages receivable	- 0 -	Other debts-itemize:	
Autos and other personal property	\$30,000	Citibank - Student Loan Corp.	\$35,537
Cash value-life insurance	- 0 -	SunTrust Bank - Mastercard	\$14,000
Other assets itemize:	- 0 -	Capital One Bank - Mastercard	\$1,000
		Sally Mae	\$962
		Total liabilities	\$389,312
		Net Worth	\$3,284
Total Assets	\$392,596	Total liabilities and net worth	\$392,596
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor	None	Are any assets pledged? (Add schedule)	No
On leases or contracts	None	Are you defendant in any suits or legal actions?	No
Legal Claims	None	Have you ever taken bankruptcy?	No
Provision for Federal Income Tax	None		
Other special debt	None		

FINANCIAL STATEMENT
SCHEDULEListed Securities:

Legg Mason Value Trust (IRA)	\$ 96
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Real Estate Owned:

Personal Residence - Gulf Breeze, FL	\$ 360,000
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Notes payable to banks - secured:

AmSouth Bank - personal automobile	\$ 1,930
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SunTrust Bank - personal automobile	\$ 19,192
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SunTrust Bank - home equity line of credit	<u>\$ 123,122</u>
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	\$ 144,244
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Real Estate Mortgage - Washington Mutual	\$193,569
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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 career as a lawyer, I participated in a pro bono program sponsored by the Escambia-Santa Rosa Bar Association and conducted through Legal Services of Northwest Florida in which local attorneys served as advisors and counselors for indigent persons needing legal assistance on a variety of matters, including landlord-tenant relations, domestic relations, including dissolution and child custody matters, and employment arrangements. The services were generally offered on Saturdays. I served in these weekend clinics on several occasions, totaling approximately twenty hours.

In connection with the above volunteer work, I agreed to accept two cases for indigent clients. Both of these cases involved domestic matters and included a child custody dispute. One of the cases required a final hearing to resolve and the other did not. Combined, these two cases required approximately twelve hours.

I was asked by my church, Gulf Breeze United Methodist Church, to assist an indigent member with a dissolution of marriage action involving both child custody and support collection issues. This case was resolved after a final hearing and involved approximately five and one-half hours of time.

I was approached by members of True Free Will Holiness Church for assistance in re-establishing their church. After determining that these members could not afford counsel, I assisted the former directors of the church with corporate reinstatement to enforce life estate in real property. I spent approximately three and one-half hours on this matter.

During my second and third years of law school, I helped to establish a pro bono program for my law school. Myself and a handful of other students came up with the idea as part of an internship course we were taking at the time. We then formed an ad hoc committee to look into the idea and to work on the development of a program. We later approached the faculty, first with a proposal for a mandatory program, and then with a proposal for a voluntary one, which passed. We started the program with Carl Poirot, of San Diego Volunteer Lawyers. I was the student leader in these efforts, serving on the student/faculty committee and also as the student liaison to the faculty. The Pro Bono Honors Program at California Western, which began during my second year of law school, has now tripled in size.

During the time I was President of the Young Lawyer's Section of the Escambia-Santa Rosa Bar Association, I was actively involved in a Bar-sponsored program called "Christmas-In-January, in which local young lawyers collected donations merchandise (monetary donations were also accepted and put towards the purchase of merchandise) from area businesses to present to the disadvantaged youth in our community, each year in January. My involvement in this project was extensive, and included approximately forty hours over a three year period from 1994-1997.

I have prepared employment policies and presented training workshops for Pensacola Habitat for Humanity and ARC- Gateway (f/k/a Association For Retarded Citizens) at no cost to these organizations. This work involved approximately eight hours time.

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, Florida has a judicial nominating commission (JNC) for each of its three districts, Northern, Middle, and Southern. My application was submitted to the JNC for the Northern District on March 13, 2003, and I was selected for an interview with the Commission on April 7, 2003 in Tallahassee, Florida. (Copies of the application were sent to all 58 members of Florida's Nominating Commission; however, the interview was solely before the members of the Northern District JNC.) My interview, which was the final interview of the day, lasted approximately 25-30 minutes. I was treated very well by the commission members and was not asked any questions about ideology or any public policy or political issue that could come before me for consideration as a district court judge. Following the interviews, I was selected by the commission, along with four others, as a potential nominee for the position and all five names were submitted to the White House for consideration. Shortly thereafter, I was contacted by the White House Counsel's Office to schedule interviews with that office as well as with Senators Bob

Graham and Bill Nelson. These interviews were held in Washington on May 2, 2003. I felt these interviews went well and again I was not asked any questions about ideology or any public policy or political issue that could come before me for consideration as a district court judge. I received the call from White House Counsel's Office on June 9, 2003, informing me of the President's decision to consider me for the nomination. Thereafter, I prepared all of the necessary forms for the Department of Justice and Federal Bureau of Investigation. The background investigation was conducted and I was notified of my nomination on July 14, 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 authority of Federal judges is limited by and derived solely from the Constitution. A Federal judge's role is limited to the impartial application of the established rule of law, as set forth in the Constitution, federal statutes, and decisions of higher courts. This constitutional constraint demands respect for the separation of powers and deference to the prerogatives of each of the branches.

The judiciary, as the only non-elected, unaccountable branch of our federal government, should not be a vehicle to loosen firmly established jurisdictional principles. Decisions are made on grounds relating to the case-specific set of facts and controlling legal authority. Judges must strive to dissociate themselves from all personal preferences and public sentiment and approach each case on its individual merits to ensure an impartial decision. Any attempt to legislate from the bench is a departure from a judge's sworn duty to remain impartial.

Senator CORNYN. Thank you, Judge Rodgers, and thanks to each of you for being here and supporting Judge Rodgers on this important day. I could tell you from my experience, even though I have never been a Article III judge, I was a State district judge and a member of the Texas Supreme Court for a period of 13 years in my previous life, and it is important on occasions like this to have those who are near and dear to you here for support, and we are delighted to have you here.

At this time, Mr. Titus, I would be glad to hear any opening comments you might have to make.

STATEMENT OF ROGER W. TITUS, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF MARYLAND

Mr. TITUS. Thank you, Mr. Chairman. I first wanted to thank my Home State Senators Sarbanes and Mikulski for their very generous remarks. I thought I was at a funeral listening to me being praised.

Senator CORNYN. They were awfully nice, I noticed.

Mr. TITUS. But it's wonderful to have their support and encouragement as I go through this quest.

I don't have an opening statement, either, but I did want to remark on one thing that Senator Mikulski reported to you about me being an electrical engineering student, as by way of introducing my family—and by way of explaining to you how I've done my best to increase the population of the legal profession.

I was indeed an electrical engineering student at Johns Hopkins, struggling in that subject with my fellow electrical engineering student, Michael Bloomberg, who was my fraternity brother. And two things happened in 1961: I changed majors, to political science; and I eloped with the daughter of a lawyer. I don't recommend that as the way to meet your first lawyer—that's the first lawyer I ever knew. Since that time, however, I've worked hard to populate the legal profession, as you will hear from my introductions.

The woman I eloped with, Cathie Titus, is right here, my wife. My daughter Paula, a lawyer, is with me. Her husband Felix is not able to be here today. He's not a lawyer, but he just was appointed by Governor Ehrlich to the Trial Court Nominating Commission for Montgomery County to select judges.

My son Richard is here, also a lawyer. His wife Marlene is here, and she's also a lawyer. We have one person who kept the whole group honest, my son Mark, who's an educator. He's here.

I have four grandchildren. They're not in law school yet. My oldest grandson is Benjamin Laboy; his sister Grace Laboy; my granddaughter Emily Titus; and my grandson Drew Titus.

I also have a nephew who's attending American University who's here, Kevin Gaughan. And lo and behold, I have a dentist of mine that retired. And I guess he has nothing better to do. He's shown up here today to watch me. This is the man who's known my mouth in special ways—Melvin Slann is in the back there.

Senator CORNYN. That is dedication and friendship personified.

Mr. TITUS. And finally, I wanted you to know that seated in the audience is Reggie Felton, who is a member of the Board of Education of Montgomery County, which is one of my clients.

And I have nothing further to say.

[The biographical information of Mr. Titus follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Roger Warren Titus

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

Residence: Bethesda, MD

**Office: Venable, Baetjer and Howard, LLP
One Church Street, Suite 500,
Rockville, MD 20850**

3. Date and place of birth.

December 16, 1941, Washington, DC

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

I am married to Catherine G. Titus, who is a housewife. Her maiden name is Catherine M. Gaughen.

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

**Johns Hopkins University, 1959-1963, B.A., February 1963
Georgetown University Law Center, 1963-1966, J.D., February 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.

**Claims Adjuster, Allstate Insurance Company, 7411 Riggs Road, Adelphi, MD 20783,
1963-1966**

Special Legal Assistant, City of Rockville, Rockville, MD, February 1966-June 1966

Assistant City Attorney, City of Rockville, Rockville, MD, 1966-1970

City Attorney, City of Rockville, Rockville, MD, 1970-1982

Partner, Titus & Glasgow, Rockville, MD, 1972-1988

Partner, Venable, Baetjer and Howard, LLP, Rockville, MD, 1988-2003

Maryland State Bar Association, member, 1966 to present; Secretary, 1984-87; President, 1988-89; member, Board of Governors, 1974-75, 1980-82, 1990-92.

Maryland Municipal Attorneys Association, 1967 to present; Vice President, 1974-75, President 1975.

Special Assistant, Maryland State Board of Law Examiners, 1969-1972

Adjunct Professor, Georgetown University Law Center, 1972-1978

Member, Trial Courts Judicial Nominating Commission for Montgomery County, Maryland, 1979-1991

Maryland Bar Foundation, Inc., Fellow, approximately 1980 to present, Vice President, 1990-91; President, 1991-1993

Member, Board of Trustees of Suburban Hospital Healthcare System, Inc., 1986-2000, (Chairman, 1997-2000)

Member, Standing Committee on Rules of Practice and Procedure of the Court of Appeals of Maryland, 1989 to present

American Judicature Society, member, Board of Directors, 1995 to 2001

Member, Appellate Judicial Nominating Commission of Maryland, 1991-1999

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.

In 1986, I was elected a fellow of the American College of Trial Lawyers.

In 1998, I was elected to membership in the American Academy of Appellate Lawyers.

I am a life fellow of both the Maryland Bar Foundation and the American Bar Foundation.

I was the first invitee to the Fourth Circuit Judicial Conference of Judge Peter J. Messitte, and have now become a permanent member.

In 1999, I was one of seventeen living lawyers to be honored by the Bar Association of Montgomery County by being awarded the Century of Service Award, an award honoring the best attorneys and judges of the twentieth century in terms of legal excellence and service to the bar and community.

In 2001, I was awarded the Leadership in Law Award of *The Daily Record*, an award designed to honor those members of the legal profession who have demonstrated legal excellence, mentoring and service to the community.

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.

Bar Association of Montgomery County, Maryland, 1966 to present; member, Executive Committee, 1983-84.

Maryland State Bar Association, member, 1966 to present; Secretary, 1984-87; President, 1988-89; member, Board of Governors, 1974-75, 1980-82, 1990-92.

American Bar Association, member 1966 to present; member, House of Delegates 1988-1995.

Maryland Municipal Attorneys Association, 1967 to present; Vice President, 1974-75, President 1975.

National Conference of Bar Presidents, 1987 to present; member, Executive Council, 1990-93.

Fourth Circuit Judicial Conference, member, approximately 1997-present.

American Judicature Society, member, Board of Directors, 1995 to 2001.

Maryland Bar Foundation, Inc., Fellow, approximately 1980 to present, Vice President, 1990-91; President, 1991-1993.

American Bar Foundation, Fellow, approximately 1985 to present.

American College of Trial Lawyers, Fellow, 1986 to present.

American Academy of Appellate Lawyers, member, 1998 to present.

Montgomery County Chapter, American Inns of Court, member, approximately 1985 to present; Treasurer, approximately 1993 to present.

Merit Selection Panel for the Selection of Magistrate Judges, United States District Court for the District of Maryland, approximately 1994-1998.

Standing Committee on Rules of Practice and Procedure of the Court of Appeals of Maryland, 1989 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.

National Association of Railroad Passengers, Washington, DC (lobbies Congress on behalf of railroad passengers)

Property Owners' Association of Deep Creek Lake, Inc. (lobbies local and State officials)

Deep Creek Sailing Association, Inc., Oakland, MD

City Tavern Club, Washington, DC

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.

Court of Appeals of Maryland, 1966
United States District Court for the District of Maryland, 1966
United States Court of Appeals for the Fourth Circuit, 1966
United States District Court for the District of Columbia, 1966
United States Court of Appeals for the District of Columbia, 1966
Supreme Court of the United States, 1970

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.

"On Professionalism Today," *Maryland Bar Journal*, January/February, 1989

"Does the Court of Appeals of Maryland Have a Sense of Humor?," speech before the Lawyers' Roundtable, February 28, 2000

"Mr. Eldridge, Enough is Enough," *Montgomery Gazette*, October 25, 2002

"The Role of Bar Associations in the Democratic Process in Latin America," Speech before the Inter-American Bar Foundation Seminar, San Salvador, El Salvador, March 5, 1993

Course materials, seminar on constitutional litigation, Georgetown University Law Center, 1972-1978

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

My health is excellent, and the date of my last physical examination was in May, 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 elective public office.

Assistant City Attorney, City of Rockville, Maryland, 1966-1970 (appointed)

Special Assistant, Maryland State Board of Law Examiners, 1969-1972 (appointed)

City Attorney of Rockville, Maryland, 1970-1982 (appointed)

Member, Trial Courts Judicial Nominating Commission for Montgomery County, Maryland, 1979-1991 (elected)

Member, Appellate Judicial Nominating Commission of Maryland, 1991-1999 (elected)

Member, Standing Committee on Rules of Practice and Procedure of the Court of Appeals of Maryland, 1989 to present (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;

I did not serve as a clerk to a judge.

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

In 1967, while serving in a part-time capacity as an Assistant City Attorney of Rockville, I established a private law practice at 255 N. Washington Street, Rockville, MD 20850, and was joined five years later by Paul T. Glasgow with whom I practiced until the merger of our practice into Venable, Baetjer and Howard, LLP in 1988.

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;

From 1972 to 1988, I was partner in Titus & Glasgow, 255 N. Washington Street, Rockville, MD 20850.

From 1988 to the present, I have been a partner of Venable, Baetjer and Howard, LLP, One Church Street, Rockville, MD 20850. I have been a partner since joining the firm, and am the partner in charge of the Montgomery County, Maryland, office. I am also a member of the Management Board of the firm.

- 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 been rather broad in scope, and has involved significant involvement in state and local government law, general litigation, constitutional litigation, complex commercial litigation, and appellate practice.

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

I have not adopted a specialty as such, but the overwhelming majority of my practice is in complex litigation, mostly civil, and appellate litigation. My typical clients are The Board of Education of Montgomery County, Howard Hughes Medical Institute, Igen International, Inc., Circuit City Stores, Inc., and the Montgomery County Government.

- 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 appear in court regularly, and have done so since the beginning of my legal career.

2. What percentage of these appearances was in:
(a) federal courts;

10%

- (b) state courts of record;

90%

- c) other courts.

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

95%

- (b) criminal.

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 maintained a record of the number of cases that I have tried, but I have been an active litigator for 37 years, and have tried hundreds of cases and have conducted numerous appeals in state and federal courts.

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

10%

(b) 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.

In Re Legislative Districting of State, 271 Md. 320, 317 A.2d 477 (1974). The Maryland Constitution was amended in 1970 in order to establish a process for legislative districting of the state legislature. The provision required that in establishing the boundaries of legislative districts, a plan would be prepared by the governor, for review and approval or replacement by the legislature. The plan was required, among others, to give "due regard to natural boundaries and the boundaries of political subdivisions." The provision also gave original jurisdiction to Maryland's highest court, the Court of Appeals of Maryland, to hear such controversies. In 1973, I filed the first case in the history of the State of Maryland to invoke the court's original jurisdiction under this provision, and my case was later joined by numerous other cases that were all heard together. My case was filed on behalf of the City of Rockville and its officials when I

was City Attorney, and attacked the legislative districting plan that divided the City of Rockville between two legislative districts. The Court of Appeals assigned the matter to its retired Chief Judge Hall Hammond (now deceased) to act as a special master and make a report and recommendation to the Court of Appeals. After submission of the report of the special master and oral arguments before the Court of Appeals, it struck down the legislative districting plan due to a defective hearing notice, and adopted its own plan which, in the case of the City of Rockville, restored it to a single legislative district. The Court of Appeals of Maryland consists of seven judges, and the seven judges who heard this case were Robert C. Murphy, Chief Judge (deceased), Judge Frederick J. Singley, Jr. (deceased), Judge Marvin H. Smith (retired), Judge J. Dudley Digges (deceased), Judge Irving A. Levine (deceased), Judge Charles E. Orth, Jr. (deceased), and Judge James C. Morton, Jr. (deceased). The following is a listing of co-counsel and principal counsel for each of the parties:

George W. Liebmann, Esq., 8 West Hamilton Street, Baltimore, MD 21201; (410) 752-5887 (counsel for petitioner in related case)

Robert W. Shook, Esq., 1580 Eton Way, Crofton, MD 21114; (410) 721-4829 (co-counsel for petitioner in related case)

James C. Chapin, Esq., later a judge of the Circuit Court for Montgomery County, Maryland, now deceased (co-counsel for petitioner in related case)

Hon. Walter E. Black, Senior Judge, United States District Court for the District of Maryland, Garmatz Federal Courthouse, 101 W. Lombard Street, Baltimore, MD 21201; (410) 962-0107 (co-counsel for petitioner in related case)

Robert H. Levan, Esq., Suite 230, 6325 Woodside Court, Columbia, MD 21046; (301) 310-9500 (co-counsel for petitioner in related case)

John F. Somerville, Jr., Esq., (deceased) (co-counsel for petitioner in related case)

T. Joseph Touhey, Esq., 791 Aquahart Road, Glen Burnie, MD 21061; (410) 768-1880 (co-counsel for petitioner in related case)

John E. Bohlen, Jr., Esq. (deceased) (co-counsel for petitioner in related case)

K. King Burnett, Esq., 115 Broad Street, P.O. Box 910, Salisbury, MD 21803; (410) 742-3176 (co-counsel for petitioner in related case)

Frank G. Perrin, Esq., (deceased) (co-counsel for petitioner in related case)

J. Joseph Curran, Jr., Esq., Attorney General of Maryland, 200 St. Paul Place, Baltimore, MD 21201; (410) 576-6316 (co-counsel for petitioner in related case)

Victor H. Laws, Esq., (deceased) (co-counsel for petitioner in related case)

Thomas S. Simpkins, Esq. (deceased) (co-counsel for petitioner in related case)

Howard J. Needle, Esq., 1321 Harden Lane, Baltimore, MD 21208; (410) 484-8701 (co-counsel for petitioner in related case)

William F. Mosner, Esq., (deceased) (co-counsel for petitioner in related case)

Alfred L. Scanlan, Esq., (deceased) (co-counsel for petitioner in related case)

Ralph J. Moore, Jr., Esq., 7009 West Greenvale Parkway, Chevy Chase, MD 20815; (202) 828-2070 (co-counsel for petitioner in related case)

Francis B. Burch, Esq., Attorney General, (deceased) (opposing counsel)

Henry R. Lord, Esq., Piper Rudnick, LLP, 6225 Smith Avenue, Baltimore, MD 21209; (410) 580-4198 (opposing counsel)

George A. Nilsson, Esq., Piper Rudnick, LLP, 6225 Smith Avenue, Baltimore, MD 21209; (410) 580-4227 (opposing counsel)

K. Donald Proctor, Esq., Suite 505, 102 Pennsylvania Avenue, Towson, MD 21204; (410) 823-2258 (opposing counsel)

State of Maryland v. Paul Vance, Jr., District Court of Maryland No. 704615 D2, (1993). In this case, the son of the then Superintendent Schools for Montgomery County was charged, together with several other defendants, with gang rape of a young woman. Because of the status of the defendant's father, the case achieved a high level of publicity. Working with my co-counsel, Thomas L. Heeney, we thoroughly investigated the charges and learned that they were without merit. We first filed a motion to

preclude the police department from making any further prejudicial out-of-court statements concerning the case, and while we did not prevail on the motion, it had the indirect effect of terminating further public discussion of the case by the police. Subsequently, criticism of the police investigation of the matter escalated, and not only were the charges dismissed voluntarily by the State's Attorney for Montgomery County, but also the handling of the case by the police department became the subject of an investigatory proceeding presided over by Judge Roslyn B. Bell, a retired judge of the Court of Special Appeals of Maryland. Judge Steven Johnson presided over the proceedings in the case. The following is a listing of co-counsel and principal counsel for each of the parties:

Thomas L. Heeney, Esq., Adams Law Center, 29 Wood Lane, Rockville, MD 20850; (301) 762-8545 (co-counsel)

Hon. Andrew L. Sonner, then State's Attorney for Montgomery County, and now a Judge of the Court of Special Appeals of Maryland, Court of Special Appeals of Maryland, Montgomery County Judicial Center, 50 Maryland Avenue, Room 302, Rockville, MD 20850; (240) 777-9320 (opposing counsel)

Thomas M. Tamm, Esq., then an Assistant State's Attorney and now a Trial Attorney in the Capital Case Unit of the Criminal Division of the United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530; (202) 353-9728 (opposing counsel)

Anne Renee Colbert v. Isiah Leggett, Circuit Court for Montgomery County, Maryland, Civil No. 60482. In 1990, the plaintiff, a former administrative assistant in the office of Montgomery County, Maryland County Councilmember Isiah Leggett, filed a suit against him asserting tort claims arising out of actions by Mr. Leggett whereby she claimed that she had been made his "private sex slave." Mr. Leggett was the first African-American to be elected to the County Council for Montgomery County, and the case generated wide public interest. The case was tried in January and February of 1992 before Judge Paul H. Weinstein and a jury. After almost five weeks of trial, the jury, after barely more than an hour of deliberation, returned a verdict in favor of Mr. Leggett. Mr. Leggett continued on the County Council and served for a total of 16 years. He is currently the chairman of the Democratic Party of the State of Maryland. My co-counsel and the principal counsel for each of the other parties are as follows:

Paula Titus Laboy, Esq., 8222 Stone Trail Drive, Bethesda, MD 20817; (301) 365-3818 (co-counsel and my daughter)

Gregory L. Laubach, Esq., Marriott ExecuStay, 7595 Rickenbacker Drive, Gaithersburg, MD 20879; (240) 386-2335 (co-counsel)

Norman G. Schneider, Esq., 1025 Vermont Avenue, NW, Washington,
DC 20005; (202) 347-5141 (opposing counsel)

Board of Education of Montgomery County v. Charles Bernardo, Equity No. 65352, in the Circuit Court for Montgomery County, Maryland. In the spring of 1978, the Board of Education of Montgomery County purported to reappoint the defendant, the incumbent superintendent of schools for Montgomery County, to a second four-year term, sixteen months prior to the expiration of his first term. It apparently did so out of fear that a change in the control of the School Board in the November elections might result in him not being reappointed. The appointment was made under a statute providing for appointment between February and July of the year in which the term of the outgoing superintendent expires. After the November 1978 election, I was consulted by the Board of Education with respect to its legal options as to the reappointment of the superintendent. On behalf of the Board of Education I filed a declaratory judgment action against Mr. Bernardo seeking a declaration that the earlier action by the Board of Education was unlawful and premature. The case was heard by then Circuit Court Judge John F. McAuliffe (now a retired judge of the Court of Appeals of Maryland). On December 13, 1978, Judge McAuliffe entered a declaratory judgment that the reappointment by the outgoing School Board was premature, and that his reappointment was null and void. The identity of co-counsel and principal counsel for each of the other parties is as follows:

Charles A. Reese, Esq., Reese and Carney, LLP, 10715 Charter Drive,
Columbia, MD 21044; (301) 621-5255 (co-counsel)

Hon. M. Stephen Derby, now a bankruptcy judge of the United States
District Court for the District of Maryland, Garmatz Federal
Courthouse, 101 W. Lombard Street, Room 9442, Baltimore, MD 21201;
(410) 962-7802 (co-counsel)

Joseph D'Erasmus, Esq., 103 N. Adams Street, Rockville, MD 20850;
(301) 762-8865 (opposing counsel)

M. Michael Cramer, Esq. (retired), 4 Whisperwood Court, Rockville,
MD 20852; (301) 530-6406 (opposing counsel)

ACandS, Inc., et al. v. Godwin, et al., 667 A.2d 116 (Md. 1995). The Circuit Court for Baltimore City entered an order consolidating approximately 8,000 wrongful death and personal injury actions for a consolidated trial of common issues and with the actual trial of six illustrative plaintiffs, three picked by each side. The case was tried over a period of six months, and resulted in findings of both liability and punitive damages liability against the number of asbestos manufacturers and a determination of a

“multiple” of compensatory damages that would be awarded against each of the defendants in future “mini-trials” involving the remaining plaintiffs. I was engaged by one of the defendants, Pittsburg Corning Corporation, to act as lead appellate counsel for all parties to challenge the decision of the lower court. Of greatest concern to the defendants was the determination of liability for punitive damages and the imposition of an automatic multiplier compensatory damages to apply in future mini-trials. I led the negotiations of the case through the prehearing conference process of the appeal, and was able to arrange for the case to bypass Maryland’s intermediate court, the Court of Special Appeals of Maryland, and be heard directly by the Court of Appeals in an extraordinary and lengthy argument before that court. In a unanimous opinion, the Court of Appeals of Maryland found that the necessary evidence to support an award of punitive damages was wanting, thus nullifying any punitive damages liability of any of the defendants to any of the plaintiffs, and that it need not reach the issue of the constitutionality of the “multiplier” determined by the lower court. Had the decision been affirmed, it undoubtedly would have forced all of the defendants into bankruptcy. A Petition for Writ of Certiorari was filed by the appellees in the Supreme Court of the United States one day after the due date, and was returned by the Clerk’s Office as untimely. The case was heard by the Court of Appeals of Maryland whose members, at the time of the decision, consisted of Chief Judge Robert C. Murphy (deceased), Judge John Eldridge, Judge Lawrence Rodowsky, Judge Howard Chasanow, Judge Robert Karwacki, Judge (now Chief Judge) Robert Bell, and Judge Irma Raker. The identity of co-counsel and principal counsel for each of the other parties is as follows:

Patrick L. Clancy, Esq., Venable, Baetjer and Howard, LLP, One Church Street, Suite 500, Rockville, MD 20850; (301) 217-5612 (co-counsel)

Paula Titus Laboy, Esq., 8222 Stone Trail Drive, Bethesda, MD 20817; (301) 365-3818 (co-counsel and my daughter)

Gerry Ellen Hoban, Esq. and Scott Patrick Burns, Esq., Tydings & Rosenberg, LLP, 100 East Pratt Street, Baltimore, MD 21202; (410) 752-9700 (co-counsel)

William D. Harvard, Esq., Evert & Weathersby, LLC, 200 Cleveland Road, Bogart, GA 30622; (706) 583-8665 (co-counsel)

R. Cornelius Danaher, Esq. and Frank H. Santoro, Esq., Danaher, Tedford, Lagnese & Neal, P.C., Capitol Place, 21 Oak Street, Hartford, CT 06106; (860) 247-3666 (co-counsel)

Louis G. Close, Jr., Esq., Warren N. Weaver, Esq., Fenton L. Martin, Esq., Gardner M. Duvall, Esq., and B. Ford Davis, Esq., Whiteford, Taylor & Preston, LLP, 7 St. Paul Street, Suite 1400, Baltimore, MD 21202; (410) 347-8700 (co-counsel)

James D. Miller, Esq., King & Spalding, 1730 Pennsylvania Avenue, NW, Washington, DC 20006; (202) 737-0500 (co-counsel)

Patricia J. Kasputys, Esq., Peter G. Angelos, Esq., Kenneth D. Pack, Esq., David L. Palmer, Esq., and Thomas P. Kelly, Esq., Law Offices of Peter G. Angelos, One Charles Center, 100 North Charles Street, Baltimore, MD 21201; (410) 649-2000 (co-counsel)

Ronald L. Motley, Esq., Joseph F. Rice, Esq., and Susan Nial, Esq., Motley Rice, LLC, 28 Bridgeside Boulevard, Mt. Pleasant, SC 29465; (843) 216-9000 (opposing counsel).

John J. McConnell, Jr., Esq. and Robert J. McConnell, Esq., Ness, Motley, P.A., 321 South Main Street, Providence, RI 02903; (401) 457-7700 (opposing counsel)

F. Ford Loker, Jr., Esq., Church, Loker & Silver, P.A., Suite 600, 2 North Charles Street, Baltimore, MD 21201; (410) 539-3900 (counsel for amicus curiae)

Giant Food, Inc. v. Department of Labor, Licensing and Regulation, et al., 356 Md. 180, 738 A.2d 856 (1999). Giant Food, Inc., had a three-week strike of warehouse and delivery personnel, and while the workers were on strike they applied for, and were granted, unemployment benefits by the State of Maryland Department of Labor, Licensing and Regulation following an extensive administrative hearing. The decision was appealed to the Circuit Court for Montgomery County, which affirmed. I was then engaged as appellate counsel for Giant Food, Inc. to pursue an appeal. The decision of the Circuit Court was affirmed by the Court of Special Appeals, and I was successful in then obtaining review by Maryland's highest court, the Court of Appeals of Maryland. In a unanimous decision, the Court of Appeals of Maryland reversed the Court of Special Appeals, the Circuit Court, and the administrative agency, ruling that they had all erred in determining that the Maryland statute involved authorized payment of unemployment benefits during a strike. As a result of the decision, 1,500 workers were required to return unemployment benefits obtained by them. The decision was rendered by the Court of Appeals of Maryland which, at the time of the decision, consisted of the following judges: Chief Judge Robert Bell, Judge John Eldridge, Judge Lawrence Rodowsky, Judge Irma Raker, Judge Alan Wilner, Judge Dale Cathell, and Judge Robert Karwacki (retired). The identity of co-counsel and opposing

counsel is as follows:

Mitchell Y. Mirviss, Esq., Venable, Baetjer and Howard, LLP, 1800 Mercantile Bank & Trust Bldg, 2 Hopkins Plaza, Baltimore, MD 21201; (410) 244-7412, (co-counsel)

John A. Roberts, Esq., Venable, Baetjer and Howard, LLP, 1800 Mercantile Bank & Trust Bldg, 2 Hopkins Plaza, Baltimore, MD 21201; (410) 244-7782, (co-counsel)

Harry W. Burton, Esq., and Francis X. Coonelly, Esq., Morgan, Lewis & Bockius, LLP, 1800 M Street, N.W., Washington, D.C. 20036-5869 (co-counsel)

J. Joseph Curran, Jr., Esq., Attorney General, Andrew H. Baida, Esquire, Assistant Attorney General, 200 St. Paul Place, 20th Floor, Baltimore, MD 21202; (410) 576-6311 (opposing counsel)

Matthew W. Boyle, Esq., Staff Attorney, 500 North Calvert Street, Suite 406, Baltimore, MD 21202; (410) 230-6134 (opposing counsel)

John R. Mooney, Esq., Mark J. Murphy, Esq., Mooney, Green, Baker, Gibson and Saindon, P.C., 700 14th Street, N.W., Suite 1100, Washington, D.C. 20005; (202) 783-0010 (opposing counsel)

Jonathan Axelrod, Esq., Barbara Kraft, Esquire, Beins, Bodley, Axelrod, Kraft, P.C., 1717 Massachusetts Avenue, N.W., Suite 704, Washington, D.C. 20036-2001; (202) 328-7222 (opposing counsel)

Daniel G. Orfield, Esq., 4550 Connecticut Avenue, N.W., Washington, DC 20008; (202) 966-0637 (opposing counsel)

Dianna M. Louis, Esq., Carey R. Butsavage, Esq., and Marc A. Stefan, Esq., Butsavage & Associates, 1920 L Street, N.W., Suite 510, Washington, D.C. 20036; (202) 861-9700 (opposing counsel)

Rudolph L. Rose, Esq., David A. Skomba, Esq., and Anthony G. Lardieri, Esq., Semmes, Bowen & Semmes, 250 West Pratt Street, Baltimore, MD 21201; (410) 539-5040 (counsel for amicus curiae)

Silver Hill Station Limited Partnership v. HSA/Wexford Bancgroup, LLC, 158 F.Supp.2d 631 (2001). This was an action brought by a unsuccessful applicant for the refinancing of a shopping center who sued the defendant, a “conduit” lender, for negligent processing of its loan. The plaintiff sought millions of dollars in damages that it claimed that it had sustained as a result of higher interest paid on its above-market mortgage loan, and for other losses. The case involved extensive discovery, including out-of-state depositions. An extensive summary judgment motion was prepared and filed, and the matter was the subject of lengthy arguments before presiding Judge Peter Messitte of the United States District Court for the District of Maryland. Judge Messitte then authored a published opinion ruling in favor of the defendants, and no appeal was taken. The identity of co-counsel and opposing counsel is as follows:

David Warner, Esq., Venable, Baetjer and Howard, LLP, 1201 New York Avenue, NW, Suite 1000, Washington, DC 20005; (202) 216-8155 (co-counsel)

Mark M. Dumler, Esq., Parker, Dumler & Kiely, LLP, 36 South Charles Street, Suite 2200, Charles Center South, Baltimore, Maryland 21201; (410) 625-9330 (opposing counsel)

Koenick v. Felton, 973 F.Supp. 522 (D. Md. 1997), *aff'd*, 190 F.3d 259 (4th Cir. 1999), *cert. denied*, 528 U.S. 1118, 120 S. Ct. 938, 145 L.Ed.2d 816 (2000). This was an action brought by a teacher against the Board of Education of Montgomery County under 42 U.S.C. § 1983 seeking a declaratory judgment that a Maryland statute, enacted 135 years earlier, which closed all public schools in the state from the Friday before through the Monday after Easter, violated the Establishment Clause. The teacher was aided in her litigation by attorneys assigned to the case by the American Civil Liberties Union which took over the case, that had originally been filed by the teacher, pro se. The case was argued before Judge Alexander Williams of the United States District of Court for the District of Maryland who, in a written opinion, upheld the statute. Ms. Koenick then appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed. The members of the panel of the United States Court of Appeals for the Fourth Circuit here in the case were Judge Ervin (deceased), Judge Diana Motz and Judge Butzner. The identity of co-counsel and opposing counsel is as follows:

Kevin Collins, Esq., Venable, Baetjer and Howard, LLP, 1201 New York Avenue, NW, Suite 1000, Washington, DC 20005; (202) 962-4941 (co-counsel)

Mitchell Y. Mirviss, Esq., Venable, Baetjer and Howard, LLP, 1800 Mercantile Bank & Trust Bldg, 2 Hopkins Plaza, Baltimore, MD 21201; (410) 244-7412, (co-counsel)

Eugene R. Fidell, Esq., Feldesman, Tucker, Leifer, Fidell & Bank LLP,
2001 L Street, NW, Washington, DC 20036; (202) 466-8960 (opposing
counsel)

Dwight H. Sullivan, Esq., American Civil Liberties Union of Maryland,
2219 St. Paul Street, Baltimore, MD 21218; (410) 889-8555 (opposing
counsel)

Mayor and City Council of Baltimore v. The New Pulaski Company Limited Partnership, 112 Md.App. 218, 684 A.2d 888 (1996). In this case, my client, the owner of a municipal waste incinerator in the City of Baltimore, announced plans to replace it with a new, state of the art waste to energy incinerator, after which there was a public outcry and opposition to the project. In response, the City Council of Baltimore passed an ordinance purporting to impose a moratorium on the construction or reconstruction of municipal waste incinerators. I filed a declaratory judgment action in the Circuit Court for Baltimore County, Maryland against the City seeking a declaration that the moratorium ordinance was preempted by state law. After hearing extensive arguments, Judge J. William Hinkel of the Circuit Court for Baltimore County (now retired) entered a declaratory judgment in favor of my client. The City appealed, and the Court of Special Appeals of Maryland affirmed, holding that the City's action was preempted by state law. The three-judge panel of the Court of Special Appeals consisted of the following judges: Arie Davis, Glenn Harrell (now a judge of the Court of Appeals of Maryland), and James Eyer. The identity of co-counsel and opposing counsel is as follows:

Kevin Collins, Esq., Venable, Baetjer and Howard, LLP, 1201 New York
Avenue, NW, Suite 1000, Washington, DC 20005; (202) 962-4941 (co-counsel)

Kathryn Kovacs, Esq., 4007 Kennedy Street, Hyattsville, MD 20781;
(202) 514-4010 (opposing counsel)

Neal Janey, Esq., 3801 Canterbury Road, Baltimore, MD 21218;
(410) 542-4510 (opposing counsel)

Burton Levin, Esq., 118 Hackamore Road, Edwards, CO 81632;
(970) 926-8915 (opposing counsel)

Montgomery County Education Association, Inc. v. Board of Education of Montgomery County, 311 Md. 303, 534 A.2d 980 (1987). Under Maryland law, a Board of Education is required to negotiate with the designated representative of a collective bargaining unit concerning "wages, hours and other working conditions." The Montgomery County Education Association, representing the school system's teachers, requested negotiations concerning, among others, the school calendar and the salary effect of

reclassification of positions. The Board of Education declined to do so, citing inherent management prerogatives and the difficulties that would occur if it were required to bargain the school calendar with multiple different unions with potentially inconsistent results. The controversy was initially heard by Judge William M. Cave (retired) of the Circuit Court for Montgomery County, who ruled in favor of the Board of Education. The Court of Special Appeals affirmed in part and reversed in part. The case was then reviewed by the Court of Appeals of Maryland, which held that the two subjects at issue could not lawfully be bargained. In an opinion for the court, Associate Judge John Eldridge ruled that under Maryland law, there could be no "discretionary" subjects of bargaining, and that all subjects were either mandatory or prohibited, and that the two subjects at issue in the case were both prohibited. The members of the Court of Appeals at the time of the decision were Chief Judge Robert Murphy (deceased), Judge John Eldridge, Judge Harry Cole, Judge Lawrence Rodowsky, Judge James F. Couch, Jr. (deceased) and Judge John F. McAuliffe (retired). The identity of co-counsel and opposing counsel is as follows:

James R. Whattam, Esq. and Walter S. Levin, Esq., 140 Main Street,
Annapolis, MD 21401; (410) 263-6600 (opposing counsel)

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.)

My most significant legal activities, other than the conduct of actual litigation or appeals, has consisted of public service legal activities, including elected service as a member of Nominating Commissions (see question 16 above), service on at least five occasions as a member of a Merit Selection Panel of the United States District Court of Maryland for the selection of magistrate judges, and 14 years of service as a member of the Standing Committee on Rules of Practice and Procedure of the Court of Appeals of Maryland (the "Rules Committee"). While on the Rules Committee, I have chaired its Evidence, Appellate, Management of Litigation, and Form Interrogatories Subcommittees, and have served as a member of the Attorneys Subcommittee and the General Provisions Subcommittee.

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 a partner in Venable, Baetjer and Howard, LLP, and have a capital account in the firm which is shown on the attached financial statement which secures a capital account loan made to me by Mercantile Bank & Trust Company which is also disclosed. Upon withdrawal as a partner of my firm, my capital account is required to be distributed to me, after payment of the loan balance due to Mercantile Bank & Trust Company. I am required to be repaid my capital account over a period of time, in the discretion of the firm's management board, in no less than 5 years nor more than 10 years in periodic installments. It has, however, been the practice of my firm in the past to accelerate the payment of a capital account to a partner who withdraws to become a judge.

In addition, I am entitled to a unfunded retirement benefit from my firm, the amount of which is approximately 47% of the amount distributed or distributable to me for the five full calendar years prior to the year of my retirement from the firm.

There are no other financial interests of which I am aware that I expect to derive from previous business relationships, professional services, firm memberships, former employees, clients, or customers.

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.

With respect to cases in which Venable, Baetjer and Howard, LLP, is acting as counsel for any party, I will not participate in any case so long as there are any financial obligations of the firm to me, nor will I participate in any case in which my former firm represents a client in any matter that was pending or threatened at the time of my appointment. I will recuse myself from participating in any case involving any partner

or associate of the firm with whom I have had a close personal relationship during my tenure with the firm. Finally, I will comply with the provisions of § 455 of Title 28 of the United States Code.

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 such plans.

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 the Ethics in Government Act of 1978 financial disclosure report is attached to this questionnaire.

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

The completed financial net worth statement is attached.

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

No

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I was engaged as volunteer counsel by Mobile Medical Care, Inc. when it sought to establish a headquarters in a home on Old Georgetown Road in Bethesda, Maryland, near Suburban Hospital. Mobile Medical Care provides free medical services to poor and homeless persons. In order to use the structure for a headquarters, it was necessary for Mobile Medical Care to file an application for a special exception before the County Board of Appeals for Montgomery County. The application was met with vigorous opposition by area civic associations. The matter was referred to hearing examiner who conducted a lengthy hearing and recommended that the application be denied. I then requested oral argument before the County Board of Appeals, and was able to convince it, by a vote of 4-1, to approve the application. As a result of approval of the application, Mobile Medical Care has now been able to establish a headquarters close to a hospital, and has been able to expand its provision of medical services to the poor and disadvantaged. The case involved the expenditure of approximately \$30,000.00 of free legal time.

In addition, I have worked, within my firm, to encourage others to engage in pro bono legal services. As a member of the Standing Committee on Rules of Practice and Procedure of the Court of Appeals of Maryland, I was instrumental in securing approval by the court of guidelines for legal representation of minors in proceedings involving termination of parental rights that have led to significant improvements in the quality of legal services provided in such proceedings.

Finally, I have devoted many hundreds of hours in my bar association activities and as a member of the Standing Committee on Rules of Practice and Procedure of the Court of Appeals of Maryland to improvements of the legal system.

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 Maryland which recommends candidates for nomination to the federal courts.

I expressed an interest in being nominated for a seat on the United States District Court for the District of Maryland in a letter addressed to Honorable Alberto Gonzales. Later, I was interviewed at the Office of the White House Counsel by a panel of three persons chaired by Deputy White Counsel David Leitch. I was also interviewed by agents of the Federal Bureau of Investigation and officials of the United States Department of Justice.

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 judiciary is one of three branches of government, and it is neither capable of, nor empowered to, perform executive or legislative functions. Judges must constrain themselves to the adjudication of actual cases and controversies brought before them by parties having a concrete interest in the outcome of a present, not a hypothetical, controversy. Cases must be decided on the basis of established precedents, thus giving stability and predictability to the law.

AO-10 Rev. 1/2002	FINANCIAL DISCLOSURE REPORT Calendar Year 2002	Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)
1. Person Reporting (Last name, First name, Middle initial) TITUS, ROGER W	2. Court or Organization U.S. DISTRICT COURT, MARYLAND	3. Date of Report 6/29/2003
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time) U.S. DISTRICT JUDGE-NOMINEE	5. Report Type (check appropriate type) <input checked="" type="radio"/> Nomination Date 6/18/2003 <input type="radio"/> Initial <input type="radio"/> Annual <input type="radio"/> Final	6. Reporting Period 1/1/2002 to 6/1/2003
7. Chambers or Office Address VENABLE, BAETJER & HOWARD, LLP ONE CHURCH STREET ROCKVILLE, MD 20850	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 filing instructions)
 NONE - (No reportable positions.)

	POSITION	NAME OF ORGANIZATION/ENTITY
1.	VICE PRESIDENT	PROPERTY OWNERS' ASSOCIATION OF DEEP CREEK LAKE, INC.
2.	TREASURER	MONTGOMERY COUNTY CHAPTER, AMERICAN INNS OF COURT
3.	PARTNER	VENABLE, BAETJER AND HOWARD, LLP

II. AGREEMENTS. (Reporting individual only; see pp. 14-16 of filing instructions)
 NONE - (No reportable agreements.)

	DATE	PARTIES AND TERMS
1.	1988	VENABLE, BAETJER AND HOWARD, LLP RETIREMENT PLAN- NO CONTROL; WILL ROLLOVER TO IRA
2.		VENABLE, BAETJER AND HOWARD, LLP PARTNERSHIP CAPITAL ACCOUNT-NO CONTROL; PAYABLE IN NOT LESS THAN 5 NOR MORE THAN 10 YEARS, BUT USUALLY ACCELERATED
3.		VENABLE, BAETJER AND HOWARD, LLP-UNFUNDED RETIREMENT BENEFIT-NO CONTROL; PAYABLE IN 1 YEAR FOLLOWING RETIREMENT

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 17-24 of filing instructions)
 NONE - (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1.	2003	VENABLE, BAETJER AND HOWARD, LLP	\$166,300.00
2.	2002	VENABLE, BAETJER AND HOWARD, LLP	\$667,835.00

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

NONE - (No reportable non-investment income.)

	<u>DATE</u>	<u>SOURCE AND TYPE</u>	<u>GROSS INCOME</u> <small>(yours, not spouse's)</small>
1.	2003	VENABLE, BAETJER AND HOWARD, LLP	\$166,300.00
2.	2002	VENABLE, BAETJER AND HOWARD, LLP	\$667,835.00
3.	2001	VENABLE, BAETJER AND HOWARD, LLP	\$662,415.00

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting TITUS, ROGER W	Date of Report 6/20/2003
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IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children. See pp. 25-27 of instructions.)

NONE - (No such reportable reimbursements.)

	<u>SOURCE</u>	<u>DESCRIPTION</u>
1.	EXEMPT	

V. GIFTS. (Includes those to spouse and dependent children. See pp. 28-31 of instructions.)

NONE - (No such reportable gifts.)

	<u>SOURCE</u>	<u>DESCRIPTION</u>	<u>VALUE</u>
1.	EXEMPT		

VI. LIABILITIES. (Includes those of spouse and dependent children. See pp. 32-34 of instructions.)

NONE - (No reportable liabilities.)

	<u>CREDITOR</u>	<u>DESCRIPTION</u>	<u>VALUE CODE</u>
1.			
2.			
3.			
4.			

FINANCIAL DISCLOSURE REPORT

Page 1 of 6

Name of Person Reporting TITUS, ROGER W	Date of Report 6/20/2003
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VII. INVESTMENTS and TRUSTS -- income, value, transactions (includes those of the spouse and dependent children. See pp. 34-37 of filing instructions.)

A. Description of Assets (including trust assets) Place "DC" after each asset exempt from prior disclosure	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amount Code 1 (A-F)	(2) Type (e.g. div. rent or inc.)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure			
						(2) Date Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)									
1. CAPITAL ACCOUNT, VENABLE, BAETJER AND HOWARD, LLP	E	Interest	N	U	EXEMPT				
2. BANK OF AMERICA ACCOUNTS	A	Interest	M	T	EXEMPT				
3. CITIBANK ACCOUNTS	A	Interest	J	T	EXEMPT				
4. MERRILL LYNCH BANK USA ACCOUNT	A	Interest	K	T	EXEMPT				
5. TRUST # 1	E	Interest	O	T	EXEMPT				
6. GDW COMMON STOCK	A	Dividend	K	T	EXEMPT				
7. HIFS COMMON STOCK	B	Dividend	M	T	EXEMPT				
8. SBC COMMON STOCK	B	Dividend	K	T	EXEMPT				
9. SEARS COMMON STOCK	A	Dividend	J	T	EXEMPT				
10. CMA TAX EXEMPT MUTUAL FUND	A	Dividend	L	T	EXEMPT				
11. PRWCX MUTUAL FUND	B	Dividend	L	T	EXEMPT				
12. PRSGX MUTUAL FUND	A	Dividend	L	T	EXEMPT				
13. TRVLX MUTUAL FUND	A	Dividend	L	T	EXEMPT				
14. SCUDDER TECHNOLOGY FUND A MUTUAL FUND	A	Distribution	J	T	EXEMPT				
15. HIFS COMMON STOCK IN IRA ACCOUNT	B	Dividend	L	T	EXEMPT				
16. MANU COMMON STOCK IN IRA	A	Dividend	J	T	EXEMPT				
17. BPUR COMMON STOCK IN IRA	A	Dividend	J	T	EXEMPT				

1. Income/Gain Codes: (See Columns B1 and D4)	A = \$1,000 or less F = \$50,001-\$100,000	B = \$1,001-\$2,500 G = \$100,001-\$1,000,000	C = \$2,501-\$5,000 H = \$1,000,001-\$5,000,000	D = \$5,001-\$15,000 I2 = More than \$5,000,000	E = \$15,001-\$50,000
2. Value Codes: (See Columns C1 and D3)	J = \$15,000 or less N = \$250,000-\$500,000 P3 = \$25,000,001-\$50,000,000	K = \$15,001-\$50,000 O = \$500,001-\$1,000,000	L = \$50,001-\$100,000 P1 = \$1,000,001-\$5,000,000 P4 = \$5,000,001-\$25,000,000	M = \$100,001-\$250,000 P2 = \$5,000,001-\$25,000,000	
3. Value Method Codes (See Column C2)	Q = Appraisal U = Book Value	R = Cost (Real Estate Only) V = Other	S = Assessment W = Estimated	T = Cash/Market	

FINANCIAL DISCLOSURE REPORT
Page 2 of 6

Name of Person Reporting
TIFUS, ROGER W

Date of Report
6/20/2003

VII. INVESTMENTS and TRUSTS - income, value, transactions (includes those of the spouse and dependent children. See pp. 24-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "X" after each asset exempt from prior disclosure	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amount Code 1 (A-H)	(2) Type (e.g. div. rent, or int.)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure			
						(2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
18. COEN COMMON STOCK IN IRA	A	Dividend	J	T	EXEMPT				
19. WSHEX MUTUAL FUND IN IRA	A	Dividend	K	T	EXEMPT				
20. PRRXX MUTUAL FUND IN IRA	D	Dividend	N	T	EXEMPT				
21. PRXX MUTUAL FUND IN IRA	C	Dividend	M	T	EXEMPT				
22. PRWCX MUTUAL FUND IN IRA	C	Dividend	M	T	EXEMPT				
23. TWCCX MUTUAL FUND IN IRA	A	Dividend	J	T	EXEMPT				
24. TWCEX MUTUAL FUND IN IRA	A	Dividend	K	T	EXEMPT				
25. TWCUX MUTUAL FUND IN IRA	A	Dividend	K	T	EXEMPT				
26. LVMTX MUTUAL FUND IN IRA	A	Dividend	L	T	EXEMPT				
27. VFVNX MUTUAL FUND IN IRA	A	Dividend	L	T	EXEMPT				
28. VANTAGEPOINT ASSET ALLOCATION MUTUAL FUND IN DEFERRED COMP	B	Dividend	L	T	EXEMPT				
29. VANTAGEPOINT GROWTH MUTUAL FUND IN DEFERRED COMP PLAN	B	Dividend	L	T	EXEMPT				
30. VANTAGEPOINT GROWTH & INCOME MUTUAL FUND IN DEFERRED COMP PL	B	Dividend	L	T	EXEMPT				
31. VT FIDELITY CONTRAFUND MUTUAL FUND IN DEFERRED COMP PLAN	B	Dividend	L	T	EXEMPT				
32. OAKMARK SELECT I MUTUAL FUND IN RETIREMENT PLAN	A	Dividend	K	T	EXEMPT				
33. MERCANTILE GROWTH & INCOME I MUTUAL FUND IN RETIREMENT PLAN	C	Dividend	M	T	EXEMPT				
34. BARCLAY'S GLOBAL INVESTORS LP MUTUAL FUND IN RETIREMENT PLAN	A	Dividend	M	T	EXEMPT				
35. PIMCO TOTAL RETURN MUTUAL FUND IN RETIREMENT PLAN	A	Dividend	M	T	EXEMPT				

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
(See Columns B1 and D-4) F = \$50,001-\$100,000 G = \$100,001-\$1,000,000 H1 = \$1,000,001-\$5,000,000 H2 = More than \$5,000,000

2. Value Codes: J = \$15,000 or less K = \$15,001-\$50,000 L = \$50,001-\$100,000 M = \$100,001-\$250,000
(See Columns C1 and D3) 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 Column C2) U = Book Value V = Other W = Estimated

FINANCIAL DISCLOSURE REPORT

Page 3 of 6

Name of Person Reporting TITUS, ROGER W	Date of Report 6/20/2003
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VII. INVESTMENTS and TRUSTS - income, value, transactions (includes those of the spouse and dependent children. See pp. 34-37 of filing instructions.)

A. Description of Assets (including trust assets) Place "00" 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)	(2)	(1)	(2)	(1)	If not exempt from disclosure			
	Amount Code 1 (A-H)	Type (e.g. div, rent, or int.)	Value Code 2 (J-P)	Value Method Code 3 (Q-W)	Type (e.g. buy, sell, merger, redemption)	(2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
36. T. ROWE PRICE LIMITED TERM BOND FUND IN LIFE INS. POLICY	A	Dividend	K	T	EXEMPT				
37. PUTNAM INCOME FUND IN LIFE INS. POLICY	A	Dividend	K	T	EXEMPT				
38. T. ROWE PRICE PERSONAL STRAT. BAL. FUND IN LIFE INS. POLICY	A	Dividend	K	T	EXEMPT				
39. FIDELITY CONTRAFUND FUND IN LIFE INS. POLICY	A	Dividend	K	T	EXEMPT				
40. FIDELITY EQUITY INCOME FUND IN LIFE INS. POLICY	A	Dividend	K	T	EXEMPT				

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	TITUS, ROGER W	6/5/2003

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

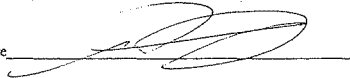
FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	TITUS, ROGER W	6/20/2003

IX. CERTIFICATION.

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

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

Signature



Date June 20, 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)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

FINANCIAL STATEMENT

ASSETS			LIABILITIES		
Cash on hand and in banks	207	000	Notes payable to banks-secured		
U.S. Government securities-add schedule			Notes payable to banks-unsecured		
Listed securities-add schedule	1 445	544	Notes payable to relatives		
Unlisted securities--add schedule		250	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	499	500
Real estate owned-add schedule	1 675	000	Chattel mortgages and other liens payable		
Real estate mortgages receivable			Other debts-itemize:	188	824
Autos and other personal property	50	000			
Cash value-life insurance	111	590			
Other assets itemize:	1 258	229			
			Total liabilities	688	324
			Net Worth	4 059	289
Total Assets	4 747	613	Total liabilities and net worth	4 747	613
CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, comaker or guarantor			Are any assets pledged? (Add schedule)	NO	
On leases or contracts		0	Are you defendant in any suits or legal actions?	NO	
Legal Claims		0	Have you ever taken bankruptcy?	NO	
Provision for Federal Income Tax		0			
Other special debt		0			

SCHEDULE OF LISTED SECURITIES

STOCKS

GOLDEN WEST FINANCIAL CORP. -400 SHARES @81.49	\$32596.00
HINGHAM INSTITUTION FOR SAVINGS-3105 SHARES @35.52	110289.60
SBC COMMUNICATIONS-952 SHARES @26.42	25151.84
SEARS- 10.555 SHARES @ 34.63	365.52

MUTUAL FUNDS

CMA TAX-EXEMPT FUND-70051 UNITS @1.00	70051.00
T.ROWE PRICE CAPITAL APPRECIATION 3601.305 SHARES @ 15.54	55964.28
T.ROWE PRICE SPECTRUM GROWTH- 4273.514 SHARES @ 12.73	54401.83
T.ROWE PRICE VALUE- 3134.84 SHARES @ 17.39	54514.87
SCUDDER TECHNOLOGY A FUND-1238.987 SHARES @ 9.11	11287.17

STOCKS IN I.R.A. ACCOUNTS

HINGHAM INSTITUTION FOR SAVINGS-750 SHARES @35.52	26640.00
E DIGITAL CORP-200 SHARES@.22	44.00
MANUGISTICS GROUP-400 SHARES @ 5.80	2320.00
HINGHAM INSTITUTION FOR SAVINGS-750 SHARES @35.52	26640.00
BIOPURE CORP-500 SHARES@ 6.11	3055.00
COMPUGEN-2000 SHARES @ 4.40	8800.00
PARADIGM ADVANCED TECH-1000 SHARES @ .045	45.00
REALITY WIRELESS NETWORK-5 SHARES @ .065	.33

MUTUAL FUNDS IN I.R.A. ACCOUNTS

WASHINGTON MUTUAL INVESTORS B-257 SHARES @25.88	6651.16
WASHINGTON MUTUAL INVESTORS B-330 SHARES @25.88	8540.40
T.ROWE PRICE PRIME RESERVE- 404839.70 SHARES @ 1.00	404839.70
T.ROWE PRICE U.S. TREASURY- 228695.64 SHARES @ 1.00	228695.64
T.ROWE PRICE CAPITAL APPRECIATION- 10660.995 SHARES @ 15.54	165671.86
AMERICAN CENTURY GROWTH-588.366 SHARES @ 16.06	9449.16
AMERICAN CENTURY SELECT- 505.445 SHARES @ 32.16	16224.79
AMERICAN CENTURY ULTRA- 838.421 SHARES @ 23.75	19912.50
LEGG MASON VALUE TRUST- 1291.581 SHARES @ 49.42	63829.93
VANGUARD 500 INDEX FUND- 432.563 SHARES @ 91.46	<u>39562.21</u>

TOTAL	\$1,445,543.79
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SCHEDULE OF UNLISTED SECURITIES

CAPITAL REALTY INVSTORS III LP- 5 UNITS	<u>250.00</u>
TOTAL	250.00

SCHEDULE OF REAL ESTATE OWNED

PERSONAL RESIDENCE	
BETHESDA, MD	\$975,000.00
PERSONAL RESIDENCE	
SWANTON, MD	600,000.00
RESIDENCE OF SON	
BETHESDA, MD [TWO THIRDS INTEREST]	<u>100,000.00</u>
TOTAL	\$1,675,000.00

SCHEDULE OF OTHER ASSETS

CAPITAL ACCOUNT, VENABLE, BAETJER AND HOWARD, LLP	441,750.00
VENABLE, BAETJER AND HOWARD, LLP RETIREMENT PLAN-	495,309.09
MONTGOMERY COUNTY GOVERNMENT DEFERRED COMPENSATION ACCOUNT [CATHERINE TITUS]	24,861.46
ICMA RETIREMENT CORPORATION DEFERRED COMPENSATION [CITY OF ROCKVILLE]	<u>296,308.77</u>
TOTAL	1,258,229.32

SCHEDULE OF REAL ESTATE MORTGAGES OWED

WELLS FARGO HOME MORTGAGE, INC., DEED OF TRUST ON PERSONAL RESIDENCE, BETHESDA, MD	BALANCE- \$499,500.00
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SCHEDULE OF OTHER DEBTS

MERCANTILE BANK AND TRUST-LOAN FOR VENABLE, BAETJER AND HOWARD, LLP CAPITAL ACCOUNT-	\$188,824.20
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Senator CORNYN. Thank you. One of the things, being elected from the State of Texas, I don't talk about an awful lot, but I am a product of Montgomery County schools, at least for a period of my growing up and my dad was stationed at Walter Reed Army Medical Center, and we lived in Kensington, Maryland. But we are delighted to have all of you here today. Thank you for being here to support soon-to-be Judge Titus.

Mr. Miller, we would be glad to hear any comments or introductions you might have to make.

**STATEMENT OF GEORGE W. MILLER, NOMINEE FOR THE
UNITED STATES COURT OF FEDERAL CLAIMS**

Mr. MILLER. Thank you very much, Senator Cornyn.

I first of all want to say that I am deeply gratified by the nomination by President Bush. And I've always believed that the highest calling of a lawyer is to be a judge. And I take this opportunity very seriously and look forward to, hopefully, making a positive contribution to the administration of justice on the Court of Federal Claims.

I want also to thank the Committee for scheduling the hearing as promptly as it did. That has not always been the case in these matters. I know I, and I think the others who are here today share my view that it is everything we could have asked for in terms of expeditious consideration, and we appreciate it greatly.

You have already met, through Senator Allen, my wife Kay, who is here, and my son George, who is also here. I'd like to introduce two other friends and colleagues who are here. The first is Austin Mittler, who is my law partner and mentor, has been with Hogan & Hartson since 1968, even longer than I, and has for many years been the head of our litigation practice group.

And with him is Steven L. Simrodt, a law school classmate of mine and long-time friend, who lives and works on Capitol Hill. So it was easy for him to come over, and I appreciate greatly his presence.

Our daughter, who lives in Austin, Texas, was not able to be with us this morning, but I hope she's listening on the Internet. And our son Bill, who is in his third year at Vanderbilt University Law School, was also not able to be here this morning. I hope he's studying hard, as I have every reason to believe that he is.

And obviously, I want to make appropriate thanks to Senator Allen for his very gracious remarks, and for Senator Warner and the help and assistance that I've received from the members of the staffs of both of the Senators from Virginia.

I have no opening statement other than those remarks.

[The biographical information of Mr. Miller follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

My full name is George Wesley Miller, Jr. That is the name on my birth certificate. However, my father died when I was 12. As a result, I dropped the "Jr." many years ago.

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

Residence:

Arlington, VA

Office:

**Hogan & Hartson
Columbia Square
555 13th Street, N.W.
Washington, D.C. 20004-1109**

3. Date and place of birth.

**July 12, 1941
Schenectady, 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).

**Mary Katherine Miller (maiden name and married name)
Librarian Assistant
Arlington County Public Libraries
Central Library
1015 N. Quincy Street
Arlington, VA 22201**

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

Princeton B.A. 1963

Dates of attendance: Sept. 1959 to June 1963

Harvard Law School J.D. 1966

Dates of attendance: Sept. 1963 to June 1966

George Washington University Law School LL.M. (Taxation) 1968

Dates of attendance: Sept. 1967 to June 1968

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.

6/63 – 9/63 Schenectady Gazette, Reporter

6/64 – 9/64 Schenectady Gazette, Reporter

**6/65 – 9/65 Breed, Abbott & Morgan, Summer Associate (later
Whitman, Breed, Abbott & Morgan; merged in 2000
with Winston & Strawn)**

**9/66 – 3/67 Law Clerk to Judge Bruce M. Forrester, Tax Court of
the United States**

3/67 – 1/70 Active Duty, U.S. Navy JAG Corps

**2/70 – present Hogan & Hartson, Associate (1970 – 1976) and Partner
(1977 to present).**

**Member, Adjunct Faculty, George Mason University School of Law,
1999 to present.**

**Member, Board of Trustees, Potomac School, McLean, Virginia, 1984-
90.**

Member, Board of Directors, Frederick B. Abramson Memorial Foundation, from inception following Mr. Abramson's death in 1991 to 1997.

Donaldson Run Recreation Association, Inc. – President, Board of Directors, 1980-81.

I am now, and have previously been (1994-96), a member of the Board of Governors of the Bar Association of the United States Court of Federal Claims.

In 1973 I was Chairman of the Arlington County Legislative Advisory Commission, and in 1972 I was a member of the Arlington County Landlord-Tenant Commission. I was appointed to both of these positions by the Arlington County Board.

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.

3/67 – 1/70 – Active Duty, U.S. Navy JAG Corps; Lieutenant (junior grade), Lieutenant; 712922; duty stations: Office of the JAG, Civil Law Division (Navy Annex to Pentagon); Department of Defense, Office of the General Counsel, Assistant General Counsel for Installations & Logistics (Pentagon); honorably discharged from the inactive Naval Reserve in 1977 with the rank of Lieutenant Commander.

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

I was elected to Phi Beta Kappa my junior year in college.

In October 1996 I received from the Chief Judge, U.S. Court of Federal Claims, an award for “Dedicated Service to the U. S. Court of Federal Claims.”

I received the Hogan & Hartson "Distinguished Pro Bono Service Partner Award" for 1995.

The D. C. Court of Appeals presented me with a Resolution dated November 1, 1991 in recognition of my six years of service on the Court-appointed Board on Professional Responsibility, which administers the lawyer disciplinary system in the District of Columbia.

Member, Board of Trustees, Potomac School, McLean, Virginia, 1984-90.

Member, Board of Directors, Frederick B. Abramson Memorial Foundation, from inception following Mr. Abramson's death in 1991 to 1997.

Donaldson Run Recreation Association, Inc. – President, Board of Directors, 1980-81.

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 Bars of New York (1966), the District of Columbia (1968) and Virginia (1978).

I am also a member of the Bar Association of the District of Columbia, the New York State Bar Association, the Virginia Bar Association, the Federal Bar Association, the American Bar Association, the Bar Association of the U. S. Court of Appeals for the Federal Circuit, and the Bar Association of the United States Court of Federal Claims. I am now, and have previously been (1994-96), a member of the Board of Governors of the Bar Association of the United States Court of Federal Claims.

I am a member of the Committee on Admissions and Grievances of the U. S. Court of Appeals for the District of Columbia Circuit.

I served as Chairman of the D. C. Court of Appeals' Board on Professional Responsibility from 1989 to 1991.

In 1990, the Chief Judge of the D.C. Court of Appeals appointed me to serve on a Task Force on Racial and Ethnic Bias in the D.C. Courts. Following the submission by the Task Force of its Report and Recommendations in May 1992, I was appointed by the Chief Judges of the D.C. Court of Appeals and the Superior Court to serve on an Advisory Committee to assist the D.C. Courts in implementing the recommendations of the Task Force.

I was appointed in 1992 to a Discovery Reform Task Force created by the U. S. Court of Federal Claims.

In 1994, I was appointed to the Court of Federal Claims Advisory Council, on which I presently serve.

I served on a Court-appointed Litigation Practice Task Force, which was established following the 1995 Judicial Conference of the Court of Federal Claims to consider ways to expedite proceedings and improve the litigation process in that court. The Task Force's report was a principal topic of the 1996 Judicial Conference of the Court of Federal Claims. At that Judicial Conference, I was asked by Judge Lawrence Margolis of the Court of Federal Claims to serve as a third-party neutral in connection with that Court's expanded Alternative Dispute Resolution program. See U. S. Court of Federal Claims, Amended General Order No. 13, November 8, 1996, 36 Fed Cl. xxxi, xxxiv (1996).

I am a member of and have served as Co-Chairman of Hogan & Hartson's Legal Ethics Committee, which deals on a day-to-day basis with issues of legal ethics, including principally potential conflicts of interest, arising in the firm's practice. I have also served on the firm's Associate Evaluation Committee.

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

Organizations active in lobbying:

**Adirondack Council
Residents' Committee to Protect the Adirondacks**

Other organizations:

**Adirondack Museum
Morgan Car Club of Washington, D.C.
American Diabetes Association
Federalist Society for Law & Public Policy Studies**

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.

I am a member of the Bars of New York (1966), District of Columbia (1968) and Virginia (1978).

I have been admitted to practice before the following courts:

<u>Courts</u>	<u>Date of Admission</u>
Supreme Court of the United States	01/13/86
U.S. Court of Appeals for the District of Columbia Circuit	02/20/69
U.S. Court of Appeals for the Fifth Circuit	06/22/95
U.S. Court of Appeals for the Fourth Circuit	01/14/75
U.S. Court of Appeals for the Federal Circuit	03/16/84
U.S. District Court for the District of Columbia	11/14/68

U.S. District Court for the Eastern District of Virginia	01/03/78
U.S. District Court for Maryland	09/12/85
U.S. District Court for the Northern District of California	06/17/93
U.S. District Court for the Eastern District of Kentucky	10/05/70
U.S. District Court the Southern District of New York	04/12/94
U.S. Court of Federal Claims	03/26/84
U.S. Tax Court	12/13/66
United States Court of Military Appeals (now the United States Court of Appeals for the Armed Forces)	10/03/67

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.

G. W. Miller, "The Odyssey of Whitney Benefits: What A Long, Strange Trip It's Been," 1 Real Property Rights Litigation Reporter 11 (1995).

G. W. Miller, "Loveladies Harbor v. United States: A Strong Takings Precedent for Landowners," Washington Legal Foundation, Legal Opinion Letter, Vol. 5, No. 9, April 14, 1995.

G. W. Miller and Jennifer L. Tiller, "Dolan v. City of Tigard: Takings Clause No Longer A Poor Relation," Washington Legal Foundation, Legal Backgrounder, Vol. 9, No. 24, July 29, 1994.

G. W. Miller and J. L. Abram, "A Survey of Recent Takings Cases in the Court of Federal Claims and the Court of Appeals for the Federal Circuit," 42 Cath. U. L. Rev. 863 (1993).

G. W. Miller and G. T. Carberry, "Government Contract Bidders Should Be Permitted to Extend Short Bid Acceptance Periods," 13 Publ. Cont. L. J. 232 (1983), reprinted in Yearbook of Procurement Articles, Volume 20, 1983.

I have also made written and oral presentations at Continuing Legal Education programs and Judicial Conferences over the years. Most recently, I made a written and oral presentation at the 5th Annual Bench and Bar Conference of the Bar Association of the Federal Circuit held at Amelia Island, Florida, May 22-25, 2003. That presentation was entitled "Who is the Taker? - Dance of the Sovereigns." In addition, I made substantially the same written and oral presentation at a continuing legal education program on

Regulatory Takings sponsored by CLE International held in Denver on June 9 and 10, 2003.

I made a presentation at a Federalist Society Workshop on "Takings and the Environment" held on March 27, 1992 in Washington, D.C. That presentation was entitled "Developments in Regulatory Takings for Mining Concerns."

I also made a presentation at a continuing legal education program on "The Endangered Species Act" sponsored by CLE International in Washington, D.C. on March 12 and 13, 1998. That presentation was entitled "The Endangered Species Act and Regulatory Takings."

I have made CLE presentations at programs sponsored by ALI-ABA, as follows:

"Natural Resources Development and Takings Litigation" (January, 1999)

"Regulatory Taking Claims: The Litigation Process" (October, 1996)

"Trying a Regulatory Taking Case: The Property Owner's Perspective" (May, 1992)

In 1990, the Chief Judge of the D.C. Court of Appeals appointed me to serve on a Task Force on Racial and Ethnic Bias in the D.C. Courts. The Task Force submitted its Report and Recommendations in May, 1992.

Following the 1995 Judicial Conference of the Court of Federal Claims, I was appointed to serve on a Litigation Practice Task Force to consider ways to expedite proceedings and improve the litigation process in that court. The Task Force submitted its report in July, 1996.

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. My last physical examination was May 15, 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 held any judicial offices.

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.

I have never run for or held elected public office. However, I have served in two appointed positions in Arlington County. In 1973 I was Chairman of the Arlington County Legislative Advisory Commission, and in 1972 I was a member of the Arlington County Landlord-Tenant Commission. I was appointed to these positions by the Arlington County Board.

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 late Judge Bruce M. Forrester of the Tax Court of the United States from September 1966 until March 1967 when I entered upon active duty in the U.S. Navy JAG Corps.

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

I have never practiced alone.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

I joined Hogan & Hartson as an associate in February 1970 after having completed three years on active duty with the Judge Advocate General's Corps of the U. S. Navy. I became a special partner in 1977 and a general partner in 1979. I have been a general partner of Hogan & Hartson continuously since 1979.

- 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 maintained a general and varied civil litigation practice throughout my 33 years as a trial lawyer with Hogan & Hartson. I have conducted civil litigation and arbitration proceedings involving environmental regulation, government contracts, eminent domain, banking, products liability, unfair competition, employment discrimination, aviation, mining, legal ethics, civil rights, and the Employee Retirement Income Security Act.

In my early years at the firm I worked almost exclusively with the late William O. Bittman and Austin S. Mittler, both of whom maintained active and challenging civil and criminal litigation practices, including, for example, the representation of E. Howard Hunt, Chrysler Corporation and Amtrak. Mr. Mittler has for many years been head of the firm's litigation practice group.

In the mid 1970s I worked with firm partners Jack Arness and Frank Roberson, two deans of the Washington trial bar, on a wide range of civil cases. During the 1970s, I was also one of a number of Hogan & Hartson lawyers who represented the United States Railway Association in connection with valuation proceedings arising out of the creation of Conrail from the estates of a number of bankrupt eastern railroads.

In the late 70s and early 80s, I began to develop a practice representing property owners and, later, governmental entities in cases arising under the Takings Clause of the Fifth Amendment to the U. S. Constitution. This led to my representation, in the

period from the late 80s to the present of clients in the natural resources and land development industries.

During the same period, I have continued to represent clients in civil cases and arbitrations in a wide variety of other industries and fields of law.

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

My typical former clients have included firms in the natural resources and land development industries. I have also represented clients holding government contracts and firms in the aerospace and insurance industries. With regard to areas in which I have specialized, I have devoted a substantial portion of my practice from the late 80s to the present to litigation, and counseling clients, regarding issues arising under the Takings Clause of the Fifth Amendment to the U.S. Constitution, including, in particular, litigation in the U.S. Court of Federal Claims.

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

I appeared in court frequently throughout my tenure as a trial lawyer with Hogan & Hartson.

2. What percentage of these appearances was in:

(a) federal courts;

50%

(b) state courts of record;

30%

(c) other courts.

20% (arbitration)

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 have tried ten such cases to verdict or judgment. I was sole counsel in one, associate counsel in one, and chief counsel in the other eight.

5. What percentage of these trials was:

(a) jury;

40%

(b) non-jury.

60%

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. Whitney Benefits, Inc. v. United States, No. 499-83L, U.S.C.O.F.C.

I represented the property owners in Whitney Benefits, Inc. v. United States which was filed in 1983 tried in 1986 before the Hon. Loren A. Smith, Chief Judge of the (as it was then) U.S. Claims Court, and resulted in a judgment in favor of my clients, Whitney Benefits, Inc. and Peter Kiewit Sons' Co., for \$60.3 million plus interest and attorneys' fees. Whitney Benefits, Inc. v. United States, 18 Cl. Ct. 394 (1989). The judgment was affirmed in February 1991 by the U.S. Court of Appeals for the Federal Circuit. Whitney Benefits, Inc. v. United States, 926 F.2d 1169 (Fed. Cir. 1991). The Supreme Court denied the Solicitor General's petition for a writ of certiorari on November 4, 1991. United States v. Whitney Benefits, Inc., 502 U.S. 952 (1991). Following further litigation relating to the government's motion for a new trial on damages and plaintiffs' motion to clarify whether the 1989 judgment provided for simple or compound interest, the case was settled in 1995 for \$200 million. See Whitney Benefits, Inc. v. U.S., 30 Fed. Cl. 411 (1994) (awarding compound interest); Whitney Benefits, Inc. v. U.S., 31 Fed. Cl. 116 (1994) (denying government's motion to set aside the judgment and for new trial). See also Whitney Benefits, Inc. v. United States, 752

F.2d 1554 (Fed. Cir. 1985) (successful appeal from initial dismissal of plaintiffs' complaint by then Chief Judge Alex Kozinski of the U. S. Claims Court). My co-counsel from Hogan & Hartson in this case was Jonathan L. Abram.

Principal counsel for defendant the United States:

Alfred T. Ghiorzi
Pamela S. West
Lisa Hemmer
c/o James E. Brookshire
U.S. Department of Justice
Environment and Natural Resources Division
General Litigation Section
601 D Street, N.W., Room 3132
Washington, D.C. 20004
(202) 305-0490

Co-counsel for plaintiffs:

Rebecca W. Watson
Assistant Secretary of the Interior for Land and Minerals
Management
U.S. Dept. of the Interior
1849 C Street, NW
Washington, DC 20240
(202) 208-6734

Terrence J. Ferguson
Fraser Stryker Meusey Olson Boyer & Bloch
500 Energy Plaza
409 South 17th Street
Omaha, Nebraska 68102
(402) 341-6000

2. William Center L.P. and NVHomes L.P. v. United States, No. 607-89L,
U.S.C.O.F.C

I was counsel in the U.S. Claims Court for two Northern Virginia developers whose property, located adjacent to the Manassas National Battlefield Park, was taken by an Act of Congress in 1988 to preserve the historic site of the first and second Battles of Bull Run. The owners' action to recover just compensation was filed in the Claims Court on November 9, 1989. The case was assigned to Judge Moody R. Tidwell. The owners' action was settled in May 1990 for a total payment to our two clients of \$34.1 million. My co-counsel from Hogan & Hartson in this case was George W. Mayo, Jr.

Principal counsel for defendant the United States:

Donald F. Rosendorf
John S. Gregory
c/o James E. Brookshire
U.S. Department of Justice
Environment and Natural Resources Division
General Litigation Section
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Washington, D.C. 20004
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3. Thomson-CSF v. NATCO

In 1994-95, I represented Thomson-CSF, a French defense and electronics firm, in an international commercial arbitration against an affiliate of Northwest Airlines. The case involved a breach of contract claim by Thomson against Northwest Aerospace Training Corporation ("NATCO"), which in late 1992 refused to take delivery of a \$10 million flight simulator manufactured for it by Thomson. The three-member arbitration panel made an award of damages to Thomson after a week-long hearing in New York in early October

1995. The arbitration proceedings were conducted pursuant to the Rules of the International Chamber of Commerce, which has its headquarters in Paris. My co-counsel from Hogan & Hartson in this case was James J. Moore. The members of the arbitration panel were:

Charles Platto, Esq., Chairman
Law Offices of Charles Platto, PLC
8 Beaver Meadow Road
P.O. Box 1111
Norwich, VT 05055
(802) 649-8400

Prof. George A. Bermann, Member
Columbia University School of Law
435 West 116th Street
New York, N.Y. 10027
(212) 854-4258

Mr. Richard A. Neddo, Member
97 Pine Knoll Road
Endicott, N.Y. 13760
(607) 785-9326

Principal counsel for NATCO:

Paul B. Klaas
Dorsey & Whitney
Pillsbury Center South
220 South Sixth Street
Minneapolis, Minnesota 55402-1498
(612) 340-2600

4. Varian Associates, Inc. v. Comark Communications, Inc.
Civil Action No. C-93-20162-JW, U.S.D.C. N.D.
Calif., San Jose Division

Beginning in 1993, I represented an American subsidiary of Thomson-CSF, Comark Communications, Inc., in litigation in federal court in San Jose, California, against Varian Associates, Inc., a silicon valley firm that supplied Comark with defective klystrode tubes that were installed in television transmitters sold by Comark. Judge James Ware denied Varian's motion for summary judgment on certain contractual defenses in August 1995. Following extensive discovery, the parties reached a mediated settlement of their dispute in July 1997. My co-counsel from Hogan & Hartson in this case was Sten A. Jensen.

Principal counsel for Varian Associates:

Mark B. Fredkin
Morgan, Franich, Fredkin & Marsh
99 Almaden Boulevard, Suite 1000
San Jose, California 95113-1606
(408) 288-8288

Co-counsel for Comark Communications, Inc.:

Gary S. Vandeweghe
Olimpia, Whelan & Lively
1723 Hamilton Avenue
Second Floor
San Jose, California 95125-5436
(408) 978-9100

Mediator:

Leonard Ware
410 Hamilton Avenue
Palo Alto CA 94301-1825
(650) 323-5963

5. Tony B. Jobe, Assignee of Air New Orleans, Inc. v. ATR Marketing, Inc., Avions de Transport Regional, G.I.E., Aerospatiale, S.N.I., Aerospatiale, Inc., and the Alenia Division of Finmeccanica, S. p. A., Civil Action No. 2:94-CV-18PS, U.S.D.C. S.D. Miss., Hattiesburg Division, and related litigation

Beginning in 1994, I represented Aerospatiale, S.N.I.; Finmeccanica, S.p.A.; Avions de Transport General (“ATR”), G.I.E.; ATR Marketing, Inc.; and Aerospatiale, Inc. in a lawsuit filed in federal court in Hattiesburg, Mississippi. The plaintiff, the assignee of a bankrupt regional airline called Air New Orleans (“ANO”), alleged that the defendants conspired with Continental Airlines to drive ANO out of business so that Continental could take over its routes in the southeastern United States. As part of the conspiracy, plaintiff alleged, ATR breached a contract to sell six ATR-42 commuter aircraft to ANO and instead entered into a contract to sell more than 40 such aircraft to Continental. In May 1995, Judge Charles W. Pickering, Sr. granted from the bench our clients’ motion to dismiss for lack of personal jurisdiction, and the Fifth Circuit affirmed in July 1996. Jobe v. ATR Marketing, Inc., et al., 87 F.3d 751 (5th Cir. 1996). Following the Fifth Circuit’s denial of plaintiffs’ petition for rehearing and suggestion of rehearing en banc, Judge Pickering granted our clients’ motion for sanctions against plaintiffs’ counsel for abusive conduct in discovery, and that ruling was affirmed by the Fifth Circuit. Jobe v. ATR Marketing, Inc., et al., 174 F.3d 198 (5th Cir. 1999). The Supreme Court denied counsel’s petition for a writ of certiorari. Jobe v. ATR Marketing, Inc., et al., 528 U.S. 825 (1999).

Following the dismissal of the Mississippi action on jurisdictional grounds, the same plaintiff filed essentially the same civil action against the same defendants in the U. S. District Court for the Eastern District of Louisiana. Jobe v. ATR Marketing, et al., 96-CV-3396-C2, U.S.D.C. E.D. La. Following extensive discovery, which included taking depositions in the states of California, Texas, New York, Missouri and Colorado, as well as on several occasions in France (Paris, Toulouse and Cannes), Judge Helen G. Berrigan on

November 13, 1998 entered an Opinion and Order granting summary judgment in favor of our clients. 1998 WL 799236 (E.D. La.). Plaintiff appealed, and the Fifth Circuit affirmed. Jobe v. ATR Marketing, Inc., et al., 189 F.3d 466 (5th Cir. 1999). My co-counsel from Hogan & Hartson in this litigation was Sten A. Jensen.

Principal counsel for plaintiff Tony B. Jobe:

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Post Office Box 24448
Jackson, Mississippi 39225-4448
(601) 969-4700

Terry O'Reilly
O'Reilly Collins & Danko
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San Mateo, California 94403
(650) 358-5901

Co-counsel for defendants in Mississippi action:

Erik M. Lowrey
Erik M. Lowrey, PA
525 Corinne St.
Hattiesburg, MS 39401
(601) 582-5015

Co-counsel for defendants in Louisiana action:

Robert E. Harrington
Robinson, Bradshaw & Hinson
101 N. Tryon Street
Suite 1900
Charlotte, N.C. 28246
(704) 377-8387

6. In Re: PEPCO Employment Litigation.

Master File: Civil Action No. 86-8603 (RCL), U.S.D.C. D.C.

In the late 1980s and early 1990s, I was one of several H&H lawyers representing the Potomac Electric Power Co. ("PEPCO") in its defense of a class action in the U.S. District Court for the District of Columbia alleging race and gender discrimination in employment. Judge Royce C. Lamberth presided in the case, which was settled in early 1993. My co-counsel from Hogan & Hartson in this case were Vincent H. Cohen and Patricia R. Ambrose.

Principal counsel for plaintiffs:

Paul C. Sprenger
Jane Lang
Sprenger & Lang
1614 - 20th Street, N.W.
Washington, D.C. 20036
(202) 265-8010

7. C C Distributors, Inc. v. United States and Del-Jen, Inc., No. 97-517C, U.S.C.O.F.C.

Since the late 1980s I have represented C C Distributors, Inc., a government contractor located in Corpus Christi, Texas, which has been involved from time to time in litigation with the U.S. Air Force, bid protest litigation and in protests of contract awards to the General Accounting Office. See, e.g., C C Distributors, Inc. v. United States, 883 F.2d 146 (D.C. Cir. 1989) (holding that plaintiffs had standing and that the challenged actions were subject to judicial review). Following the decision just cited, Hon. Royce C. Lamberth granted summary judgment to our client and entered an order requiring the Air Force to permit our client to compete for contracts at approximately 20 Air Force bases around the country. (Order filed August 8, 1990.) In that litigation and in subsequent related

litigation in 1996, our client recovered attorneys' fees and expenses under the Equal Access to Justice Act. See C C Distributors, Inc. v. United States, C. A. No. 89-0054 (RCL), Order filed March 20, 1996 (granting plaintiffs motion to enforce August 8, 1990 injunction) and Order filed May 13, 1996 (approving parties' stipulation for payment to plaintiff of agreed amount of attorneys' fees and costs). I was counsel for this same client in C C Distributors, Inc. v. United States, 36 Fed. Cl. 771 (1997), a bid protest case dealing with standing requirements under the 1996 amendments to the Tucker Act, 28 U.S.C. § 1491, that conferred jurisdiction on the Court of Federal Claims to hear post-award bid protest litigation concurrent with the district courts. The September 2, 1997 decision of Judge Marian Blank Horn is reported at 38 Fed. Cl. 771 (1997). My co-counsel from Hogan & Hartson in this litigation was Thomas L. McGovern, III.

Principal counsel for defendant United States in 1997 litigation:

Katherine M. Kelly
 Commercial Litigation Branch
 Department of Justice
 1100 L Street, N.W.
 Washington, D.C. 20530
 (202) 514-3301

Principal counsel for intervenor, Del-Jen, in 1997 litigation:

William A. Roberts, III
 Wiley Rein & Fielding LLP
 1776 K Street, N.W.
 Washington, D.C. 20006
 (202) 719-4955

8. Jenkins, et al. v. State of Missouri and School District of Kansas City, Missouri, No. 77-0420-CV-W-4, U.S.D.C. W.D. Mo.

During the summer of 1987, I had principal responsibility for conducting a seven-day evidentiary hearing before the Hon. Russell

G. Clark in the U.S. District Court for the Western District of Missouri at Kansas City. The hearing was part of the firm's on-going representation of the Kansas City, Missouri, School District ("KCMSD"). In the August 1987 hearing, the School District sought Court approval for a \$265 million capital improvement plan as part of the remedy phase of school desegregation litigation in which the firm had represented KCMSD for a number of years. In mid-September 1987, Judge Clark issued an opinion that approved KCMSD's proposed ten-year capital improvement program and ordered funding for the first three years in the amount of approximately \$187 million. Jenkins v. State of Missouri, 672 F.Supp. 400 (W.D. Mo. 1987). My co-counsel from Hogan & Hartson in this matter were Kevin J. Lanigan and Douglas B. Farquhar. (I also worked on the St. Louis school desegregation litigation, see, e.g., Liddell v. State of Missouri, 731 F.2d 1294 (8th Cir. 1984). In that case Hogan & Hartson lawyers, under the leadership of my former partners David S. Tatel and Allen R. Snyder, assisted Kenneth C. Brostron of the St. Louis firm of Lashley Caruthers Baer & Hamel in representing the School Board of the City of St. Louis.)

Counsel for the State of Missouri:

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 Farr & Taranto
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 Washington, DC 20036-2435
 (202) 775-0184

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Counsel for plaintiffs:

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Arthur A. Benson II & Associates
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Kansas City, MO 64171-9007
(816) 531-6565

Co-counsel for KCMSD:

Shirley Keeler
Blackwell Sanders Peper Martin, LLP
2300 Main Street
Suite 1000
Kansas City, MO 64108
(816) 983-8000

9. Donnkenny, Inc., et al. v. Virginia Financial and Insurance Services, Inc., et al., Civil Action No. 89-0050-L, U.S.D.C. W.D. Va.

I represented the Mutual Life Insurance Company of New York in litigation arising under the Employee Retirement Income Security Act of 1974 ("ERISA"). One such case, filed in the U.S. District Court for the Western District of Virginia, involved claims by a major Virginia corporation and its corporate pension plan that an executive of MONY, Robert M. Beecroft, had participated in the misappropriation of substantial sums from the plan, which was administered by MONY. A MONY agent involved in marketing MONY's services to plaintiffs eventually pleaded guilty to a federal theft charge and was sentenced to prison. I represented both MONY and Mr. Beecroft in this litigation for nearly a year and a half before Judge Jackson L. Kiser. The case was settled in 1991 on terms favorable to MONY and Mr. Beecroft. My co-counsel from Hogan & Hartson in this case was William C. Schmidt.

Principal counsel for plaintiff:

Harvey B. Cohen
Cohen Gettings Caulkins
2200 Wilson Blvd.
Suite 800
Arlington, VA 22201
(703) 525-2260

Counsel for co-defendant Provident Mutual Life Insurance Company of Philadelphia:

Steuart H. Thomsen
Sutherland, Asbill & Brennan
1275 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 383-0100

Counsel for co-defendants Virginia Financial and Insurance Services, Inc., et al.:

W. Fain Rutherford
106 Eakin Street, S.W.
Blacksburg, VA 24060-4602
(540) 953-0115

Counsel for co-defendant Ronald L. Wood:

John S. Edwards
P. O. Box 1179
Roanoke, VA 24006-1179
(540) 985-8625

**10. Bay-Houston Towing Company, Inc. v. United States, No. 01-88L,
U.S.C.O.F.C., and related litigation**

I am representing the plaintiff property owner in this taking case now pending before Senior Judge Eric G. Bruggink in the Court of Federal Claims. The plaintiff's complaint was filed February 20, 2001 and alleges a taking by the United States of plaintiff's property interests in two parcels comprising a total of approximately 2,800 acres in the Minden Bog, a wetland located in Sanilac County, Michigan. Bay-Houston, through its Michigan Peat division, and a predecessor entity have since 1958 been harvesting and marketing peat from the bog for horticultural purposes. The complaint alleges that the March 1995 denial of Bay-Houston's application for a permit to allow expanded harvesting under Section 404 of the Clean Water Act effected a taking. The government has moved to dismiss on ripeness grounds, and Bay-Houston has moved for summary judgment on liability as to one of the two parcels. Those motions were argued June 5, 2003. The Court of Federal Claims case is related to two other pieces of litigation in which I have been assisting Bay-Houston's Michigan counsel. They are a declaratory judgment action brought by our client, see Michigan Peat v. U. S. Environmental Protection Agency, 175 F.3d 422 (6th Cir. 1999); Michigan Peat v. U. S. Environmental Protection Agency, 2001 WL 1136082 (6th Cir. Sept. 18, 2001), cert. denied, 536 U.S. 939 (2002); and an enforcement action brought by EPA, see United States EPA v. Bay-Houston Towing Co., 197 F. Supp. 2d 788 (E.D. Mich. 2002). My co-counsel from Hogan & Hartson in these cases are James T. Banks and Jonathan T. Stoel.

Principal counsel for the United States:

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Principal counsel for intervenor J. M. Hartman Corporation:

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Van Ness Feldman, P.C.
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(202) 298-1826

Co-counsel for Bay-Houston Towing Co., Inc.:

Steven D. Weyhing
Kelley Cawthorne
Ninth Floor
101 South Washington Square
Lansing Michigan 48933
(517) 371-1400

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 represented Andalex Resources, Inc., of Price, Utah, in connection with Andalex's potential taking claim against the United States arising out of President Clinton's designation on September 18, 1996

of the Grand Staircase-Escalante National Monument in southern Utah. Andalex was the lessee of several hundred million tons of coal that was, as a practical matter, rendered unmineable by the monument designation. Andalex's claim for compensation was settled without litigation for \$14 million in 1999.

I was counsel for trade associations of the mining and timber industries as amici curiae in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), a significant regulatory taking case decided by the United States Supreme Court.

In 1990, the Chief Judge of the D.C. Court of Appeals appointed me to serve on a Task Force on Racial and Ethnic Bias in the D.C. Courts. Following the submission by the Task Force of its Report and Recommendations in May 1992, I was appointed by the Chief Judges of the D.C. Court of Appeals and the Superior Court to serve on an Advisory Committee to assist the D.C. Courts in implementing the recommendations of the Task Force.

I am a member of the adjunct faculty of the George Mason University School of Law, having taught a seminar for a number of years on the subject "Advanced Constitutional Law (Takings)."

In June 1994 Hogan & Hartson was invited by the Virginia Attorney General to submit a competitive proposal to serve as eminent domain counsel for the Virginia Department of Transportation in northern Virginia. I took the lead in preparing the firm's proposal, which highlighted my own experience, and that of others in the firm, in inverse condemnation, eminent domain, land use law and trial practice. In late 1994, the Virginia Attorney General selected the firm to serve as one of several eminent domain counsel for VDOT in northern Virginia. Since that time, we have represented VDOT, in its capacity as condemnor, in approximately 50 cases in the state courts of northern Virginia.

I served as Chairman of the D.C. Court of Appeals' Board on Professional Responsibility from August 1989 to August 1991. The nine-member Board is appointed by the D. C. Court of Appeals to administer the lawyer disciplinary system in the District of Columbia.

I was first appointed to the Board by the Court of Appeals in 1985 and served as the Board's Vice-Chairman from February 1988 to July 1989. From 1980 to 1985, I was Chairman of one of the Board's three-member Hearing Committees. The Hearing Committees are the trial level of the disciplinary system. They conduct evidentiary hearings to adjudicate formal charges brought against members of the D.C. Bar by the Office of Bar Counsel alleging violations of the Rules of Professional Conduct. The Hearing Committees also make an initial recommendation of discipline to be imposed where they find that the respondent lawyer has violated the Rules of Professional Conduct.

The Board reviews decisions of the Hearing Committees based on the record compiled before the Hearing Committee. The Board's role in this regard is analogous to that of a court of appeals, and the Board frequently hears oral argument in appeals from decisions of the Hearing Committees.

I served as a member of a Hearing Committee for several years before becoming Chairman of that Hearing Committee in 1980. During my service on the Hearing Committee, I estimate that I participated in approximately 25 hearings, including approximately ten as a member and approximately 15 as Chairman. Most of those hearings were concluded in a single day; probably half a dozen went on for more than one day.

While on the Board, I wrote a number of opinions for the Board that were later adopted by the D. C. Court of Appeals. See, e.g., In re Thompson, 583 A.2d 1006 (D.C. 1990); and In re Delate, 598 A.2d 929 (D.C. 1991).

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.

If confirmed, I would expect to resign from Hogan & Hartson and receive a lump sum payment representing my interest in the earnings and capital of the firm, amounts due me under the firm's funded and unfunded retirement plans, and under the partners' investment program. I would thereby sever all legal and financial connections with the 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.

I would create a system to ensure that all cases assigned to me were immediately reviewed to determine whether they involve: 1) an entity or issue that might affect any financial holding or interest of mine or a member of my family; 2) a former client of mine or of Hogan & Hartson's during my tenure with the firm; or 3) a lawyer associated with Hogan & Hartson. I would recuse myself for an appropriate period of time from cases in which Hogan & Hartson represented a party. In all respects, I would be guided by the Code of Conduct for United States Judges and the provisions of 28 U.S.C. §455.

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

No, although I would like to continue to teach as a member of the adjunct faculty at George Mason University School of Law.

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 required by the Ethics in Government Act of 1978.

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

See the 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.

In 1972 I served as a volunteer in the successful campaign of Joseph S. Wholey for election to the Arlington County Board. I also served during the 1970s in the same capacity in Mr. Wholey's subsequent successful campaigns for re-election to the County Board.

AO-10
Rev. 1/2002

**FINANCIAL DISCLOSURE REPORT
FOR CALENDAR YEAR 2002**

*Report Required by the Ethics
in Government Act of 1978,
(5 U.S.C. App., §§101-111)*

1. Person Reporting (Last name, first, middle initial) George W. Miller		2. Court or Organization U.S. Court of Federal Claims	3. Date of Report 8/25/03
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) Judge	5. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date 7/30/03 <input type="checkbox"/> Initial <input type="checkbox"/> Annual <input type="checkbox"/> Final		6. Reporting Period 1/1/02 to 7/30/03
7. Chambers or Office Address c/o Hogan & Hartson 555 13 th St., N.W. Washington, DC 20004-1109		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 _____	
<p>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.</p>			

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

<u>POSITION</u>	<u>NAME OF ORGANIZATION/ENTITY</u>
<input type="checkbox"/> NONE (No reportable positions.)	
1 Partner	Hogan & Hartson, LLP
2 Member, Adjunct Faculty	George Mason University School of Law

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

<u>DATE</u>	<u>PARTIES AND TERMS</u>
<input type="checkbox"/> NONE (No reportable agreements.)	
1 2003	If confirmed, I would expect to resign from Hogan & Hartson and receive a lump sum payment representing my interest in the earnings and capital of the firm, amounts due me under the firm's funded and unfunded retirement plans, and under the partners' investment program. I would thereby sever all legal and financial connections with the firm.
2	

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

<u>DATE</u>	<u>SOURCE AND TYPE</u>	<u>GROSS INCOME</u> (yours, not spouse's)
<input type="checkbox"/> NONE (No reportable non-investment income.)		
1 2001	Hogan & Hartson, LLP	\$218,040.00
2 2002	Hogan & Hartson, LLP	\$181,260.00
3 1/1/03 - 7/30/03	Hogan & Hartson, LLP	\$105,735.00
4 2001	George Mason University School of Law	\$2,160.00
5 2001 - 7/30/03	Arlington County Public Libraries	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting George W. Miller	Date of Report 8/25/03
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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.)		
1	Exempt		\$
2			\$
3			\$
4			\$

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 type="checkbox"/>	NONE (No reportable liabilities.)		
1	Princeton University	Parents' Tuition Loan	K
2			
3			
4			
5			
6			

*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	P1=\$1,000,001-\$5,000,000	P2=\$5,000,001-\$25,000,000	P3=\$25,000,001-\$50,000,000	P4=\$50,000,001 or more

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting George W. Miller	Date of Report 8/25/03
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VII. 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) <i>Place "(X)" after each asset except 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)	If not exempt from disclosure				
	Ann. Code1 (A-H)	Type (e.g., div. rent or int.)	Value Code2 (J-P)	Value Method Code3 (Q-W)	Type (e.g., buy, sell, merger, redemption)	(2) Date: Month- Day	(3) Value	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)									
1 Texas Instruments (TXN) common stock	A	div.	K	T	Exempt				
2 Navy Federal Credit Union savings accounts	A	int.	L	T	Exempt				
3 Mass Mutual cash value life insurance policies	A	div.	L	T	Exempt				
4 Penn Mutual cash value life insurance policy	A	div.	J	T	Exempt				
5 Hogan & Hartson Partners' Retirement Plan: Strong Large Cap Growth Fund	A	div.	P1	T	Exempt				
Fidelity Retirement Money Market Fund	B	div.	M	T	Exempt				
6 Hogan & Hartson Partners' 401 (k) plan: Fidelity Retirement Money Market Fund	A	div.	K	T	Exempt				
7 Hogan & Hartson Partners' Unfunded Retirement Plan	None	None	O	T	Exempt				

1. Income/Gain Codes: (See Col. B1, D4)	A=\$1,000 or less F=\$50,001-\$100,000	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000	C=\$2,501-\$5,000 H=\$5,001-\$10,000 I1=\$1,000,001-\$5,000,000 I2=More than \$5,000,000	D=\$5,001-\$15,000 E=\$15,001-\$50,000
2. Value Codes: (See Col. C1, D3)	J=\$15,000 or less K=\$250,001-\$500,000 L=\$25,000,001-\$50,000,000	M=\$15,001-\$50,000 N=\$50,001-\$100,000 O=\$500,001-\$1,000,000	P1=\$1,000,001-\$5,000,000 P2=More than \$5,000,000	Q=\$100,001-\$250,000 R=\$250,001-\$500,000 S=\$500,001-\$1,000,000 T=\$1,000,001-\$25,000,000 U=More than \$25,000,000
3. Value Method Codes: (See Col. C2)	Q=Appraisal U=Book value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting George W. Miller	Date of Report 8/25/03
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VII. Page 2 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) <i>Place "XX" after each asset except 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)	If not exempt from disclosure				
	Am't. Code1 (A-H)	Type (e.g., div., rent or int.)	Value Code2 (J-P)	Value Method Code3 (Q-W)	Type (e.g., buy, sell, merger, redemption)	(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)									
8 Spouse's IRA (Navy Federal Credit Union)	A	div.	J	T	Exempt				
9 Spouse's 401 (a) Account with Arlington County: ING VP Money Market Portfolio	A	div.	J	T	Exempt				
ING Fixed Account	A	div.	J	T	Exempt				
10 Spouse's 457 Account with Arlington County: ING VP Money Market Portfolio	A	div.	J	T	Exempt				
11 Pangemo Properties: Raw land in King George County, VA	E	Distribution			Exempt				
12									
13									
14									
15									
16									
17									
1. Income/Gain Codes: (See Col. B1, D4)	A=\$1,000 or less F=\$50,001-\$100,000		B=\$1,001-\$2,500 G=\$100,001-\$1,000,000		C=\$2,501-\$5,000 H=\$1,000,001-\$5,000,000		D=\$5,001-\$15,000 I=\$5,000,001-\$15,000,000		E=\$15,001-\$50,000
2. Value Codes: (See Col. C1, D3)	P=\$15,000 or less N=\$250,001-\$500,000 P3=\$25,000,001-\$50,000,000		K=\$15,001-\$50,000 O=\$500,001-\$1,000,000		L=\$50,001-\$100,000 P1=\$1,000,001-\$5,000,000 P4=More than \$50,000,000		M=\$100,001-\$250,000 P2=\$5,000,001-\$25,000,000		
3. Value Method Codes: (See Col. C2)	Q=Appraisal U=Book value		R=Cost (real estate only) V=Other		S=Assessment W=Estimated		T=Cash/Market		

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	George W. Miller	8/25/03

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

IX. CERTIFICATION.

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

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

Signature

George W. Miller

Date

August 25, 2003

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

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

FINANCIAL STATEMENT

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	\$64,000.00	Notes payable to banks-secured	0
U.S. Government securities-add schedule	0	Notes payable to banks-unsecured	0
Listed securities (1,256 shares of Texas Instruments)	\$22,400.00	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	N/A	Real estate mortgages payable (15-year-mortgage with Navy Federal Credit Union on residence, Arlington, VA; will be fully paid by 2008)	\$106,400.00
Real estate owned Residence, Arlington, VA	\$950,000.00	Chattel mortgages and other liens payable	0
Real estate mortgages receivable	0	Other debts-itemize:	
Autos and other personal property	\$27,000.00	Home Equity Line of Credit with Navy Federal Credit Union	\$30,000.00
Cash value-life insurance	\$60,000.00	Tuition Loan due Princeton University	\$22,500.00
Other assets itemize:			
H&H Partner's Retirement Plan:	\$1,635,000.00		
Strong Large Cap Growth Fund	\$1,491,000.00		
Fidelity Retirement Money Market Fund	\$144,000.00		
H&H Partners' 401 (k) Plan:	\$21,700.00		
Fidelity Retirement Money Market Fund	\$21,700.00		
H&H Partners' Unfunded Retirement Plan	\$640,000.00		
Spouse's IRA (Navy Federal Credit Union)	\$9,454.00		
Spouse's 457 and 401(a) Accounts w/ Arlington County	\$20,500.00	Total liabilities	\$158,900.00

		Net Worth	\$3,291,154.00
Total Assets	\$3,450,054.00	Total liabilities and net worth	\$3,450,054.00
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor	0	Are any assets pledged? (Add schedule)	0
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	NONE		

[Please note that figures are approximate and as of 6/27/03]

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 was principal counsel for plaintiffs on a pro bono basis in Streicher v. Zanni, Case No. SP 1598-83, Superior Court of the District of Columbia, a class action challenging the criteria for involuntary civil commitment in the District of Columbia. The action was tried before Hon. Kaye K. Christian over 21 days beginning in February of 1995 and ending in June 1995. My co-counsel were my associate, Catherine L. Pinkerton, and lawyers from the D. C. Public Defender Service and the Bazelon Center for Mental Health Law. The plaintiff

class was composed of persons who had been involuntarily civilly committed in the District of Columbia. The lawsuit involved an as-applied challenge to the constitutionality of the Ervin Act, the statute governing involuntary civil commitment in the District of Columbia. On July 12, 1996, Judge Christian filed her 109-page Findings of Fact, Conclusions of Law and Order, which granted substantial relief to our clients. The case was settled while on appeal to the D. C. Court of Appeals.

I have also handled a number of prisoner's rights cases on a pro bono basis, including:

In June 1994, I (along with my associate Donald C. Brown, Jr.) conducted a three-day jury trial before Hon. Joyce Hens Green in the U. S. District Court for the District of Columbia on a pro bono basis on behalf of plaintiff, John B. Perry, an inmate at the Lorton Reformatory who alleged that he had been injured as the result of misconduct by D.C. Corrections Officers. The jury returned a verdict in favor of our client for compensatory and punitive damages. That case was styled John B. Perry v. District of Columbia, Civil Action No. 92-1580 (JHG) (PJA), U.S.D.C. for D. C.

In September 1995, I (along with my associate, Donald C. Brown, Jr.) conducted a five-day jury trial before the Hon. Joan Zeldon of the Superior Court of the District of Columbia in a lawsuit in which we represented, pursuant to Court appointment and on a pro bono basis, the defendant, Captain William H. Hinton, a D. C. Correctional Officer employed at the Lorton Reformatory. The plaintiff was an inmate at Lorton who alleged that Captain Hinton had injured him as the result of an assault. The jury returned a verdict in favor of Captain Hinton. That case was styled Bobby Farmer v. District of Columbia and Captain William H. Hinton, 93 CA 9692, Superior Court of the District of Columbia.

I served as pro bono general counsel to Dr. Ronald M. Shansky, the Court-appointed Receiver for Medical and Mental Health Services at

the D. C. Central Detention Facility (also referred to as "the D.C. Jail"). Dr. Shansky was appointed Receiver in 1995 by U. S. District Judge William B. Bryant, in consolidated cases pending before him under the names Leonard Campbell, et al. v. Anderson McGruder, et al., C.A. No. 1462-71 (WBB), and Inmates of D.C. Jail, et al. v. Delbert C. Jackson, et al., C.A. No. 75-1668 (WBB), U.S.D.C. for D.C. Judge Bryant in 2000 approved the termination of the Receivership and the transfer of the functions that had been performed by the Receiver back to the District of Columbia Department of Corrections.

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 hold membership in 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).

There is no selection commission to recommend candidates for the U.S. Court of Federal Claims. Late last year, I expressed an interest to former colleagues in being considered for a vacancy on the Court of Federal Claims, a court in which I have litigated with some frequency since the late 1970s. Thereafter, I was interviewed by lawyers from the White House Counsel's Office, a special agent of the FBI and lawyers at the Department of Justice.

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.

In our system of government, Congress, as the legislative branch, is responsible for making the laws; the executive branch for seeing that

they are faithfully executed; and the judiciary for interpreting the laws and applying them to particular circumstances when presented with an appropriate case or controversy. In exercising the judicial function, the judge should interpret and apply the law without regard to his or her personal views as to what is fair and just. He should do so in a manner consistent with the doctrine of stare decisis and with due regard for the Constitutional and prudential limitations on judicial authority embodied, for example, in the doctrines of standing, ripeness and justiciability.

Senator CORNYN. Thank you very much, Mr. Miller.

I am happy to have been joined by my colleague Larry Craig. And Senator Craig, if you have any comments at this point before we launch into the questions, I would be glad to recognize you for that purpose.

Senator CRAIG. I have no questions, thank you very much, Mr. Chairman. I am here to listen and to get to know these three nominees better.

Senator CORNYN. Excellent. We are glad you could be here in person.

Well, let me just launch into a few questions here, if we may. First, Judge Rodgers, there was comment made about your experience as a magistrate judge, and I wonder if you could tell the Committee a little bit about your experience in that capacity—the kinds of cases you have heard, kinds of responsibilities that you have assumed and discharged as a Federal magistrate judge.

Judge RODGERS. All right. Thank you, Mr. Chairman. If I might, before I embark on answering your question, I was remiss in not thanking Senator Bob Graham as well earlier. Senator Graham has submitted comments for the record, and I am deeply grateful to him for that and, again, was remiss earlier in not mentioning that.

Senator CORNYN. We will certainly make those, as we will all other written comments made by Senators, as part of the record. Thank you for remembering that.

Judge RODGERS. Thank you.

The last 16 or so months have been probably the most rewarding in my career, and that's the time that I have been serving as a magistrate judge on the United States District Court for the Northern District of Florida. This position has, in my opinion and in my experience, been invaluable to me, and I think it will prove to be invaluable if I am fortunate enough to be confirmed by the Senate.

As far as day-to-day responsibilities as a magistrate, I now perform many of the same or similar type of duties that the district court judges on our court perform. In our district, magistrate judges are fully utilized. And what I mean by that is they have both a civil and a criminal docket. They manage both.

On the criminal side, I handle all felony initial appearance proceedings, beginning with, again, the initial appearance, the arraignment, detention hearings, which are of course evidentiary hearings. I do on occasion accept pleas in felony cases. That is done on a report and recommendation basis to the district court.

We also have a very large misdemeanor docket in the Northern District of Florida due to the number of military facilities that we have in our area, as well as National Seashore areas. On the misdemeanor side of the docket, I handle the case from the inception all the way through the trial, through sentencings, and I will add that, as part of that, I do on occasion apply the Sentencing Guidelines in Class A misdemeanor cases. So I have some familiarity with the Sentencing Guidelines, which I think will prove useful to me down the road if I am confirmed.

I also handle violation of probation hearings, as well as, again, sentencings, and handle matters pertaining to the grand jury as a magistrate.

On the civil side of the docket, our duties are vast. And I would add that on the Northern District of Florida, our docket is approximately 90 percent civil. Over half of that docket is made up of cases that the magistrates handle on a day-to-day basis, those cases being Social Security cases, habeas corpus matters, petitions and motions, as well as prisoners' civil rights cases. And I handle those cases on report and recommendation to the district court judges.

We also handle all of the civil discovery matters as magistrates on our district court, which, as you can imagine, keeps us very busy and requires a good command of the Federal Rules of Civil Procedure, which, again, I think will prove useful down the road if I am confirmed.

The, I guess, more of a subjective benefit of having served as a magistrate is that it has allowed me to develop a certain judicial temperament. I enjoy my time in the courtroom as well as outside the courtroom, but I do believe that the time that I've spent in the courtroom as a magistrate judge has been invaluable to me and will prove to be so down the road.

I think it has taught me a lot about respect for the litigants that come into the courtroom. As a district court judge, I'm the first—excuse me, as a magistrate judge, I am the, really, the first person that they see and hear from in the courtroom, and I feel that I represent the court. And as a district court judge, if I'm confirmed, I feel the same way, that I would have a duty and a responsibility to ensure that the litigants are treated fairly, respectfully, courteously. And not just the litigants, but the attorneys as well, the jurors, and every member of the public that comes into the courthouse, because it is a public forum.

But in short, I think that the time that I've spent as a magistrate has been invaluable, and I think would prove to be invaluable down the road if I'm fortunate enough to be confirmed.

Thank you.

Senator CORNYN. Thank you very much.

Mr. Titus, during your introduction, I was—one of the things that you have done or the honors that you have received caught my attention, in particular being admitted to the American College of Trial Lawyers, which I know is reserved, really, for people at the top of their profession, people who represent clients in courtrooms. And you, of course, having spent a lot of time in the courtroom as a lawyer, I know, in all likelihood, share my concern that there are a lot of people who can't afford to resolve their differences in a courtroom because of the cost. Particularly we are talking about civil cases. We know indigents who are charged with crimes can get court-appointed lawyers. But also the delay that seems to be built in too often in our civil litigation system precludes many people from seeking resolution of their disputes in a court of law.

And I wondered what thoughts you might have about either case management techniques of alternative dispute resolution or other similar techniques you might be able to use to make sure that more people have access to the courts, and not less.

Mr. TITUS. Thank you, Mr. Chairman.

One of the activities that I've been engaged in since 1989 is being a member of the—the full long name for it is the Standing Com-

mittee on Rules of Practice and Procedure of the Court of Appeals of Maryland. We call it the rules committee. It's a tongue-twister.

Since I've been on that committee, I was, among others, given the chairmanship of the management of litigation subcommittee. And one of the concerns of that Committee is to address the very type of thing that you're mentioning now. While I was chairman, we came up with a mandatory requirement for all circuit courts in our State to have differentiated case management plans, so that a complex case would be on one type of a track and a very simple case would be on a very simpler track.

That has worked very well, because it means that a case that should be inexpensive to litigate ends up on a rather quick, short track for discovery and pre-trial and so forth. Another aspect of it is that there are mandatory conferences with the presiding judge early in the case, to discuss such things as discovery planning, but most importantly, to talk about the alternatives for resolving the matter without having to go through the full-blown process of preparing for and conducting an actual trial. So it provides for—and I've been sometimes disappointed that it hasn't been implemented as well as I'd like—but it provides for the possibility of early intervention by mediation.

In the Federal court to which I've been appointed, significant use is made of the magistrate judges to conduct mediations. And I've participated in a number of them, and they do an extraordinarily good job of helping the parties identify a solution to their case, that is, not necessarily one that's going to be hammered out in a courtroom with uncertain results and possibly high costs.

So those are obvious concerns to me, and that's how I've acted on them in the past.

Senator CORNYN. Thank you very much. I think it was Ambrose Bierce who defined litigation as something to which you go in—or people who resolved their disputes through basically a sausage-grinding process. And he said it more artfully than I can remember right now, but essentially sometimes it is hard, through the litigation process, to identify the winner from the loser; both of them are so battered and bruised and depleted during the process. So I am glad to hear of your commitment to differentiated case management and alternative dispute resolution.

Mr. Miller, you are also an advocate of the use of alternative dispute resolution. Can you talk a little bit about your ideas about how those ADR techniques can be used to resolve disputes that will be pending before the U.S. Federal Court of Claims?

Mr. MILLER. Thank you, Senator Cornyn.

I, as Senator Allen mentioned, have been a member of the Advisory Council of the Court of Federal Claims for the past 9 years. And one of the things which the Court of Federal Claims has itself done very recently is to establish a pilot program seeking to utilize alternative dispute resolution techniques more aggressively to try to settle cases that should be settled at an early point in the proceedings.

My own experience in that regard has been that there is no substitute for judicial involvement at a point in time, hopefully when the parties have conducted some discovery, know what the facts of the case are, and the parties would benefit from a neutral evalua-

tion by a judge who can share with the parties what his reaction might be if he were confronted with the particular facts and circumstances. And the Court of Federal Claims ADR pilot program seeks to utilize so-called settlement judges for that purpose.

And I would hope that that pilot program will be expanded—modified as appropriate, given the court's experience with the pilot program—but expanded to be even more widely utilized in the Court of Federal Claims. I think that there has been a lot of progress in that regard to date in that court, and my impression is that the judges are very interested in expanding the reach of the ADR pilot program, which I support.

Senator CORNYN. Senator Leahy, the Ranking Member of the Judiciary Committee, is unable to be here in person but has sent a written statement which will be made, without objection, part of the record.

Mr. Miller, tell me, for those who may not be as familiar as you are with the work of the United States Court of Federal Claims, what you consider to be the greatest challenges that confront that court.

Mr. MILLER. Senator Cornyn, I think one of the greatest challenges confronting that court is ensuring the expeditious decision of cases. There was a time, I think, when practitioners generally regarded the Court of Claims, as it was then known, as a forum in which it could take a long time to get a decision. I was a member of a litigation practice reform task force in 1996, which studied that issue, made some recommendations. And my own experience is that, as a result of that activity and of the work of the Advisory Council, the Board of Governors of the Bar Association of the Court of Federal Claims, and the active participation of the judges of the Court of Federal Claims, that the court has come a long distance from the era when it was, I think, widely regarded as too slow in rendering decisions. And I think, at this point in time, that perception among the members of the bar has generally changed, and the court is in fact must more, in my judgment, conscious of the need to render its decisions quickly as well as well. And I think continuing that trend is one of the most significant challenges facing the court.

Senator CORNYN. Are there case-disposition standards that exist for that court? And how is the court doing in terms of meeting those standards, if they exist?

Mr. MILLER. It is my understanding, Senator, that the court has an internal operating rule or procedure which contemplates, as I understand it, that within 30 days of the filing of the last brief or the conclusion of the hearing, the matter is set for argument. Argument, in turn, is set within 60 days of the last brief or conclusion of the hearing, and decision is rendered within 30 days of argument; therefore, within 90 days of the conclusion of the trial proceedings.

My impression is that the court is generally adhering to that guideline. Now obviously there are cases which for one reason or another should be stayed pending, perhaps, a decision of the Court of Appeals for the Federal Circuit which may resolve the case or to permit the parties to arrive at an amicable resolution. But I think in principle that is the timetable which the court has inter-

nally set for itself. And as an outside observer, it is my impression that the court adheres to that timetable in most of the cases that come before it and are not otherwise candidates for some sort of delay.

Senator CORNYN. Thank you.

As each of you know, judges are not legislators. And sometimes a judge is confronted with a legal precedent, or maybe even a statute, which directs a result that they may not personally agree with or be happy with. Of course, the United States Supreme Court precedents are binding on all lower Federal courts, and circuit court precedents are binding on the district courts. I would like to hear a little bit from each of you—perhaps, Ms. Rodgers, starting with you—about your observations with regard to the duty of a United States Federal district judge to follow precedents of higher courts and the statutes passed by Congress in the event that they aren't unconstitutional.

Judge RODGERS. Thank you, Mr. Senator, Mr. Chairman.

If I am fortunate enough to be confirmed, my judicial philosophy as a district court judge would be one of respect for the limited powers of the district court, and also respect for the separation of powers. If I'm confirmed, I would leave the matter of law-making and legislating to the Congress, where it rightfully belongs. I wouldn't have any problem doing that whatsoever.

Senator CORNYN. What is your approach to a—let's say the United States Supreme Court has not passed on an issue that you need to decide. Where would you look for guidance, and how would you arrive at a decision absent a clear precedent or a clear statute?

Judge RODGERS. Well, the first place I would look would be to the law or precedent of our circuit, which would be the 11th Circuit Court of Appeals. In the absence of any guiding precedent in that circuit, I would most probably look to circuit court decisions in other circuits that might be analogous to the facts before me or the legal issues before me. In the absence of any guidance, or persuasive guidance, from other circuits, I would, in reviewing Federal legislation, I would first afford the statute a presumption of constitutionality. From there, I would apply statutory rules and principles of construction to try to arrive at the statute's meaning. And in the event the statute was not clear or there was some ambiguity there, I would rely on legislative history to guide me in determining the statute's meaning.

Senator CORNYN. Mr. Titus, do you agree that occasionally judges have to make decisions that are unpopular or perhaps may not even be consistent with their own personal preferences because precedent, faithful application of precedent or a statute requires it?

Mr. TITUS. Thank you, Mr. Chairman. I don't think there's any question but that a judge's personal views are irrelevant. When it comes to a case that comes before a judge that has a controlling precedent or a statute that dictates the result, you have to follow it.

I have been an advocate for people who I didn't like or whose views I didn't like, and that's the nature of the advocate's job. Your job is to be the advocate. And a judge is in the same situation. You bury your personal feelings and you follow the precedent, follow what the law is.

Senator CORNYN. Are you saying that the role of an advocate is represent the client faithfully without regard to whether you like the client or even agree with their legal arguments?

Mr. TITUS. That's what the Code of Professional Responsibility says—zealously represent the client to the best of my ability.

Senator CORNYN. And what should we glean from, let's say, for example, the kinds of cases that you have handled and maybe the kinds of positions that you have taken as an advocate on behalf of a client, what should we glean from that in terms of your ability to perform the duties of a United States Federal district judge. Is it relevant at all?

Mr. TITUS. Well, I have been involved in cases where the positions I took were not necessarily popular. One of those was mentioned by Senator Mikulski. I mean, I was having people booing at me and everything else trying to get an administrative headquarters for an organization to provide medical care for the homeless. But I had a client and I had a job to do, and we got the job done.

Senator CORNYN. Does that have any bearing, do you think, on how you will regard such cases, or other cases, as a judge? I guess what I am trying to get at—I am not asking the question very well—but what the difference in the role is between that of an advocate and that of a judge, and what relevance your conduct as an advocate should have in terms of our consideration of whether you should be confirmed as a judge.

Mr. TITUS. Well, what I'm trying to say is I feel very comfortable with the constraints that are upon a judge to follow precedent, to make decisions that may not be popular but which are bound by—are controlled by precedent or by statute. And I was simply trying to draw an analogy to the fact that lawyers, as advocates, frequently have to advocate positions with which they may not personally agree but which is in the interest of the client to advocate. And I'm comfortable with making that transition and keeping my own personal views, whatever they may be, not in the forefront of any decision making as a jurist.

Senator CORNYN. Thank you.

Mr. Miller, would you comment on those same questions?

Mr. MILLER. Well, I think I have actually little to add to the comments of Judge Rodgers and Mr. Titus. I would say that I think the first task, actually both of the advocate and, I think, of the judge, is to, having ascertained the relevant facts, look up the law. And just as the advocate seeks to marshal precedents in support of his client's position, so, it seems to me, the judge, in analyzing the existing law and relevant authority, is seeking to find out, at least initially, if it's possible to do so, what the law is. And having ascertained that, assuming he is able to do so, that in turn sets the course that the judge necessarily is on to make a decision, regardless of what his personal views of what might be good policy in the circumstances might be.

Senator CORNYN. Thank you very much.

Well, I want to thank each of you for being here today to answer a few questions in addition to the multitude of questions you have already answered to even get to this point, and to congratulate you and your families on your nomination. It is my hope that your

nominations will be voted out of the Committee quickly and that you will be speedily confirmed by the United States Senate. I think your record, your answers to these questions and others have shown not only your qualification for the office to which you have been nominated, but your temperament is appropriate to that job, and your approach to the unique role of judging in our legal system commends itself toward your confirmation.

There may be other questions that will be tendered to you in writing by members of the Committee. That is their right. And we will hold the record open for that purpose.

But with that, this hearing today will be concluded. And thank you again for being here.

[Whereupon, at 11:00 a.m., the Committee was adjourned.]

[Questions and answers follow.]

QUESTIONS AND ANSWERS

HOGAN & HARTSON
LLP

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September 24, 2003

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

Re: Responses to Written Questions Submitted
Following September 17, 2003 Confirmation Hearing

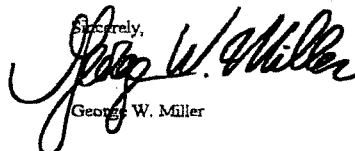
Dear Chairman Hatch:

Following my confirmation hearing on September 17, 2003 I received on September 23 written questions from Senator Leahy and Senator Durbin.

My responses to those questions are enclosed.

Thank you for your consideration.

Sincerely,



George W. Miller

cc: The Honorable Patrick J. Leahy, Ranking Member

**RESPONSES FROM GEORGE W. MILLER
TO QUESTIONS SUBMITTED BY SENATOR PATRICK J. LEAHY**

1. You are involved in several organizations that were created in part to advocate for a change in the law with regard to the "takings" clause of the Constitution. On your Senate Questionnaire, you indicated that you are a member of the Federalist Society and noted that some of your takings publications were published by the Washington Legal Foundation.

Despite listing many organizations where you have served as a board member on your Senate Questionnaire, you failed to note the active role you have played on the Board of Advisors for the Defenders of Property Rights. This organization's mission statement explains that the "Defenders of Property Rights was founded in 1991 to counterbalance the governmental threat to private property as a result of a broad range of regulations."

- a. Please explain why you did not include this organization on your Senate Questionnaire in light of the fact that you listed at least four other organizations where you served on various Boards, particularly in light of direct interest Defenders of Property Rights has in the takings jurisdiction of the Court of Federal Claims.

RESPONSE: I did not include Defenders of Property Rights on my Senate Questionnaire because I had simply forgotten that I was a member of the Board of Advisors of that organization until I read your 9/17/03 statement submitted for the record following the hearing on that date. In fact, I have not played an active role in that organization or as a member of the Board of Advisors. I do not believe that I have ever attended a meeting of the Board of Advisors, or had any communication with any staff members of the organization regarding any aspect of its activities since I agreed to serve in that capacity in 1991. I apologize for the omission. It was entirely inadvertent and innocent.

These three organizations have taken a very strong position on property rights and takings issues that frequently come before the Court of Federal Claims. For example, at least one of these organizations supported federal legislation that would have required compensation for any federal regulation that reduced the value of any portion of any parcel of property by more than 50 percent.

- b. Do you agree with these organizations' view that Supreme Court "takings" precedents do not adequately protect private property rights? Please explain.

RESPONSE: I assume the "three organizations" you reference in your questions are Defenders of Property Rights, the Washington Legal Foundation and the Federalist Society. While I do not know that each of them holds the view described in question 1.b., the takings precedents of the Supreme Court necessarily constitute the extent to which the Takings Clause may be said to protect private property rights. Should I be confirmed, I would faithfully follow the law as set forth by the Supreme Court in those decisions.

While I have limited familiarity with the legislation to which the question refers, I can see pros and cons in specifying a fixed percentage diminution in value as a "test" to determine when a compensable taking has occurred. On one hand, such a fixed percentage would respond to the desire for certainty in an area of the law that is frequently characterized by ad hoc, case-by-case determinations. However, reliance on diminution in value as the sole criterion fails to take into account other factors that would seem to be relevant in determining whether the public should bear the cost of the diminution in value, including, for example, the reasonableness of the owner's expectations about the permissible uses of his property and the nature of the governmental action that effected the diminution in value. Whether legislation of the type described would be desirable or not is a question for the legislative branch.

- c. Given your position on the Board of Advisors of the Defenders of Property Rights, your membership in the Federalist Society, your intellectual contributions to the Washington Legal Foundation, and your extensive representation of property owners in the field of takings, what facts demonstrate that you will be able to put aside your personal views and be a fair and neutral adjudicator of takings claims that come before you as a judge, if you are confirmed?

RESPONSE: While I have represented property owners in takings cases, I have also represented regulators and governmental entities. For example, I assisted in the firm's representation of the Tahoe Regional Planning Agency in the Tahoe-Sierra case decided by the Supreme Court in the October 2001 Term. In addition, I have served since 1994 as eminent domain counsel in Northern Virginia for the Virginia Department of Transportation. I also represented the National Parks and Conservation Association on a pro bono basis in litigation that successfully protected delicate ecosystems present in the caves of Mammoth Cave National Park from damage due to sources of pollution on the surface. In fact, I think the breadth of my practice and the diversity of the types of clients I have represented, over a career of nearly 37 years at the bar, shows that I will be able to put aside my personal views and be a fair and neutral adjudicator of takings claims (and other cases) that would come before me as a judge should I be confirmed. In this regard, I would also point to my service in a quasi-judicial capacity as Chairman of the D. C. Court of Appeals' Board on Professional Responsibility, the court-appointed body that administers the lawyer disciplinary system in the District of Columbia, and as Chairman of a Hearing Committee of that Board. I would also point to my service in other positions of importance to the administration of justice, including my service on the U. S. Court of Appeals' Committee on Admissions and Grievances; my service on the Court-appointed Task Force on Racial and Ethnic Bias in the District of Columbia Courts; my service on the Advisory Council of the Court of Federal Claims; and my service on the Board of Governors of the Court of Federal Claims Bar Association. These activities are described in more detail in my questionnaire.

- d. Should you be confirmed, do you believe that your past contributions to these advocacy groups will give a perception of partiality, especially in takings cases?

RESPONSE: In light of my entire record as a lawyer and litigator in the Washington, D.C. legal community over a period of nearly 37 years, as described above and in my questionnaire, I do not believe that my past contributions to the groups identified will give a perception of partiality in takings cases or in any other cases.

- e. Will you continue to be affiliated with the Washington Legal Foundation, the Federalist Society, and the Defenders of Property Rights, if you are confirmed?

RESPONSE: I would resign from the Advisory Board of Defenders of Property Rights since I have not been active in that capacity, thereby severing any affiliation with that organization. Except for having authored the two articles identified in my questionnaire, I do not consider myself to have been affiliated with the Washington Legal Foundation. I would not write any similar articles if I am confirmed. The articles in question analyzed recent decisions of the Supreme Court and U. S. Court of Appeals for the Federal Circuit. As a judge, I might be called upon to apply such decisions to cases before me. Subject to the limitations of Canon 4 of the Code of Conduct for United States Judges, I plan to continue my membership in the Federalist Society. Subject to the same constraints, I would not regard it as improper, if invited to do so, to speak at a Federalist Society function.

- f Have you continued to be affiliated or involved with these groups since you were nominated? If so, please explain.

RESPONSE: Except for having written the two articles described above, I have not been affiliated with the Washington Legal Foundation before or since the date of my nomination. I have remained a member of the Federalist Society. Until I read your 9/17/03 statement, I had forgotten that I was on the Board of Advisors of Defenders of Property Rights. I have not taken action since that date with respect to my membership on that Board.

- g. If you are confirmed, will you recuse yourself from cases involving the Defenders of Property Rights, or its president, Nancie Marzulla or fellow board member Roger Marzulla? If not, what can you say to assure the Senate that you will fairly consider the propriety of governmental regulations against challenges from entities similar to or affiliated with the Defenders of Property Rights, despite your alliance with this organization?

RESPONSE: It is my understanding that whether I should recuse myself in the situations described would depend upon whether my impartiality might reasonably be questioned. See 28 U.S.C. § 455(a); Canon 3(C)(1), Code of Conduct for United States Judges. The inquiry under § 455(a) "is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances." Microsoft v. United States, 530 U.S. 1301 (2000) (Rehnquist, C.J.) (citing Litecky v. United States, 510 U.S. 540, 548 (1994); In re Drexel Burnham Lambert Inc., 861 F.2d 1307, 1309 (2d Cir. 1988)); see also Sao Paulo State of the Federative Republic of Brazil v. American Tobacco, 535 U.S. 229, 233 (2002) (per curiam).

If I had in fact played an active role as a member of the Board of Advisors, then I would recuse myself in the situations described. However, in view of the fact that I actually had no role in the conduct of the activities of the organization, it is not clear to me that recusal would be required. As indicated in my answer to question 1.a. above, I do not recall ever attending a meeting of the Board of Advisors. Nor do I recall ever having any communication with Nancie or Roger Marzulla or any staff member of the organization regarding any aspect of its activities. Nonetheless, I would research the issue more carefully if I were in fact confronted with any of the situations described, and I would not hesitate to recuse myself if a more thorough study of the governing authorities suggested that was required.

With respect to the second part of question 1.g., I would point to the limited nature of my relationship with this organization, as described above, and to my conduct over the course of my career as described above and in my questionnaire. As I stated at my confirmation hearing, I believe the highest calling of a lawyer is to be a judge. Essential to the judicial role is the putting aside of one's personal views as to what may be sound policy or a preferred result and the conscientious striving in a disinterested manner through reasoned elaboration from the decided cases and other sources of law toward an understanding of what the law is. I would strive to achieve the ideal described by Justice Breyer in his confirmation hearing for the Supreme Court: "Why is it that judges wear black robes? I have always thought that the reason that a judge wears a

black robe is to impress upon the people in the room that a particular judge is not speaking as an individual."

2. In *Lucas v. South Carolina Coastal Council*, on behalf of the American Mining Congress, the National Coal Association and other amici, you argued that the "primary purpose of the Just Compensation Clause" is "encouraging the use and development of property interests through the assured protection of those interests." Brief at 5.

- a. Do you personally agree with this characterization of the primary purpose of the Just Compensation Clause?

RESPONSE: The brief states that "encouraging the use and development of property interests through the assured protection of those interests" is "a primary purpose of the Just Compensation Clause" (emphasis added). I agree with that characterization.

b. What is the purpose of the Just Compensation Clause, in your opinion?

RESPONSE: The best statement of the purpose of the Just Compensation Clause of which I am aware is set forth by the Supreme Court in Armstrong v. United States, as follows: "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960).

In his *Lucas* opinion, Justice Scalia acknowledges that "early constitutional theorists did not believe that the Takings Clause embraced regulation of property at all."

- c. What evidence supports the argument that the clause was intended to encourage the use and development of property?

RESPONSE: Even if the Takings Clause were held not to embrace regulation of property at all (and instead held to apply only to physical occupations of property), that would seem to me to be entirely consistent with the argument that a purpose of the clause was to encourage the use and development of property. This is so because a physical invasion of property would ordinarily preclude, or limit, the use and development of the property just as effectively, if not more so, as a regulatory restriction that precluded or limited economically viable use.

However, as Justice Scalia pointed out in *Lucas*, the Takings Clause has not been so limited. Rather, the clause has been interpreted since *Pennsylvania Coal v. Mahon* in light of Justice Holmes's recognition in that 1922 case "that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits." That now settled interpretation of the Takings Clause is the source from which the regulatory takings doctrine has evolved. The evolution of that doctrine is, in turn, itself support for the argument, advanced in our *Lucas* amicus brief, that a purpose of the clause was to encourage the use and development of property.

**RESPONSES FROM GEORGE W. MILLER
TO QUESTIONS FROM SENATOR RICHARD J. DURBIN**

1. Mr. Miller, you've practiced for many years before the Court of Federal Claims (CFC), the court to which you have been nominated. You are probably familiar with the March 2003 *Washington Post* editorial entitled "Court of Extravagance" which argues that the CFC should be abolished because it has too many judges and too little work. A CFC judge has one case for every eight handled by a federal district court judge. The *Post* also points out that the CFC has overlapping jurisdiction with federal district courts, suggesting that it is redundant. What is your response to this commentary on the CFC?

RESPONSE: The President of the Court of Federal Claims Bar Association sent a letter to the editor of the *Post* on behalf of the Bar Association, dated March 28, 2003, that took issue with any suggestion that the court "has too many judges and too little work." A copy of that letter is attached. As the letter points out, and as the *Post* editorial conceded, because the court's business is different from that of federal district courts, comparisons of output levels are misleading. The letter stated, "Those practicing before the Court know that the Court and its judges are busy." That is consistent with my own observation and experience. The assertion "that the CFC has overlapping jurisdiction with federal district courts, suggesting that it is redundant" appears to be based on a misunderstanding of the court's jurisdiction. Pursuant to the "Little Tucker Act," 28 U.S.C. § 1846 (a)(2), the district courts have concurrent jurisdiction with the Court of Federal Claims only in cases where the amount claimed does not exceed \$10,000. Where claims exceed \$10,000, the Court of Federal Claims has exclusive jurisdiction. The issues raised by the *Post* editorial are also addressed in the message of the Chief Judge of the Court of Federal Claims published in the Summer 2003 issue of the Court of Federal Claims Bar Association newsletter. A copy of that message is also attached.

2. You are on the Board of Advisors of a group called Defenders of Property Rights, an organization that takes positions on property rights and takings issues that frequently come before the Court of Federal Claims. The organization supported federal legislation that would have required compensation for any federal regulation that reduced the value of any portion of any parcel of property by more than 50 percent.

- A. Do you agree with the view of Defenders of Property Rights that Supreme Court takings rulings do not adequately protect property rights? If so, please explain. If not, please explain why have you been a member of this organization.

RESPONSE: The takings precedents of the Supreme Court necessarily constitute the extent to which the Takings Clause may be said to protect private property rights, and, should I be confirmed, I would faithfully follow the law as set forth by the Supreme Court in those decisions. Although my familiarity with the legislation to which the question refers is limited, I can see pros and cons in specifying a fixed percentage diminution in value as a "test" to determine when a compensable taking has occurred. On one hand, such a fixed percentage would respond to the desire for certainty in an area of the law that is frequently characterized by ad hoc, case-by-case determinations. However, reliance on diminution in value as the sole criterion fails to take into account other factors that would seem to be relevant in determining whether the public should bear the cost of the diminution in value, including, for example, the reasonableness of the owner's expectations about the permissible uses of his property and the nature of the governmental action that effected the diminution in value. Whether legislation of the type described would be desirable or not is a question for the legislative branch.

- B. In light of your support of Defenders of Property Rights – and your longtime representation of corporations and industries – how would you assure litigants that you would be a fair and impartial adjudicator of takings claims that came before you as a judge?

RESPONSE: As an initial matter, my support of Defenders of Property Rights has been quite limited. I have not played an active role in that organization or as a member of its Board of Advisors. Indeed, I do not believe that I have ever attended a meeting of the Board of Advisors, or had any communication with any staff members of the organization regarding any aspect of its activities since I agreed to serve in that capacity in 1991.

While I have represented property owners in takings cases, I have also represented regulators and governmental entities. For example, I assisted in the firm's representation of the Tahoe Regional Planning Agency in the Tahoe-Sierra case decided by the Supreme Court in the October 2001 Term. In addition, I have served since 1994 as eminent domain counsel in Northern Virginia for the Virginia Department of Transportation. I also represented the National Parks and Conservation Association on a pro bono basis in litigation that successfully protected delicate ecosystems present in the caves of Mammoth Cave National Park from damage due to sources of pollution on the surface. In fact, I think the breadth of my practice and the diversity of the types of clients I have represented, over a career of nearly 37 years at the bar, shows that I will be able to put aside my personal views and be a fair and neutral adjudicator of takings claims (and other cases) that would come before me as a judge should I be confirmed. In this regard, I would also point to my service in a quasi-judicial capacity as Chairman of the D. C. Court of Appeals' Board on Professional Responsibility, the court-appointed body that administers the lawyer disciplinary system in the District of Columbia, and as Chairman of a Hearing Committee of the Board. I would also point to my service in other positions important to the administration of justice, including my service on the U. S. Court of Appeals' Committee on Admissions and Grievances; my service on the Court-appointed Task Force on Racial and Ethnic Bias in the District of Columbia Courts; my service on the Advisory Council of the Court of Federal Claims; and my service on the Board of Governors of the Court of Federal Claims Bar Association. These activities are described in more detail in my questionnaire.

C. Would you be willing to recuse yourself in cases in which Defenders of Property Rights was a participant?

RESPONSE: It is my understanding that whether I should recuse myself in the situation described would depend upon whether my impartiality might reasonably be questioned. See 28 U.S.C. § 455(a); Canon 3(C)(1), Code of Conduct for United States Judges. The inquiry under § 455(a) "is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances." Microsoft v. United States, 530 U.S. 1301 (2000) (Rehnquist, C.J.) (citing Litecky v. United States, 510 U.S. 540, 548 (1994); In re Drexel Burnham Lambert Inc., 861 F.2d 1307, 1309 (2d Cir. 1988)); see also Sao Paulo State of the Federative Republic of Brazil v. American Tobacco, 535 U.S. 229, 238 (2002) (per curiam).

If I had in fact played an active role as a member of the Board of Advisors of Defenders of Property Rights, then I would recuse myself in the situation described. However, in view of the fact that I actually had no role in the conduct of the activities of the organization, it is not clear to me that recusal would be required. I do not recall ever attending a meeting of the Board of Advisors. Nor do I recall ever having any communication with any staff member of the organization regarding any aspect of its activities. Nonetheless, I would research the issue more carefully if I were in fact confronted with the situation described, and I would not hesitate to recuse myself if a more thorough study of the governing authorities suggested that was required.

3. You are also a member of the Federalist Society. According to the Federalist Society's mission statement:

"Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law."

As a member of the Federalist Society, do you agree with the mission statement of your organization? Why or why not?

RESPONSE: In my personal experience (now somewhat dated), I have not found law schools to be "strongly dominated by a form of liberal orthodoxy" such as that described in the excerpt quoted above. Our son's experience (he is currently a third-year law student) also does not suggest to me that such is presently the case.

I do agree with that portion of the mission statement of the Federalist Society that seeks to foster thoughtful and vigorous debate on legal issues with a focus on encouraging the expression of a wide diversity of points of view. The greatest benefits that I have derived from membership in the Federalist Society have resulted from its educational mission, which emphasizes the presentation at conferences of legal thinkers with divergent views. I am also encouraged by the presentation of different viewpoints at the first National Convention of the recently established American Constitution Society. Debate and disagreement fosters deeper thinking by members of the bar on important legal issues.

4. According to your Senate questionnaire, you made a presentation at a Federalist Society workshop on "Takings and the Environment" in 1992. According to an April 2, 1992 article about this workshop in the *Chicago Daily Law Bulletin*, "During question-and-answer sessions with lecturers, many speakers from the floor used enunciation to slather sarcasm onto such terms as 'pristine environment,' spotted owls and snail darters. It's like they've been a suppressed religious cult for years and suddenly gained legitimacy and mainstream currency." Does this article accurately reflect your views about the balance between property rights and environmental interests? Please explain.

RESPONSE: I am not familiar with the article. I also do not recall the sort of sarcasm to which the author refers during the question-and-answer sessions. In any event, however, the article does not accurately reflect my views. I have the greatest respect for advocates of environmental protection and, indeed, count myself among their number. As my questionnaire reflects, I am a member of the Adirondack Council and the Residents' Committee to Protect the Adirondacks - both advocacy groups seeking to preserve the "Forever Wild" character of the Adirondack Forest Preserve in upstate New York, where I grew up and return with frequency to visit family and to hike the Adirondack trails and scale (though more slowly now) the Adirondack peaks. In addition, I represented the National Parks and Conservation Association on a pro bono basis in litigation to protect fragile ecosystems in caves within the Mammoth Cave National Park from the effects of pollution on the surface. I also assisted in the firm's representation of the Tahoe Regional Planning Agency in the Tahoe-Sierra case decided by the Supreme Court in the October 2001 term. The Supreme Court's decision in favor of our client was described in the press as a victory for land use planning and environmental protection and a setback for the so-called property rights movement. I do not regard property rights and environmental interests as necessarily opposed to each other. Even our adversaries in the Tahoe-Sierra case were not advocating a right to pollute the pristine waters of Lake Tahoe. Rather, they were arguing that the conceded public benefit of maintaining Lake Tahoe in its pristine state should not be accomplished entirely at their expense. The resolution of such cases, as the Supreme Court's decision in the Tahoe-Sierra case shows, involves complex, subtle and fact-specific inquiries.

**COURT OF FEDERAL CLAIMS BAR ASSOCIATION
C/O U.S. COURT OF FEDERAL CLAIMS
717 MADISON PLACE, NW
WASHINGTON, DC 20005**

28 March 2003

Dear Editor:

This letter is in response to your editorial of March 26, 2003 advocating abolition of the United States Court of Federal Claims and is being sent on behalf of the Court's Bar Association, serving both government and private bar, with national membership. The members of the Bar Association practice in both the Court of Federal Claims and the United States District Courts and are in a good position to assess the value of the Court.

The Court was created some 150 years ago by President Lincoln to assure justice between the federal government and its citizens. Throughout its history it has dealt with issues of tremendous national importance (including resolution in 2002 of nearly \$50 billion in claims against the United States) and intentionally strives to be at the cutting edge of creative and efficient techniques for management of the most complex of cases.

As your newspaper concedes, the Court hears a broad array of citizen claims (including a number of important tax refund matters not listed in your editorial). However, the Post has missed the essential point - while the United States District Courts primarily address injunctive and declaratory relief, and also focus on their large criminal dockets, the Court of Federal Claims addresses claims of various types seeking money from the federal government - the taxpayer's money. The Court of Federal Claims and its predecessor courts have a proud heritage of expertise in dealing with monetary claims against the "sovereign", and in dealing with some of the most complex litigation on the federal judicial docket. Indeed, Congress has recognized time and again this special expertise, and, as recently as 2000, after extensive study, determined that certain government contract claims jurisdiction was better placed solely in the Court of Federal Claims rather than shared with the already burdened federal district courts.

Your comments about the business and "busy-ness" of the Court are also misplaced. Because the Court's business is different from that of federal district courts, as you noted, comparison of output levels are misleading. The Court's docket consists of more than 4,000 cases. The opinions generated by the judges of the Court are recognized as well written and well considered reflecting the complexity of the caseload at the Court. Those practicing before the Court know that the Court and its judges are busy.

This Court has for a number of years taken its role in the federal judiciary very seriously. It has shown a willingness to engage the attorneys appearing before it in significant dialogue regarding a host of issues. Typical of this was the 2002 Judicial Conference. Rather than the "birthday party" described in your editorial, the Judicial Conference focused upon ways to improve the delivery of justice in suits against the United States. Representatives of the Court's bench and bar were joined by experts from nine foreign countries to "compare" systems. The topic was explored in depth and with "no holds barred". Professor Schooner, whose field is government contracts, was but one voice and while his views were heard, other speakers advocated that the Court's role should be increased, not diminished. Among the distinguished panelists reflecting that perspective were Professor Judith Resnik of Yale Law School, a noted expert on the federal court system.

Finally, this Court appreciates that debate can often lead to better understanding of the judicial process and to improvement of the dispensation of justice. That was the spirit and the goal of the conference at which Professors Schooner and Resnik spoke. The Court emerged both affirmed and strengthened.

Sincerely,



John Lodge Eiler
President
United States Court of Federal Claims
Bar Association

Home Address: 5517 Oak Place
Bethesda, MD,
20817

Telephones: (w) 202-616-4068
(h) 301-530-3290

Message From the Chief Judge
CFC Bar Association Newsletter
(Summer '03)

The Court's Judicial Conference last October was a celebration of the 20th year of our incarnation as a separate Article I court under the jurisdiction of the newly created United States Court of Appeals for the Federal Circuit, pursuant to the Federal Courts Improvement Act of 1982. As many of the practitioners before the Court – and the general Court community – may be aware, we observed the occasion with a zesty, academic debate and discussion of the future of the Court, its unique role in the adjudication of money claims against the federal government, its continued vitality, and a comparison of our Court with the mechanisms for suits against the sovereign in a number of foreign countries.

Former Chief Judge Loren Smith and Professor Steven Schooner of George Washington University School of Law debated the latter's proposition that the Court's jurisdiction and caseload could be satisfactorily distributed *in its entirety* to the (Article III) U.S. district courts. Among other valued speakers, Professors Judith Resnick of Yale Law School, Joshua Schwartz of George Washington University School of Law, Gregory Siak of Drake University School of Law, and Craig Stern of Regent University School of Law weighed in with their various endorsements of the utility of the Court, calls for granting it greater remedial authority, or other disagreement with the proposal that it be abolished. The agenda of the conference was, in that sense, deliberately provocative. We apparently succeeded, however somewhat beyond what we had contemplated.

In March, the *Washington Post* published an editorial endorsing the Court's abolition. The genesis and timing of the *Post's* editorial are beyond our ken but, to the extent its editorial has continued the academic and practical discussion that we initiated, it may actually prove to be a valuable contribution to the efforts of many to highlight the work of the Court and focus the discussion on various ways to strengthen the Court's authority to provide more complete justice to deserving litigants against the government.

The Court appreciates the input of the Court's bar association, which, by means of a letter to the editor from Bar Association President John Euler, responded to the *Post's* editorial with an endorsement of the role of the Court. That letter, in an edited version, appeared in the *Post* on April 9 and is reprinted in this newsletter. Unfortunately, the published version of the letter omitted a key observation that the members of the Court's bar are generally practitioners in both this Court as well as the U.S. district courts and thus in a good position to assess the value of the Court of Federal Claims.

It bears noting that there has been a judicial forum for hearing claims against the government since 1855! The Court of Federal Claims is the inheritor of that special function and has consistently been given additional jurisdiction over time. For example, in 2000, after

extensive study by the GAO, Congress removed concurrent bid protest jurisdiction in the district courts and gave this Court exclusive jurisdiction of those actions.


The current docket of the Court is over 4,000 cases, including vaccine cases. Even without inclusion of the vaccine case numbers, comparison of raw case statistics in this Court with those of district court is inapt, inasmuch as district courts, unlike our Court, employ a weighted-case reporting methodology. In 2002, there were claims totaling \$49.2 billion and judgments awarded in excess of \$935.4 million. Decisions of the Court typically involve lengthy written opinions and come at the end of extensive motion and discovery practice. The Court published 258 opinions in 2002, making a substantial contribution to the development of the law. It is true that the parties sometimes have alternative fora, but they come to our Court nevertheless because they know that the Court has the particularized expertise to address and resolve suits against the government (and is not distracted by a high-volume docket of smaller cases that is more characteristic of the district courts).

It puzzles me that the district courts are held up by some as models which this Court would strive to emulate. Many district courts are so burdened by their volume of criminal cases that civil cases are often given short shrift. Increasingly, district courts have had to rely on magistrate judges to manage their civil dockets. Certainly compared to the Court of Federal Claims, it is relatively rare that oral argument is heard on dispositive motions in the district courts or that written opinions on them are issued.

In contract matters, as another example of alternative fora, the agency Boards of Contract Disputes are intentionally designed as non-judicial bodies to quickly and informally resolve contract disputes under the Contract Disputes Act. The Court of Federal Claims, by contrast, attracts the attention of the judicial process to bear. In addition, the largest and most intractable contract matters on the Court's docket typically are outside the reach of the Contract Disputes Act and hence outside the jurisdiction of the BCAs. The "Winstar" cases arising out of the buying and saving and loan crises of the 1980s, spent nuclear fuel cases, and nuclear clean-up are the foremost examples.

In tax matters, the resolution of cases coming out of this Court have the potential, unlike most of the district courts and courts of appeal, to create precedent on a national basis. The average tax claim in the Court of Federal Claims involves substantially more money than cases litigated in the district courts.

In short, there is much to consider in the continued discussion of the vitality of the Court. We welcome this continued debate, just as we welcome the many constructive calls for reforming our jurisdiction and for expanding the remedial powers of the Court. We must all remember to maintain our focus on the ultimate goal and rationale for any such body that hears these claims against the sovereign: fair inquiry into such claims and complete justice for all of those whom the government has wronged.




United States Senate
Committee on the Judiciary

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Committee Information

Statement of
The Honorable Orrin Hatch
United States Senator
Utah

September 17, 2003  PRINTABLE
VERSION

Statement of Chairman Orrin G. Hatch
Before the United States Senate Committee on the Judiciary
Hearing on the nominations of

Margaret Catharine Rodgers to be United States District Judge
for the Northern District of Florida;

Roger W. Titus to be United States District Judge
for the District of Maryland; and

George W. Miller to be Judge for the
United States Court of Federal Claims

It is with great pleasure that I welcome to the Committee these three esteemed
candidates for the federal trial court bench.

Margaret Catharine Rodgers is our nominee for the Northern District of Florida.
Judge Rodgers graduated from California Western School of Law in the top 2%
of her class. She then served as a law clerk for Judge Lacey Collier, the same
judge whose seat she has now been nominated to fill. She enjoyed a successful
career in private practice before her appointment last year as a federal magistrate
judge. She will undoubtedly serve with distinction upon her elevation to the
district court.

Roger Titus has been nominated for the District of Maryland. Mr. Titus, a graduate of Georgetown University Law Center, is a partner in the prestigious firm of Venable, Baetjer and Howard. He has received many accolades in recognition of his outstanding legal skills. For example, in 1999 he was one of only seventeen living attorneys to be awarded the Century of Service Award by the Bar Association of Montgomery County. Mr. Titus will bring nearly 40 years of legal experience and a sterling record to the federal bench.

George Miller, our nominee for the Court of Federal Claims, has distinguished himself in virtually everything he has done as a lawyer. After graduating from Harvard Law School, he clerked for the late Judge Bruce Forrester on the U.S. Tax Court. For the next three years he served in the Navy JAG Corps, then joined the highly regarded law firm of Hogan & Hartson, where he became a partner in 1979. He has represented clients in civil litigation and arbitration proceedings involving a wide variety of matters, including environmental regulation, government contracts, eminent domain, banking, products liability, unfair competition, employment discrimination, aviation, mining, legal ethics, civil rights, and the Employee Retirement Income Security Act. His more than 35 years of litigation experience will serve him well as a federal trial judge.

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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
September 17, 2003**

Today the Committee will hear from three judicial nominees, including two for district court seats and the nominee for the last vacancy on the Court of Federal Claims. For the record, this hearing is the 17th judicial nominations hearing held so far this year. This pace stands in sharp contrast to the way President Clinton's nominees were treated by the Republican majority.

Chairman Hatch never held 17 judicial nominations hearings in any comparable time period during his six years as chairman during the Clinton Administration. In most of those years, there were far fewer hearings and far fewer nominees. For example, I recall that during the *entire* year of 1996, when the vacancy rate was higher and rising, the Committee held only six hearings all year, and those hearings included only five Circuit Court nominees. During that 1996 session, not a single judge was confirmed to the Circuit Courts -- not one. That represents a stark difference to the 11 circuit court confirmations this year.

In fact, Chairman Hatch has now held more hearings for President Bush's judicial nominees in just 9 months than he held in all 24 months of 1999 and 2000 combined for President Clinton's judicial nominees. During the entire year of 2000, only eight judicial nominations hearings were held. In 1999, the Committee did not have a hearing to consider a single judicial nominee until June 16th, and during the rest of 1999, it held only seven hearings to consider judicial nominees. That was the third year of President Clinton's second term. Like 1999, this year, 2003, is the third year of this President's term, and Chairman Hatch has held more than twice as many hearings for President Bush's judicial nominees as for President Clinton's that year.

This accelerated rate of review has resulted in 146 of President Bush's nominees winning confirmation. It is a pace that has put this Administration ahead of previous ones in stacking the federal bench with judges. In just two and a half years, he now has more active judges on the bench than the former President Bush.

It is clear from these statistics that 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 President Bush's judicial nominees.

senator_leahy@leahy.senate.gov

<http://leahy.senate.gov/>

This morning the Senate Judiciary Committee will hear from Roger W. Titus to be United States District Judge for the District of Maryland. Mr. Titus, who is a partner at Venable LLP in Maryland, has been practicing law for 37 years and received a unanimous rating of "Well Qualified" from the American Bar Association. His lengthy record as an attorney and the esteem of members of the local bar stand in stark contrast to the types of nominations this President has made for circuit court vacancies.

For example, five of the 12 circuit court candidates nominated by President Bush and rated by the ABA so far this year have earned a rating of "Not Qualified" in the view of some members of the bar. Many of those circuit court nominees have proven to be quite controversial and have practiced law for far fewer years than Mr. Titus. In fact, the nominee that President Bush has put forward for the Maryland seat on the Fourth Circuit, created upon the death of Judge Francis Murnaghan, is a young Virginian who earned some "Not Qualified" votes from the bar. Yet, the nomination of Mr. Titus clearly demonstrates that there are well qualified, experienced and uncontroversial Maryland Republicans who could be chosen for the Court of Appeals for the Fourth Circuit had the President and his advisors looked for a mainstream nominee rather than a young ideologue. I welcome Senator Sarbanes and Senator Mikulski for coming today to introduce Mr. Titus to the Committee.

Judge Margaret Catharine Rogers, who is nominated to be a United States District Judge for the Northern District of Florida, is also on today's hearing. Like Mr. Titus, Judge Rodgers has earned bipartisan support for her nomination. She has been admitted to the bar for about ten years and has served for about a year as a United States Magistrate Judge in the district to which she is nominated. Judge Rodgers served honorably in the Army, earning a Commendation Medal and a Good Conduct Medal, and she has also volunteered a great deal of time to help others in the community. I welcome Senator Nelson to the Committee today who has come to support this nominee, who is the product of Florida's bipartisan judicial selection commission that Senator Nelson and Senator Graham have worked hard to establish with this White House.

Finally, on today's agenda is George W. Miller, who is nominated to be a Judge for the United States Court of Federal Claims. Mr. Miller is a partner at Hogan & Hartson and he specializes in cases filed under the "Takings Clause" of the Fifth Amendment, which is an area of special jurisdiction for this Article I court.

Like so many of this President's judicial nominees, Mr. Miller is a member of the Federalist Society for Law & Public Policy Studies. In fact, more than 17 of this President's circuit court nominees were members of the Federalist Society and five others were frequent speakers at Federalist Society events, in addition to many trial court nominees. Mr. Miller also serves on the Board of Advisors for the Defenders of Property Rights, which according to its mission statement, "was founded in 1991 to counterbalance the governmental threat to private property as a result of a broad range of regulations."

As I have mentioned in connection with the other six nominations to the Court of Federal Claims (CFC) by this President, the CFC hears many cases alleging "takings" due to environmental or other laws which involve billions of dollars in potential governmental liability. Because of its special takings jurisdiction, the CFC has been targeted as a "place where the Reagan and Bush Administrations have been able to place top-notch conservative judges without getting much attention," according to Clint Bolick of the Institute for Justice. By expanding regulatory takings jurisprudence, some seek to chill the federal government from passing laws that protect the health, safety and welfare of American citizens by increasing the cost of such regulations through lawsuits. The CFC has been ground zero of the "property rights movement," with its anti-environmental agenda. I hope that Mr. Miller was not chosen for this important position with the hope that he will join some of the other Republican appointees to this court in trying to impose their ideological agenda in this area through judicial decisions.

Additionally, this nomination was put forward without any consultation with Democratic Members of the Senate, despite the insistence of Chairman Hatch during the Clinton Administration that bipartisan consultation and appointments were important for this court. However, Senator Allen has come to testify in support of the confirmation of this nominee for the last open seat on this court, and I welcome him to today's hearing.

As I have repeatedly remarked throughout the last three years, the Senate is able to move expeditiously when we have consensus nominees. I look forward to receiving testimony from the three nominees on today's hearing and hope that we can continue to act in a bipartisan manner in considering the lifetime appointments to our federal district courts.

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**NOMINATION OF DORA L. IRIZARRY, OF NEW
YORK, NOMINEE TO BE DISTRICT JUDGE
FOR THE EASTERN DISTRICT OF NEW YORK**

WEDNESDAY, OCTOBER 1, 2003

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

The Committee met, pursuant to notice, at 10:02 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Kyl, Schumer, and Durbin.

**OPENING STATEMENT OF HON. JON KYL, A U.S. SENATOR
FROM THE STATE OF ARIZONA**

Senator KYL. This hearing will come to order.

The agenda of the Senate Judiciary Committee this morning is to hear from a candidate for Federal district court and witnesses in connection with her nomination. The candidate is Dora Irizarry. She is a candidate for the United States District Judge for the Eastern District of New York, and she is going to be introduced this morning by the Senator from New York, who I will turn to in just one moment.

Let me explain for those of you in the audience. As is frequently the case, the Members of the Senate are each supposed to be in four different places as of 10 o'clock, so we are going to take turns here in conducting this hearing. I want to make two points.

First of all, the fact that not everybody is up here does not mean that we do not care or that we will not all review the record and talk to the people who are here in moving the nomination forward or dealing with the nomination. And, secondly, therefore, the failure of a lot of members to cross-examine and quiz and ask a lot of questions and so on does not denote lack of interest. That interest will be certainly revealed as the nominee proceeds through the process and we have additional hearings. But for this hearing this morning, I regret to say there may be some lack of attendance from time to time, and I just do not want any of you to take that as a lack of respect for this nominee or for the process. It certainly does not represent that at all.

Now, I know that Senator Schumer—at least I believe Senator Schumer would like to introduce the nominee, and, therefore, let me call upon the Senator from New York.

PRESENTATION OF DORA L. IRIZARRY, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF NEW YORK, BY HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Thank you, Mr. Chairman. I very much appreciate the opportunity not only to be here today and serve on this Committee, but particularly to introduce our nominee, Dora Irizarry, to the Federal Court for the Eastern District of New York, which represents four counties that have a population of 7 million people, including my home county of Brooklyn. And our nominee is from Brooklyn as well.

Now, I just want to say before I begin, Senator Clinton would have been here as well but had prior scheduling, as the Chairman said. At 10:00 in the morning, we are supposed to be in four places at once, but she wanted to convey her support for the nominee as well.

Also, I would say that Judge Irizarry's parents and son, Justin, could not be here today, but I know they are very proud of Dora's accomplishment. And I would also note just for the record, a sign of our times, her sister and brother-in-law could not be here either. Judge Irizarry's sister is an Army civilian and her brother-in-law is an enlisted man, and they both are stationed in Fort Buchanan in Puerto Rico. So I want to congratulate them, wish them well, and thank them for the service to our country.

Now, coming here today to introduce Judge Irizarry is a—excuse me—is a particular pleasure for me. So pleasurable that I am overcome here today.

[Laughter.]

Senator SCHUMER. It is a particular pleasure for me because her nomination is an example, Mr. Chairman, of what happens when the process works right. We are filling all of the vacancies on New York's Federal courts with nominees who have bipartisan support. All of the relevant parties, myself and Senator Clinton, Governor Pataki, and the White House, are not only comfortable supporting all of the judges we put on the Federal bench, but we believe each of them will do the Nation a credit as members of the Judiciary.

The Committee is familiar with the judge's biography, so I am just going to touch on a couple of highlights.

She was born in Puerto Rico but raised in New York, and she graduated from one of the best high schools not only in New York City but in the country, and that is the Bronx High School of Science, which you have to take a test to pass and it is very hard to get in.

From there she went to Yale College—not bad—and Columbia Law School—excellent; my brother went there—before embarking on a 16-year distinguished career as a New York prosecutor. She was appointed to the New York City Criminal Court by Mayor Giuliani and then to the Court of Claims by Governor Pataki. She left the bench a few years ago, ran for public office, and has been in private practice since.

Now, as the Committee knows, because I talk about this all the time—and I also want to welcome so many guests from New York who are here today. I want to thank them all for being here, including—we have some judges who are here, we have some mem-

bers of the bar, some members who have been very active in the Latino legal community, and just friends of the judge. And they fill the room, and I want to welcome everyone here. For fear of offending anyone, I will not single anybody out, except there is one person I served in the Assembly with in 1974 when I was first elected to the Assembly at the young age of 23, and that is Judge Michael Pesce, my friend who serves on the Brooklyn Supreme Court. But I will not tell them what we talked about—well, can I? Jon would appreciate it. No? All right. I will tell him privately. In any case, so I welcome everybody here.

Now, you may not be familiar, but the Committee knows, because I talk about this a lot. I have three standards when I help select judges in New York and when I vote on judges here in Washington. And they are these: excellence, moderation, and diversity.

Excellence: A judge should be legally excellent. The Federal courts have awesome power, and we do not want someone's brother-in-law or political hack. We want the best.

Moderation: I do not like judges too far right. You know that, Mr. Chairman. I also do not like judges too far left and, in fact, on my legal Committee have knocked out a number of people who the Committee thought highly of because I thought they were ideologues of the left. And I think ideologues, whether they be of the far right or the far left, want to make law. And the Founding Fathers wanted people to interpret the law. Nothing against these ideologues. They care passionately. But when you care so passionately about something, it is sort of harder to just interpret law rather than make it.

And my third qualification is diversity. I do not think the bench should just be white males. Obviously, that is an important standard as well.

Well, Judge Irizarry clears the bar on all three. First, her background shows good, excellent training and experience, and she has had an excellent record. I was impressed by her background. But when I met with her—I had read her biography—I was very impressed, Mr. Chairman, with her legal knowledge and with her candor. There was no trying to beat around the bush, figure out what I wanted to hear and then say it. She said what she thought. She also had a great grasp of things.

I always ask nominees: What are some opinions that you are critical of by the Supreme Court or other? And she gave two really thoughtful opinions, not the kind of thing you would see that she was critical of. One she was critical of from the right; one she was critical of from the left. But really thoughtful and impressive.

Now, I know that the ABA has found her not qualified, but their concerns are not based on her legal knowledge or her intellectual ability. Everybody gives her high marks on those. Rather, the ABA's concerns regard the standard of temperament from the bench. And I asked Judge Irizarry about these concerns when she came to be interviewed by me. Her answers were quite persuasive. While she suggested the concerns may have been a bit exaggerated in some instances, she did not duck it. She took full responsibility for the temperament concerns, discussed candidly the growing she has done since then, and expressed a genuine commitment to ensuring that these concerns do not follow her to the bench.

As my colleagues know, when a red flag is raised regarding a judicial nominee, I believe the burden is on him or her to demonstrate that he or she deserves lifetime appointment to a powerful post of Federal judge. In my opinion, Judge Irizarry has carried that burden and carried it well.

I am proud to support her nomination, proud to commend her to my colleagues on the Committee, and look forward to her swift confirmation by the full Senate.

Thank you, Mr. Chairman.

Senator KYL. Thank you very much, Senator Schumer.

Senator Hatch had an opening statement, which detailed much of the information that you raised, and I am going to insert that in the record rather than take the time to read it here. But I did want all of you who traveled to be here today to know of Senator Hatch's strong support for the nominee and his conclusion, much the same as Senator Schumer has expressed himself, as well as a recitation of Judge Irizarry's record. And so that will be made a part of the record.

Senator SCHUMER. Mr. Chairman, I would just ask unanimous consent that Senator Leahy, who is the ranking Democrat on the Committee, also in support of the judge's nomination, that his full statement be added to the record.

Senator KYL. Without objection, it will be included in the record.

Now, Judge Irizarry, if you would take the dais, and I think I am going to ask you, first of all, if you would like to introduce members of your family who are here.

Judge IRIZARRY. Thank you very much. Good morning to everyone, and good morning, Mr. Chairman. Good morning, Senator Schumer. I thank you very much for your continued and unwavering support and for that very generous and kind introduction.

If you would just bear with me, please, I would like to make special note of some people who did come a long way to be here with me today:

The Honorable Michael Pesce, who is the Presiding Justice of the Appellate Term in New York State Supreme Court for the Second and the Eleventh Districts, which covers part of the Eastern District of New York.

The Honorable Lewis L. Douglass, Justice of the Supreme Court of the State of New York, who sits in Brooklyn Supreme Court and is also the Chair of the Franklin H. Williams Commission on Minorities in the Courts.

And James Castro-Blanco, immediate past president of the Puerto Rican Bar Association and also a member of the Mayor's Committee on Judicial Nominations.

As Senator Schumer noted, my son, Justin, could not be here. He is in school in Idaho, and they are finishing up the term. So it was a little difficult for him to be here today. And my parents are a little elderly, and it was difficult for them to travel from Puerto Rico. And you have heard about my sister, Rosario, and Gilbert Marrero, and they are serving their country with the Army, and it was difficult for them to get away. And they are stationed in Puerto Rico.

And I do not want to disrespect all of the people who came here today. There are too many names to mention. But I do want to make special note of certain individuals who are here today:

Manuel Romero, who is president-elect of the Brooklyn Bar Association; Dolly Caraballo, who is the current president of the Puerto Rican Bar Association; Telesforo DelValle, Jr., who is here with his wife, Claudia; and he is past president of the Puerto Rican Bar Association, past president of the New York Region Hispanic National Bar Association, past vice president of the New York State Criminal Trial Lawyers Association, and has sat on many judicial nominating committees; Honorable Francois Rivera from New York State Supreme Court sitting in Brooklyn; Honorable Ariel Belen, Justice of the Supreme Court, State of New York, sitting in Brooklyn, and is one of the founders of the Cervantes Society, which is an umbrella organization within the Office of Court Administration, which joins together all Hispanic employees from the custodians to the judges under one umbrella group. His daughter, Lauren, who is 11 years old, is with us here today. And Fredric Newman, who is partner of the firm that I am currently with, Hognuet, Newman, and Regal, and I believe Judge Douglass' daughter is here today with his grandson as well.

Thank you very much, Mr. Chairman, for the opportunity.

Senator KYL. Well, thank you, and we welcome all of you to this hearing and are delighted to have you here.

Now, may I swear you in? Would you raise your right hand and affirm this oath? Do you swear that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge IRIZARRY. I do so swear.

Senator KYL. Thank you. Now, Judge, let me ask you if you would like to give an opening statement, and then members of the Committee can refer questions to you.

STATEMENT OF DORA L. IRIZARRY, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF NEW YORK

Judge IRIZARRY. Thank you for the opportunity to make an opening statement, but I think that I will waive that at this time.

Thank you.

[The biographical information follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)
Dora Lizette Irizarry
2. Address: List current place of residence and office address(es).

Residence: New York, NY

Business: Hoguet Newman & Regal, LLP
10 East 40th Street, 35th Floor
New York, NY 10016
3. Date and place of birth.
San Sebastian, Puerto Rico DOB: January 26, 1955
4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Not married.
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Columbia University School of Law Attended from 8/76 to 5/79
425 West 116th Street Degree Awarded: Juris Doctor
New York, NY 10025 Date Degree Awarded: October 1979

Yale University Attended from 8/72 to 5/76
New Haven, CT 06520 Degree Awarded: Bachelor of Arts
Honors: Cum Laude, Honors and Distinction in the major of Political Sociology

***Senior Supervising and Investigating Assistant 1992 to 1995
 ***Acting Deputy Bureau Chief March to September 1992
 ***Senior Trial Counsel 1990 to 1992
 ***Cross-designated as Special Assistant Deputy Attorney General for the Statewide
 Organized Crime Task Force
 ***Cross-designated as Special Assistant United States Attorney in the Office of Hon.
 Rudolph W. Giuliani, United States Attorney for the Southern District of New York

Assistant District Attorney September 1979 to June 1987
 Office of Hon. Mario Merola
 District Attorney, Bronx County
 215 East 161st Street, Bronx, NY 10451

Special Assistant District Attorney September 1981 to May 1987
 Office of the Special Narcotics Prosecutor, City of New York
 80 Centre Street, New York, NY 10013

Appeals Bureau September 1979 to September 1981
 Bronx County District Attorney's Office
 215 East 161st Street, Bronx, NY 10451

Law Student Intern June 1978 to August 1978
 US Department of Justice
 US Attorney's Office Eastern District of New York
 Special Investigations Unit
 147 Pierrepont Street
 Brooklyn, NY 11201

Law Clerk October 1977 to November 1977
 Center for Social Welfare Policy and Law
 95 Madison Avenue, 7th Floor
 New York, NY 10016

Temporary Probation Clerk June 1977 to August 1977
 US Probation Office
 Southern District of NY
 40 Foley Square
 New York, NY 10007

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. I never served in the 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.

ACADEMIC HONORS

Graduated *Cum Laude* and with honors and distinction in my major of political sociology from Yale University in 1976.

SCHOLARSHIPS

Charles Evans Hughes Scholarship – 3 years- bestowed by Columbia University School of Law for my interest in Public Service

AWARDS/HONORS

The New York City Police Department Hispanic Society 2003 Special Recognition Award for Dedication and Commitment to New York's Hispanic Community May 9, 2003

The Woman Pioneer Award, Puerto Rican Bar Association, Inc., Women's Committee
March 20, 2003

Certificate of Appreciation for Outstanding Achievements in the Field of Drug Law Enforcement, Drug Enforcement Administration, U. S. Department of Justice May 2001

The Hon. Emilio Nunez Award for Judicial Excellence, Puerto Rican Bar Association, Inc.
January 4, 2001

Award for Excellence in the Administration of Justice and Service to the Community, Instituto de Puerto Rico (Puerto Rican Institute) September 26, 1999

Award for Outstanding Achievements and Distinction in a Chosen Profession by a Native of San Sebastian, presented by the Mayor of San Sebastian, P.R. January 25, 1998

Certificate of Appreciation for Outstanding Achievements in the Field of Drug Law Enforcement, Drug Enforcement Administration, U. S. Department of Justice December 1997

Certificate in Recognition of Contributions to the Hispanic Employment Program and in Recognition of the Heritage of Hispanic Americans, U. S. Department Of Health and Human Services, Food and Drug Administration, Northeast Regional Laboratory October 1997

Plaque in Appreciation for Contributions to the Hispanic Heritage Celebration as Keynote Speaker, U. S. Customs Service September 1996

Certificate of Appreciation for Contributions to the Women's Month Celebration, U. S. Customs Service March 1996

Award in Recognition of 14 Years of Service and Dedication, Office of the Special Narcotics Prosecutor, City of New York January 1996

Award in Recognition and Appreciation of Outstanding Service to the People of New York County, Office of Robert M. Morgenthau, District Attorney of New York County, Office of Community Affairs January 1996

Award in Recognition and Appreciation for Supporting the Drug Enforcement Hispanic Organization and the Hispanic Law Enforcement Community, New York Drug Enforcement Administration Hispanic Organization, U.S. Department of Justice January 1996

Certificate of Appreciation for Outstanding Achievements in the Field of Drug Law Enforcement, Drug Enforcement Administration, U. S. Department of Justice August 1994

Achievement Award for Outstanding Accomplishments and Exemplary Performance, Office of the Special Narcotics Prosecutor, City of New York December 1993

Recipient, Award for Top Hispanic Civilian in Law Enforcement, Hispanic National Law Enforcement Association, N. Y. Chapter October 1993

Certificate of Appreciation for Outstanding Achievements in the Field of Drug Law Enforcement, Drug Enforcement Administration, U. S. Department of Justice July 1990

Certificate of Appreciation for Outstanding Achievements in the Field of Drug Law Enforcement, Drug Enforcement Administration, U. S. Department of Justice February 1990

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.
- Association of Judges of the Court of Claims – member from 1997 to present
 - Association of Judges of Hispanic Heritage – member from 1996 to present. Was Vice-President from 1996 to 1997. Was President from 1997 to 2002.
 - Association of Criminal Court Judges – member from 1996 to 1997

- National Association of Women Judges – member (approximately) from 1998 to present.
- Hogan/Morgenthau Associates – member from approximately 1996 to present (not sure when I joined initially).
- Puerto Rican Bar Association – member from approximately 1993 to the present. In 1996, became the founder and co-chair of the Committee on the Bench and Bar. Continued as co-chair in 1997.
- Hispanic National Bar Association – member since December 2002
- American Bar Association – member since January 2003
- Alumni Association of the Office of the New York City Special Narcotics Prosecutor – member from 1993 to the present.

COMMITTEE MEMBERSHIP

Craco Task Force Committee on Continuing Legal Education	1996 to 1997
Craco Task Force Committee on the Statement of Clients' Rights and Code of Civility	1996 to 1997
Judicial Seminars Criminal Law Curriculum Development Committee	1997 to 2002
Jury Implementation Committee, Kings County Supreme Court	1998
Employee of the Month Committee Kings County Supreme Court	1998
Criminal Term Forum, Kings County Supreme Court	1998
Co-founder and Co-chair of the Committee of the Bench and Bar, Puerto Rican Bar Association	1996 to 1997

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 than the professional associations and organizations listed in question #9 above, I do not belong to any other organizations.

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

New York State Bar	Admitted May 1981
U.S. District Court for the Southern District of New York	Admitted June 1981
U.S. District Court for the Eastern District of New York	Admitted June 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.

In September 1998, I authored a section on "Interpreters" included in the Kings County Supreme Court Criminal Term Judge's Manual.

I wrote an outline and summary of cases for my two-part lecture on Hinton hearings (closure of the courtroom), audibility hearings and admissibility of tapes which was distributed to the attendees at an educational program for attorneys I organized entitled "From Dropsies to Pleas and Beyond . . . A Forum on Narcotics Cases," held at New York Law School on February 6, 1997.

On April 27 and 28, 1994, I gave a two-part lecture for the National College of District Attorneys: I. "Electronic Surveillance - The Investigation," and II. "Electronic Surveillance - Arrest Through Trial." The lecture outline and supplemental materials I used for the lecture were published by the National College of District Attorneys and may be copied or reprinted only with the permission of the National College.

I have given the following speeches. Unless otherwise specified, they were not reduced to writing:

- "Celebrating Women's Right to Vote" [may have been videotaped and partially reduced to writing] given at the Women's Equality Day Luncheon held on August 22, 2002 at the United States Army South, Fort Buchanan, Puerto Rico.
- "Latinas in the Law", Keynote Speech, Puerto Rican Bar Association Women's Committee reception in honor of Hispanic Women in the Legal Profession held on November 15, 2000 at the Law Firm of Pacheco and Lugo, 67 Wall Street, New York, NY.
- "Hispanic Women in the Criminal Justice System - Experiences and Trends", Keynote Speech presented at the annual meeting of the National Association of Hispanic Prosecutors held on July 22, 1999 at the New York County District Attorney's Office, 80 Centre Street, New York, NY 10013.
- Testimony re: "Diversity in the Courts" given before the New York State Office of Court Administration's Committee to Promote Public Trust and confidence in the Legal System on January 29, 1999 [reduced to writing].
- "Women in Leadership" given on October 9, 1998 at the Federal Aviation Administration's Hispanic Heritage Celebration held at JFK International Airport, Jamaica, NY.

- “Steppin’ into Harmony”, Keynote speaker, at the Annual Multi-cultural Celebration held June 30, 1998, U. S. Postal Service, JFK International Airport, Jamaica, NY.
- “Hispanic Women in the Judiciary” given on December 5, 1997 at the New York Office of the Drug Enforcement Administration (Dept. of Justice), 99 Tenth Avenue, New York, NY.
- “Hispanics in the Legal System: Pillars of a Just Society – Ensuring Justice in the Courts Through Diversity”, given on October 8, 1997, at the U.S. Department of Health and Human Services, U. S. Food and Drug Administration, Northeast Regional Laboratory, Brooklyn, NY.
- “Challenges for the Future in the Criminal Justice System,” keynote speech given on September 20, 1996, Celebration of Hispanic Heritage Month, U.S. customs Service, World Trade Center, New York, NY
- “Women and Hispanics in the Criminal Justice System”, given on March 15, 1996 as part of a panel discussion on women’s issues, Women’s Month Celebration, U.S. Customs Service, JFK International Airport, Jamaica, NY.

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

My health is generally good. I had a physical examination in connection with this application on February 4, 2003 and the doctor so states. I am an asthmatic; however, it is under control and does not interfere with my ability to work or fulfill any of my other obligations.

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 of the Court of Claims

March 25, 1997 to May 17, 2002

This is an appointed position. I was nominated by New York State Governor George E. Pataki and confirmed by the New York State Senate on March 25, 1997. I was reappointed in June 2001 to a nine-year term. I was assigned as an Acting Supreme Court Justice sitting in Criminal Term presiding over all aspects of felony cases from arraignments to trials. Initially, I sat in Kings County Supreme Court and then was assigned to New York County Supreme Court where I presided over a felony trial part. On May 17, 2002, I stepped down from the bench pursuant to the Ethical Rules for Judges in order to run as the Republican and Conservative Party candidate for New York State Attorney General.

Acting Justice of the Supreme Court, Criminal Term

New York County Supreme Court
111 Centre Street, New York, NY 10013

November 1998 to May 17, 2002

Acting Justice of the Supreme Court, Criminal Term

Kings County Supreme Court May 1997 to November 1998
360 Adams Street, Brooklyn, NY 11201

Acting Justice of the Supreme Court, Criminal Term

Arraignments, New York County Criminal Court April, 1997 to May 1997
100 Centre Street, New York, NY 10013

Judge, New York City Criminal Court

Appointed December 28, 1995

This is an appointed position. I was appointed by the Hon. Rudolph Giuliani, then Mayor of the City of New York. I presided over misdemeanor cases from arraignments to trial. I also arraigned felony cases. I initially sat in Bronx County Criminal Court and then was assigned to New York County Criminal Court where I served until I was elevated to the Court of Claims as described above.

New York County Criminal Court June 1996 to March 1997
100 Centre Street, New York, NY 10013

Bronx County Criminal Court January 1996 to June 1996
215 East 161st Street, Bronx, NY 10451

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 I have written (rendered):

- (1) *People v. Jeffrey LaFontaine*, 190 Misc.2d 565, 740 N.Y.S.2d 580 (Sup. Ct. NY Co., Feb. 26, 2002)

Defendant was charged with a single count of Criminal Sale of a Controlled Substance in the Third Degree based upon police observations of defendant's actions in a targeted known drug area, and a jury trial commenced. Defendant left the courtroom immediately prior to summations and failed to return. Accordingly, the court had to determine whether defendant effectively waived his right to be present for the balance of the trial proceedings.

Prior to the commencement of trial, the court had advised defendant that, if he failed

to return to court voluntarily during any part of the proceedings, the trial would continue in his absence. Defendant had been present during all stages of the trial, including jury selection and the presentation of evidence. However, immediately prior to scheduled summations and jury charge, defendant absented himself from the courthouse premises. He subsequently contacted the court by cellular telephone and advised that he had boarded a bus heading out of the city and that he would consider returning for the trial proceedings. Defendant was advised by the court and by his counsel in a telephone conference call at which the prosecutor also was present that the trial would continue in his absence should he fail to return.

Defendant was given an opportunity to return to court, but failed to do so.

The court considered the totality of the circumstances, *i.e.*, the evidence had been closed in the case, only summations and jury charge remained, defendant's palpable evasiveness and disingenuous promise to return to the courtroom, despite repeated admonitions that the trial would continue in his absence, and determined that there appeared to be no probability that any efforts to locate defendant for return to the courtroom within a reasonable period of time would prove fruitful. The court accordingly held that defendant, by his conduct and word, knowingly, voluntarily and intelligently effectively had waived his right to be present and continued the trial in his absence.

- (2) *People v. Errol Cherry*, 188 Misc.2d 799, 729 N.Y.S.2d 591 (Sup. Ct. NY Co., June 13, 2001)

Defendant had been charged with two counts of Assault in the First Degree and one count of Criminal Possession of a Weapon in the Third Degree. This case raised the unique issue in New York State of what procedural safeguards must be followed to determine questions of potential juror bias and/or impartiality based upon concerns brought to the court's attention by sitting jurors during various stages of a criminal trial.

Following a thorough jury voir dire conducted by the court and the parties, which included questioning regarding personal and professional experience, twelve jurors and three alternate jurors were deemed acceptable by the parties and were duly sworn. The court then gave the required preliminary instructions to the jury, explaining in general terms the basic functions and duties of jurors, standard trial procedures and relevant legal principles. During the opening by the defense, the court sustained various objections made by the prosecutor and gave curative instructions to the jury. At this point, as the court directed a recess in the proceedings, Juror #5 who advised during the jury voir dire that he is an attorney currently sitting as an Administrative Law Judge, stated that he wished to speak to the court "in private." Outside the presence of the other jurors, but on the record and in the presence of the parties, the court determined that the juror was second guessing the judge's rulings and inferences to be drawn from them, and that he was personally evaluating the legal soundness of objections from his perspective as an administrative law judge, all of which indicated his inability to follow basic legal instructions and consider the evidence and arguments fairly and impartially. Accordingly, the court found that this juror was grossly unqualified to sit and discharged him.

During the course of the trial, a second juror also asked to speak to the court. Outside the presence of the other jurors, but on the record and in the presence of the parties,

the court determined that the juror was unwilling to state unequivocally that he would not utilize his specialized knowledge of boxing and martial arts in evaluating critical factual determinations in the case as to the nature and effect of blows allegedly inflicted on the victim. Accordingly, the court found that this juror was grossly unqualified to sit and discharged him.

- (3) *People v. Norman Schuler*, 185 Misc.2d 806, 713 N.Y.S.2d 852 (Sup. Ct. NY Co., Sept. 27, 2000)

In a three-count indictment, defendant was charged with the crime of Criminal Possession of a Weapon in the Second Degree and two counts of Criminal Possession of a Weapon in the Third Degree predicated upon defendant's alleged commission of the crime of Criminal Possession of a Weapon in the Fourth Degree, elevated to the higher grade on the ground of an alleged prior criminal conviction. On defendant's motion, the court dismissed these two counts with leave to re-present to the Grand Jury, on the ground that the prosecutor failed to comply with the requirement of New York State Criminal Procedure Law that an indictment for an elevated offense be accompanied by a special information charging that defendant previously was convicted of a specified offense. The court further held that the prosecution could not rely on the presumption of regularity to cure the defect where the court file did not contain the required document and there was no evidence that the required special information accompanied the indictment actually filed with the court. The court also rejected the prosecutor's contention that the defect could be cured immediately prior to trial by filing a special information, since a special information required pursuant to the Criminal Procedure Law must be filed at the same time as the indictment. The court also determined that, while the defect may be waived, defendant had not waived it in this case. The prosecutor was granted leave to re-present to the Grand Jury inasmuch as there was no showing of bad faith on the prosecution.

- (4) *People v. Paul Gibbs*, 2/19/99 NYLJ 25 (col. 2)

Defendant was charged with the crimes of Burglary in the First, Second and Third Degrees, Robbery in the First and Third Degrees, Grand Larceny, Petit Larceny, and Menacing in the Second Degree. Defendant moved to dismiss the indictment contending that the integrity of the Grand Jury proceeding was impaired and he was prejudiced because a Grand Juror saw him in handcuffs outside the Grand Jury room after he testified before that body. Defendant further contended that the error was compounded by the prosecution's failure to question the grand juror properly and to record the questioning. The defense further contended that the prosecutor dismissed the juror without proper authority causing the indictment to be returned by an improperly constituted Grand Jury.

Upon examining the Grand Jury minutes in camera and the submissions of the parties, the court ordered a hearing to determine what had transpired during the proceedings in question as the Grand Jury minutes were silent regarding the events described by the defense. Based upon the evidence adduced at the hearing, the court's inspection of the Grand Jury minutes, the submissions of the parties and the relevant statutes and case law, defendant's motion to dismiss the indictment was granted. The prosecutor's failure to follow proper statutory procedure under the circumstances presented impaired the integrity of the Grand

Jury, potentially prejudicing the defendant. The prosecutor failed to question the Grand Juror properly, record their conversation, question the other Grand Jurors to determine what they had seen and whether they had been tainted through their exposure to the viewing juror, and to give any sort of curative instruction. Additionally, the prosecutor dismissed the juror without court approval. The court granted the prosecution leave to re-present the case to another Grand Jury.

***** Please note with respect to the additional cases described below that they are not published cases. Due to the large volume of cases, the general procedure or practice in New York State courts, particularly in Criminal Term where I presided, is for decisions on motions to be rendered orally and recorded by an official court stenographer. However, the minutes generally are not transcribed unless ordered by the litigants. This rarely happens unless it goes up on appeal. The court does not always file a written opinion. Accordingly, the summaries of decisions rendered by me described below are based upon notes that I maintained on matters I handled. I should also note that many of the cases that were sent to me for trial resulted in the entry of a guilty plea by the defendant before trial commenced.**

- (5) *People v. Omar Brown*, Indictment #2813/2001 – *Hinton hearing* (hearing to determine if closure of the courtroom is warranted during the testimony of an undercover officer or confidential informant) held 3/15/02

Defendant was charged with the sale of narcotic drugs to an undercover officer. The defense wanted to consent to the closure of the courtroom during the testimony of the two undercover officers. The court denied the request, as federal and state case law require that, before defendant's right to a public trial is abridged, a hearing must be held to determine whether there is any overriding governmental interest that justifies the denial of such an important constitutional right.

The testimony elicited from both undercover officers during the hearing established that: defendant's accomplices were at liberty and recently had been seen near the vicinity where the crime had been committed; the undercovers were returning to that area immediately upon the completion of the trial; one undercover officer had a distinctive appearance; undercovers' names and addresses can be located over the internet; the undercovers had open cases in the same area; one undercover officer had been shot because a subject suspected he was a police officer; both officers had been searched and threatened by perpetrators; cases had to be terminated due to the suspect's suspicions that they were officers; and numerous efforts were taken to protect the true identity of the officers both during and after the investigation of cases.

Based upon these facts, the court held that the courtroom would be closed to the general public during the testimony of the two undercover officers. However, rather than simply locking the courtroom doors, a court officer would be posted at the door and officers of the court (prosecutors and other attorneys) and official court personnel, and members of the defendant's family (with the consent of the prosecutor) would be allowed to remain in the courtroom during the officers' testimony.

A second important motion decided in this case was whether the prosecutor could elicit testimony from both the arresting officer and the undercover officers about the different roles involved in the street sales of narcotics and the use of pre-recorded buy money generally used by undercover officers in order to explain to the jury the police observations of money and drugs. The defense opposed the motion.

The court held that the prosecutor could elicit testimony from either an undercover officer or the arresting officer, but not both, concerning the different roles of officers in making observations of street sales of drugs and to explain the absence or presence of money and drugs. However, the prosecutor was not permitted to elicit testimony concerning undercover buy and bust operations or the use of pre-recorded buy money, none of which were utilized in this case and, therefore, were not relevant.

The court also granted the defense motion to preclude any testimony from the police officers concerning their work at Ground Zero post 9/11/01.

(6) *People v. Kareem McCutheon*, Indictment # 3927/2001

Defendant was charged with Robbery in the First Degree and Resisting Arrest. Defendant was accused of snatching a gold chain from a teenager and was arrested one month after the alleged robbery based on the complainant's identification. The defense requested permission to introduce expert eyewitness testimony regarding the alleged unreliability of eyewitness testimony claiming that the complainant's attention was drawn away from the perpetrator by the gun used in the robbery, the length of time between the crime and the arrest of defendant, racial difference between the complainant and the defendant (complainant was Hispanic and defendant was African American), and, at the time of his arrest, the defendant was wearing a chain similar to that stolen from complainant. The People opposed the motion claiming that it was not beyond the ken of jurors to assess the reliability of the eyewitness identification based on those factors and their observations of the complainant and their assessment of his credibility.

The court denied defendant's motion, based upon the arguments made by the prosecutor as well as the following factors: the initial contact or confrontation between the complainant and the defendant was lengthy, not fleeting; words were exchanged; the lighting was excellent as the incident occurred during the day; the defendant got close to the complainant in order to snatch the chain from his neck; the complainant saw the defendant a month later in the subway transporting a bicycle and got a close look at him as he passed; and the complainant followed the defendant to a park and called the police and pointed him out to the police.

(7) *People v. Richard Powell*, Indictment # 7843/2001

Defendant was charged with Promoting Prostitution in the Third Degree and was under investigation for tax evasion and moneylaundering. At the request of the Government, the court held a bail source hearing (also known as a surety hearing in state court and the equivalent of a Nebbia hearing in federal court). Bail had been set by another judge at \$10,000 bond or cash. Defendant wanted to post cash from his wife, sister and mother. The mother and wife testified at the hearing. Evidence was adduced at the hearing that the money

from the sister came from savings she had from her military salary. Neither the court nor the prosecutor objected to the cash to be posted by defendant's mother, as it appeared to come from legitimate sources. However, the court found incredible the testimony of the wife as to the source of the money to be posted by her and, thus, denied the use of that money towards the bail as against public policy.

(8) *People v. N'Gina Cain*, Indictment # 3701/2001

Defendant was charged along with two other co-defendants, Enrique Davila and Rodney Freeman, with Burglary in the First Degree, two counts of Attempted Robbery in the First Degree, Attempted Robbery in the Second Degree, Gang Assault in the Second Degree, and Assault in the Second Degree stemming from the robbery and assault of a garage attendant in Manhattan. Davila agreed to testify against defendant Cain, a female who claimed that she went along only because she was a prostitute and feared her pimp, codefendant Freeman. A cooperation agreement was executed and Davila testified at the trial.

Among the many trial issues that I had to decide was the extent to which Davila could testify about uncharged crimes against Cain. The court held that the prosecutor could elicit limited testimony concerning defendant's alleged drug and prostitution activities from Davila as it went to intent and motive and was inextricably intertwined with the sequence of events. Curative instructions were given to the jury.

Codefendant Freeman accepted the prosecutor's offer of a plea bargain, but refused the prosecutor's request for cooperation against Cain. At the People's request, the court held a hearing to determine if Freeman was unavailable and thus permit the People to introduce at trial a redacted version of his guilty plea allocution. Freeman asserted his 5th Amendment right against self-incrimination and refused to testify. Accordingly, he was found to be unavailable to the People and the court granted the People's request.

(9) *People v. Anthony Ashley*, 296 A.D.2d 339, 744 N.Y.S.2d 408 (1st Dept., July 1, 2002).

The defendant was convicted of Robbery in the First Degree after a non-jury trial and sentenced, as a second felony offender, to a term of imprisonment of 20 years with 5 years parole supervision, which was to run consecutive to defendant's sentences for robbery convictions in Kings County. The appellate court modified the sentence, in the interest of justice, to the extent that the sentence I imposed would run concurrently with the sentences imposed in Kings County. The court otherwise affirmed the verdict and legal rulings.

Defendant had been arrested and charged with five armed robberies in Brooklyn. Defendant made a videotaped confession wherein he admitted committing those robberies and one in Manhattan. Defendant was tried in Brooklyn Supreme Court and found guilty of three out of the five robberies and was sentenced to three consecutive ten-year terms of imprisonment.

Defendant was indicted for the Manhattan robbery and proceeded to a non-jury trial. The People sought to introduce evidence of the Brooklyn robberies in order to establish a

distinctive *modus operandi* and defendant's identity. The People also sought to introduce the videotaped confession.

The court held that the People could introduce evidence concerning two of the Brooklyn robberies for which the defendant had been convicted. They were sufficiently similar to the Manhattan crime to establish a distinctive *modus operandi* and thus were relevant to establish defendant's identity. Moreover, the court held that it would not consider the robberies as evidence tending to establish defendant's propensity to commit the Manhattan robbery. Additionally, evidence of the two robberies was inextricably woven to the narrative as to how defendant was arrested and how the gun used in the Manhattan robbery was recovered. This evidence was admitted at trial without objection from the defense. The court admitted the videotape as defendant made the statements contained therein knowingly, intelligently and voluntarily after properly having been given his *Miranda* warnings.

- (10) *People v. Angel Santos*, Indictment # 4010/2000, affirmed 289 AD2d 68 (1st Dept. 2001)

Defendant was charged with Robbery in the Second Degree. This is a case where a shoplift turned into a robbery when defendant caused injury to a nine-month-old baby during an altercation with a Macy's security guard as he tried to flee with the stolen property. At issue was whether the baby had suffered substantial pain to support submission of the charge of Robbery in the Second Degree to the jury. The court held that there was ample evidence to support submission of that charge to the jury, based upon the testimony of the baby's mother which established that the stroller the baby was in was flung four feet and flipped upside down causing the baby to hit its head on the pavement. Additionally, she testified that the fall caused a large dark bruise on the baby's forehead, which lasted several days. The baby cried in pain for about one hour and had to be administered Tylenol at the hospital. This ruling and defendant's conviction were affirmed on appeal.

(2) The following matters were reversed or modified on appeal:

1. *People v. Lance Smith*, 2003 WL 1821466 (N.Y.A.D. 1 Dept.), 2003 N.Y. Slip Op. 12799 (April 8, 2003).

Defendant was convicted after a jury trial of Criminal Sale of a Controlled Substance in the Third Degree and Criminal Sale of a Controlled Substance in or near School Grounds. I sentenced him, as a second felony offender to concurrent terms of 7 ½ to 15 years. The appellate court, in the interest of justice, reduced the sentences to concurrent terms of 5 to 10 years, but otherwise affirmed his judgment of conviction.

2. *People v. Tony Wilson*, 301 AD2d 483 (1st Dept. 2003)

Defendant was convicted after a jury trial of Criminal Possession of a Forged Instrument in the Second Degree and Criminal Impersonation in the Third Degree. Defendant was sentenced, as a second felony offender, to concurrent terms of 3 ½ to 7 years and 1 year. The appellate court modified the judgment to the extent that it vacated the conviction for

Criminal Possession of a Forged instrument in the Second Degree, remanded the matter for a new trial and otherwise affirmed. The appellate court held that the trial court should have submitted the issue of venue to the jury as requested by the defendant.

3. *People v. Julio Ortiz*, 297 A.D.2d 758, 747 N.Y.S.2d 789 (2nd Dept., Sept. 23, 2002).

Due to a misunderstanding of all the parties, an illegal sentence was imposed. The appellate court vacated the imposed sentence and remanded the matter to Kings County Supreme Court for further proceedings.

4. *People v. Anthony Ashley*, 296 A.D.2d 339, 744 N.Y.S.2d 408 (1st Dept., July 11, 2002).

The defendant was convicted of Robbery in the First Degree after a nonjury trial and sentenced, as a second felony offender, to a term of imprisonment of 20 years with 5 years parole supervision which was to run consecutive to defendant's sentences for robbery convictions in Kings County. The appellate court modified the sentence, in the interest of justice, to the extent that the sentence I imposed would run concurrently with the sentences imposed in Kings County. The court otherwise affirmed the verdict and legal rulings.

5. *People v. Adam Brown*, 293 A.D.2d 302, 741 N.Y.S.2d 512 (1st Dept., April 9, 2002), lv. to app. den. 98 N.Y.2d 673, 746 N.Y.S.2d 462 (2002).

Defendant was convicted of Criminal Sale of a Controlled Substance in the Third Degree after a jury trial and was sentenced, as a second felony offender, to 7 to 14 years of imprisonment. The appellate court modified the sentence, in the interest of justice, reducing it to 5 to 10 years and, otherwise, affirmed the verdict and legal rulings.

6. *People v. Carlos Vasquez*, 283 A.D.2d 239, 724 N.Y.S.2d 406 (1st Dept., 2001), lv. to app. den., 97 N.Y.2d 659, 737 N.Y.S.2d 60 (2001).

Defendant was convicted of Criminal Sale of a Controlled Substance in the Third Degree after a jury trial. The appellate court reversed defendant's conviction holding that defendant's trial request for an agency charge to the jury should have been granted.

7. *People v. Michael Rutigliano*, 278 A.D.2d 258, 717 N.Y.S.2d 295 (2nd Dept., 2000).

Defendant was convicted, upon his plea of guilty, of Criminal Sale of a Controlled Substance in the Third Degree and was given an enhanced sentence due to his failure to appear timely for sentence. The appellate court held that defendant's late arrival for sentencing did not authorize the court to impose a sentence other than that provided in the plea agreement and, accordingly, reversed and vacated defendant's sentence.

8. *People v. Luis Gonzalez*, 266 A.D.2d 471, 698 N.Y.S.2d 890 (2nd Dept., 1999), lv. to app. den., 94 N.Y.2d 920, 708 N.Y.S.2d 359 (2000).

Defendant's jail sentences on his pleas of guilty to two indictments were modified to the extent of running the sentences concurrently rather than consecutively. I had imposed consecutive sentences due to defendant's failure to comply with the terms of the plea agreement. There was no opinion written by me in this case.

9. *People v. Juan Bautista*, 260 A.D.2d 388, 686 NYS 2d 315 (2nd Dept., 1999), lv. to app. den. 93 N.Y.2d 922, 693 N.Y.S.2d 505 (1999).

Defendant's jail sentence on a plea of guilty was modified to the extent that it was reduced from 10 to 20 years to 7 1/2 to 15 years. There was no opinion written by me in this case.

10. *People v. Maurice Christopher and Tonya Jackson*, 258 A.D.2d 662, 685 N.Y.S.2d 786 (2nd Dept., 1999), lv. to app. den. 93 N.Y.2d 923, 693 N.Y.S.2d 506 (1999).

I granted defendant's motion to suppress evidence pursuant to their motions to controvert a search warrant. The appellate court reversed. A copy of my reversed decision is attached hereto.

11. *People v. Robert K. White*, 258 AD 2d 677, 685 N.Y.S.2d 806 (2nd Dept., 1999).

I granted defendant's motion to suppress evidence pursuant to his motion to controvert a search warrant. The appellate court reversed. A copy of my reversed decision is attached hereto.

Note: On constraint of the Appellate Division, Second Department's decisions in *People v. Maurice Christopher and Tonya Jackson* and *People v. Robert K. White*, above, I vacated my decisions in *People v. Regina Blow*, Indictment # 13516/97, dated October 13, 1998 and in *People v. James White*, Indictment #3933/98, dated October 22, 1998, as they were factually similar to the cases that were appealed. Copies of the original decisions and the vacating decisions for each case are attached hereto.

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

The following cases were in state court and were cited above.

(a) *People v. Jeffrey LaFontaine*, 190 Misc.2d 565, 740 N.Y.S.2d 580 (Sup. Ct. NY Co., Feb. 26, 2002)

Defendant was charged with a single count of Criminal Sale of a Controlled Substance in the Third Degree based upon police observations of defendant's actions in a targeted known drug area, and a jury trial commenced. Defendant left the courtroom immediately prior to summations and failed to return. Accordingly, the court had to determine whether defendant effectively waived his right to be present for the balance of the trial proceedings.

Prior to the commencement of trial, the court had advised defendant that, if he failed to return to court voluntarily during any part of the proceedings, the trial would continue in his absence. Defendant had been present during all stages of the trial, including jury selection and the presentation of evidence. However, immediately prior to scheduled summations and jury charge, defendant absented himself from the courthouse premises. He subsequently

contacted the court by cellular telephone and advised that he had boarded a bus heading out of the city and that he would consider returning for the trial proceedings. The court advised defendant and by his counsel in a telephone conference call at which the prosecutor also was present that the trial would continue in his absence should he fail to return. Defendant was given an opportunity to return to court, but failed to do so.

The court considered the totality of the circumstances, *i.e.*, the evidence had been closed in the case, only summations and jury charge remained, defendant's palpable evasiveness and disingenuous promise to return to the courtroom, despite repeated admonitions that the trial would continue in his absence, and determined that there appeared to be no probability that any efforts to locate defendant for return to the courtroom within a reasonable period of time would prove fruitful. The court accordingly held that defendant, by his conduct and word, knowingly, voluntarily and intelligently effectively had waived his right to be present and continued the trial in his absence.

(b) *People v. Errol Cherry*, 188 Misc.2d 799, 729 N.Y.S.2d 591 (Sup. Ct. NY Co., June 13, 2001)

Defendant had been charged with two counts of Assault in the First Degree and one count of Criminal Possession of a Weapon in the Third Degree. This case raised the unique issue in New York State of what procedural safeguards must be followed to determine questions of potential juror bias and/or impartiality based upon concerns brought to the court's attention by sitting juror during various stages of a criminal trial.

Following a thorough jury voir dire conducted by the court and the parties, which included questioning regarding personal and professional experience, twelve jurors and three alternate jurors were deemed acceptable by the parties and were duly sworn. The court then gave the required preliminary instructions to the jury, explaining in general terms the basic functions and duties of jurors, standard trial procedures and relevant legal principles. During the opening by the defense, the court sustained various objections made by the prosecutor and gave curative instructions to the jury. At this point, as the court directed a recess in the proceedings, Juror #5 who advised during the jury voir dire that he is an attorney currently sitting as an Administrative Law Judge, stated that he wished to speak to the court "in private." Outside the presence of the other jurors, but on the record and in the presence of the parties, the court determined that the juror was second guessing the judge's rulings and inferences to be drawn from them, and that he was personally evaluating the legal soundness of objections from his perspective as an administrative law judge, all of which indicated his inability to follow basic legal instructions and consider the evidence and arguments fairly and impartially. Accordingly, the court found that this juror was grossly unqualified to sit and discharged him.

During the course of the trial, a second juror also asked to speak to the court. Outside the presence of the other jurors, but on the record and in the presence of the parties, the court determined that the juror was unwilling to state unequivocally that he would not utilize his specialized knowledge of boxing and martial arts in evaluating critical factual determinations in the case as to the nature and effect of blows allegedly inflicted on the victim.

Accordingly, the court found that this juror was grossly unqualified to sit and discharged him.

(c) *People v. Paul Gibbs*, 2/19/99 NYLJ 25 (col. 2)

Defendant was charged with the crimes of Burglary in the First, Second and Third Degrees, Robbery in the First and Third Degrees, Grand Larceny, Petit Larceny, and Menacing in the Second Degree. Defendant moved to dismiss the indictment contending that the integrity of the Grand Jury proceeding was impaired and he was prejudiced because a Grand Juror saw him in handcuffs outside the Grand Jury room after he testified before that body. Defendant further contended that the error was compounded by the prosecution's failure to question the grand juror properly and to record the questioning. The defense further contended that the prosecutor dismissed the juror without proper authority causing the indictment to be returned by an improperly constituted Grand Jury.

Upon examining the Grand Jury minutes in camera and the submissions of the parties, the court ordered a hearing to determine what had transpired during the proceedings in question, as the Grand Jury minutes were silent regarding the events described by the defense. Based upon the evidence adduced at the hearing, the court's inspection of the Grand Jury minutes, the submissions of the parties and the relevant statutes and case law, defendant's motion to dismiss the indictment was granted. The prosecutor's failure to follow proper statutory procedure under the circumstances presented impaired the integrity of the Grand Jury, potentially prejudicing the defendant. The prosecutor failed to question the Grand Juror properly, record their conversation, question the other Grand Jurors to determine what they had seen and whether they had been tainted through their exposure to the viewing juror, and to give any sort of curative instruction. Additionally, the prosecutor dismissed the juror without court approval. The court granted the prosecution leave to re-present the case to another Grand Jury.

(d) *People v. Maurice Christopher and Tonya Jackson*, 258 A.D.2d 662, 685 N.Y.S.2d 786 (2nd Dept., 1999), lv. to app. den. 93 N.Y.2d 923, 693 N.Y.S.2d 506 (1999).

I granted defendant's motion to suppress evidence pursuant to their motions to controvert a search warrant finding that the reliability of the confidential informant had not been established sufficiently before the issuing magistrate and, accordingly, the search warrant had been issued without probable cause. The appellate court reversed. A copy of my reversed decision is attached hereto.

(e) *People v. Robert K. White*, 258 AD 2d 677, 685 N.Y.S.2d 806 (2nd Dept., 1999).

I granted defendant's motion to suppress evidence pursuant to his motion to controvert a search warrant finding that the reliability of the confidential informant had not been established sufficiently before the issuing magistrate and, accordingly, the search warrant had been issued without probable cause. The appellate court reversed. A copy of my reversed decision is attached hereto.

Note: On constraint of the Appellate Division, Second Department's decisions in *People v. Maurice Christopher and Tanya Jackson* and *People v. Robert K. White*, above, I vacated my decisions in *People v. Regina Blow*, Indictment # 13516/97, dated October 13, 1998 and in *People v. James White*, Indictment #3933/98, dated October 22, 1998, as they were factually similar to the cases that were appealed. Copies of the original decisions and the vacating decisions for each case are attached hereto.

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 never have held any federal, state or local public offices (other than judicial office). In 2002, I ran, unsuccessfully, as the Republican Party and Conservative Party candidate for the office of New York State Attorney General.

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 never served as a clerk to a judge.
 2. whether you practiced alone, and if so, the addresses and dates;

I never practiced alone.
 3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

Answer is in reverse chronological order, beginning with the most recent:

Current: Hoguet Newman & Regal, LLP	Position: Of counsel
10 East 40 th Street, 35 th Floor	November 25, 2002 to present
New York, NY 10016	

Reference: Fredric S. Newman, Partner
 Firm specializes in commercial and employment discrimination litigation.

Assistant District Attorney July 1987 to December 1995
 Office of Hon. Robert M. Morgenthau
 District Attorney, New York County
 One Hogan Place, New York, NY 10013

Special Assistant District Attorney July 1987 to December 1995
 Office of the Special Narcotics Prosecutor, City of New York
 80 Centre Street, New York, NY 10013

- ***Assigned to Special Investigations Bureau 1983 to 1995
- ***Senior Supervising and Investigating Assistant 1992 to 1995
- ***Acting Deputy Bureau Chief March to September 1992
- ***Senior Trial Counsel 1990 to 1992

Specialized in the investigation and prosecution of long-term complex narcotics undercover investigations and became an expert in the use of wiretaps (state equivalent of Title III applications). I ultimately became responsible for the assessment of new investigations, supervision of assistant district attorneys and their law enforcement teams, and the review, editing and coordination of wiretap applications. I supervised prosecutors in our bureau as they prepared to take down cases, present them to the grand jury and prepare them for trial. I assisted in the training of prosecutors in the use of confidential informants, the drafting of search warrant applications, wiretap applications and other court orders and other aspects of prosecuting cases.

***Cross-designated as Special Assistant Deputy Attorney General for the Statewide Organized Crime Task Force (OCTF) to assist on investigations conducted by OCTF, sometimes jointly with other law enforcement agencies and to assist in the coordination of the prosecutions thereof. Approximately from 1985 to 1989

***Cross-designated as Special Assistant United States Attorney in the Office of Hon. Rudolph W. Giuliani, United States Attorney for the Southern District of New York to handle the investigation and prosecution of *United States v. Ike Atkinson, et. al.*, (Docket number not available at this time). This was a joint FBI, Drug Enforcement Administration, and New York City Police Department investigation wherein the state obtained wiretap authorization for telephones in a federal correctional facility. We also obtained federal search warrants authorizing the seizure and duplication of the targets' correspondence, which documented their conspiracy to obtain heroin in Thailand for distribution in New York City. The

conspirators were spread out throughout the United States and ultimately federal search warrants were simultaneously executed in different states. An undercover agent made the heroin purchase in Thailand and eventually the drugs were transported to New York City. Most defendants pled guilty before trial. Two defendants went to trial before the Hon. John E. Sprizzo in the District Court for the Southern District of New York in the fall of 1987 and were found guilty.

Assistant District Attorney September 1979 to June 1987
 Office of Hon. Mario Merola
 District Attorney, Bronx County
 215 East 161st Street, Bronx, NY 10451

Special Assistant District Attorney September 1981 to May 1987
 Office of the Special Narcotics Prosecutor, City of New York
 80 Centre Street, New York, NY 10013

For the first two years served as a trial assistant, handling narcotics cases from arrest to trial. From 1983 on I was assigned to the Special Investigations Bureau specializing in wiretap and complex undercover narcotics investigations as described above.

Appeals Bureau September 1979 to September 1981
 Handled approximately 100 appeals from judgments of convictions. I argued some of these cases before the Appellate Division, First Department. I also handled federal writs of habeas corpus and extradition and rendition matters.

- 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 am currently in private practice specializing in commercial and employment discrimination litigation (as of November 25, 2002). From May 17, 2002 to Election Day, November 5, 2002, I did not practice law as I ran for the office of New York State Attorney General. Before running for office, I served as a judge in the state system for seven years. Prior to becoming a judge, I was a prosecutor for sixteen years. I began as an Assistant District Attorney in the Appeals Bureau of the Bronx District Attorney's Office upon graduating from law school in 1979. I handled approximately 100 appeals from judgments of convictions, some of which I argued before the Appellate Division, First Department. I also handled rendition and extradition matters as well as federal habeas corpus matters. In 1981, I was assigned to the Office of the New York City Special Narcotics Prosecutor as a trial assistant. Less than a year later, I was assigned to that Office's Special Investigations Bureau and prosecuted some of the most important narcotics cases in the city involving complex undercover, confidential informant and wiretap investigations. In 1987, I was appointed as an Assistant District Attorney in the New York County District Attorney's Office and continued

to serve with the Office of the Special Narcotics Prosecutor. I soon assumed positions of greater responsibility involving the training and supervision of prosecutors in the bureau that culminated in my appointment as Senior Supervising and Investigating Attorney specializing in wiretap and electronic surveillance operations. I also served as a Special Assistant United States Attorney in the Office of the United States Attorney for the Southern District of New York and as a Special Assistant Deputy Attorney General for the Statewide Organized Crime Task Force.

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

As a prosecutor, I represented the People of the City and State of New York. I specialized in criminal law.

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

As a prosecutor, I appeared in court almost every day.

2. What percentage of these appearances was in:
 - (a) federal courts;

I was cross-designated as a Special Assistant United States Attorney for the Southern District of New York in 1987. The trial I was on lasted 13 weeks and there were additional appearances in connection with that case. While assigned to the Office of the Special Narcotics Prosecutor, a few cases required my appearance in the United States District Court for the Southern District of New York. I would estimate the total percentage of appearances in federal court since graduating from law school at less than 5%.

- (b) state courts of record;

Approximately more than 95%

- (c) other courts.

Not applicable

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

Not applicable prior to November 25, 2002. My current practice is 100% civil litigation. The firm's practice is in both state and federal courts.

- (b) criminal.

As a prosecutor, 100%

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 6 cases in state court where I was sole counsel, the prosecutor. In my federal trial, I was co-counsel with an Assistant United States Attorney.

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

100%

- (b) non-jury.

None

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.

Note: I served as a judge from December 28, 1995 to May 17, 2002. Before that, I spent 16 years as a prosecutor. I spent fourteen of these years in the Special Investigations Bureau handling major investigations utilizing undercover officers, confidential informants, wiretaps and other forms of electronic surveillance. In most cases, defendants pled guilty because of the amount and quality of evidence generated by these investigations. I tried my last case as a prosecutor in 1989. From then on, I not only worked on investigations, but I also had more of an administrative, supervisory role, training prosecutors and overseeing their investigations. I do not have records of indicted matters or of my investigations. Most of that information was sensitive and confidential. I have exercised all due diligence to secure these records through a variety of sources, including conversations with executive personnel, former colleagues and clerks from the New York County Supreme Court, the New York County District Attorney's Office, the Office of the Special Narcotics Prosecutor for New York City, and defense attorneys, as well as electronic databases, and the 2003 New York Lawyers Diary and Manual, Bar Directory for the State of New York, Published 2002 by Skinder-Strauss Associates. My efforts have been met with limited results. I have reconstructed the following matters to the best of my ability, based upon information I was able to obtain from the sources listed above, reported cases, and upon my memory.

(1) September to November 1987 *United States v. Ike Atkinson, et. al.*, Docket number unavailable at this time. I was unable to ascertain the names of the defense attorneys who litigated this matter. I litigated this matter before the Hon. John E. Sprizzo, United States District Court, Southern District of NY. There were multiple defendants. Only two went to trial by jury. The rest pled guilty. All had been charged with conspiracy to sell and possess over 100 grams of heroin. The trial lasted approximately 13 weeks. I tried it as a Special Assistant United States Attorney with co-counsel Assistant United States Attorney Anne Marie Levins. I was involved in the investigation of the case and in all aspects of trial preparation. Ms. Levins and I equally divided the task of presenting evidence. Among other witnesses, I was responsible for preparing a Thai accomplice witness who had made multiple conflicting statements given under oath, presenting serious credibility issues. I also convinced the court of the necessity of presenting expert testimony as to how narcotics transactions were conducted in Thailand. I prepared and presented that witness. I also summed up before the jury. All defendants were convicted.

(2) December 1989 *People v. Kwei Shoon Poon, et. al.* Indictment number 11411/88. Tried in New York County Supreme Court before the Hon. Edward J. McLaughlin
Adversary: Ms. Candice Kurtz, Legal Aid Society, 49 Thomas Street, New York, NY 10013
(212) 298-5387

I was the prosecutor in the case. Defendant was charged with acting in concert with his supplier in selling over 700 grams of heroin to an undercover officer. There was a confidential informant in the case and the defense argued that the informant had entrapped the defendant into making the sale. I had argued, and the court agreed, that under relevant NY state statutes the informant, under the circumstances of this case, could not entrap the defendant. The jury convicted the defendant and acquitted the co-defendant (against whom the case was weaker). In a post-verdict motion, defense counsel claimed that it was error for

the court not to charge the jury that the confidential informant could have entrapped the defendant. The People also had learned that the supplier forced the defendant to testify falsely on his behalf at trial by kidnapping the defendant's family in China. In the interest of justice, I consented to the court's vacatur of the verdict. Defendant was permitted to enter a plea of guilty to a reduced charge. He was sentenced to seven years to life imprisonment by the Hon. Edwin Torres in New York County Supreme Court on February 7, 1990.

(3) *People v. Felipo Ragusa, Salvatore Bartolotta, et. al*, Indictment number 00006/84).

This was the first complex undercover and wiretap narcotics investigation that I worked on as a Special Assistant District Attorney in the Office of the Special Narcotics Prosecutor. It began in 1982 as a simple narcotics undercover operation conducted by the New York City Police Department in Brooklyn, NY. An undercover officer made several low-level street heroin purchases and worked his way up to the supplier who was connected to the Bonnano Crime Family. Numerous eavesdropping warrants were obtained during this investigation, which crossed paths with a concurrent investigation conducted by the FBI and the United States Attorney's Office for the Southern District of NY. We joined forces and established links to other federal Organized Crime investigations throughout the United States. I was one of three state prosecutors on the case and two Assistant United States Attorneys were also assigned.

Ultimately, through wiretap, videotape, and undercover evidence, we seized a major shipment of heroin inside tires sent from Italy at Port Newark, NJ and arrested high-ranking members of the Bonnano Crime Family in late 1983. Arrests also were made in other states. Most importantly, the evidence developed during this investigation ultimately led to the "Pizza Connection" Case and was used by law enforcement authorities in Italy in their Organized Crime investigations. Bartolotta, one of the higher-level dealers, was sentenced in New York County Supreme Court by Judge Schlessinger (retired) to 15 years to life imprisonment on his plea of guilty to selling narcotics to an undercover officer. Additionally, a major cocaine supplier for that area who had been suspected of a number of homicides, including those of witnesses was convicted in State Court and sentenced to life imprisonment. He contracted for the murder of the undercover officer in this case. As a result, the undercover officer and his family were under FBI protection for over one year until the contract was finally lifted. This case served as the basis for other joint FBI and local law enforcement task forces.

One of the Assistant United States Attorneys who worked on this case is former U. S. District Court Judge for the Southern District of New York and former FBI Director, Louis Freeh who currently is Senior Vice Chairman of MBNA America Bank, N. A., Wilmington, DE 19884-0154, (302) 432-1490. One of the Assistant District Attorneys who also worked on this case is Meggan Dodd, Counsel to the Special Investigations Bureau, Office of the Special Narcotics Prosecutor for the City of New York, 80 Centre Street, 5th floor, New York, NY 10013, (212) 815-0945. Defense Counsel for Mr. Bartolotta was Jacob Evseroff, Esq., 186 Joralemon Street, Brooklyn, NY 11201, (718) 875-0903.

(4) *People v. Andre Acosta, et. al., Indictment # 5677/88*

This long-term undercover narcotics operation utilized court-authorized eavesdropping over telephones and search warrants. I took over the investigation for the assigned prosecutor who was on long-term leave. Undercover officers infiltrated this family-run, major cocaine distribution organization based in Washington Heights. Search warrants issued, based on police observations and drug purchases, as well as wiretap evidence, resulted in significant seizures of cocaine, drug records and proceeds. I presented the evidence to the Grand Jury and obtained indictments on several individuals, including one who later cooperated with law enforcement officials against other drug dealers. Significantly, I was able to obtain a Class AI felony indictment for Criminal Possession of a Controlled Substance in the First Degree against the leader of the organization, Andre Acosta, based almost entirely on intercepted telephone conversations and police observations, without actually seizing the drugs in question. Most defendants pled guilty to felony conspiracy charges or to Class A felony charges, the latter of which resulted in life imprisonment sentences. Andre Acosta went to trial before a jury. The prosecutor originally assigned to the investigation tried the case. The defendant was convicted of Attempted Criminal Possession of a Controlled Substance in the First Degree, a Class AI felony and was sentenced to 25 years to life imprisonment. Defendant was also convicted of Conspiracy in the Second Degree and sentenced concurrently to 8 1/3 to 25 years' imprisonment.

Defendant appealed from his judgment of conviction [*People v. Andre Acosta*, 172 AD2d 103 (1st Dept., 1991)]. The Appellate Division, First Department held that there was insufficient evidence to convict defendant of the attempted possession charge and, accordingly, dismissed the attempted possession count and vacated that portion of the sentence. It otherwise affirmed defendant's judgment of conviction.

The People appealed to the Court of Appeals, which reversed the Appellate Division's ruling [*People v. Andre Acosta*, 80 NY2d 665 (1991)]. Writing for the court, Judge Judith S. Kaye held that: (1) a person who, with intent to possess cocaine, orders from a supplier, admits a courier into his home, examines the drugs and ultimately rejects them because of perceived defects in quality, has attempted to possess cocaine, and (2) the statutory renunciation defense required abandonment of the overall criminal enterprise, not just abandonment with respect to the particular quantity of cocaine. The Court of Appeals remitted the case to the Appellate Division because the Appellate Division had vacated the conviction for legal insufficiency without using its weight-of-the-evidence review powers. The Court of Appeals also held that there was sufficient evidence to support defendant's conviction for attempted drug possession. This decision also defined when an "attempt" to commit a crime had been proven and served as the basis for rewording the jury charge used in future cases.

On the remittitur [*People v. Andre Acosta*, 197 AD2d 448 (1st Dept., 1993)], the Appellate Division held, in a memorandum decision, that there was sufficient evidence to sustain defendant's attempted possession conviction. It further held that the maximum sentence imposed by the trial court was appropriate.

Defense Counsel for Andre Acosta: Barry Mahler, 274 Madison Avenue, New York, NY 10016, (212) 889-7600

Assistant District Attorney at Trial: Amy Kaplan (now Amy Cohn), Assistant Deputy Attorney General/Senior Investigative Counsel, New York State Attorney General's Office, Organized Crime Task Force, 101 East Post Road, White Plains, NY 10601, (914) 422-8615.

(5) *People v. Miguel Acosta, et. al.*, Indictment Number 5677/88

This indictment stemmed from the investigation which resulted in the *Andre Acosta* case cited above. This defendant was the brother of Andre Acosta and helped to run the cocaine importation and distribution operation with him. He was arrested before Andre Acosta was arrested. Search warrants executed at the home of Miguel Acosta resulted in the seizure of substantial quantities of cocaine, narcotics paraphernalia, and proceeds of narcotics transactions. Miguel Acosta pled guilty to felony drug possession charges and was sentenced on July 18, 1979 by the Hon. Leslie Crocker Snyder in New York County Supreme Court. Defense Counsel for Miguel Acosta was Andres Aranda, Esq., 291 Broadway, New York, NY 10007, (212) 608-7575

(6) *People v. David Rosenthal, et. al.*, Indictment Number 5677/88

This indictment stemmed from the investigation which resulted in the Andre Acosta and Miguel Acosta cases cited above. Defendant was charged with selling cocaine to an undercover officer. He was sentenced on his plea of guilty to drug sale charges to three years to life imprisonment on June 18, 1993 before the Hon. Leslie Crocker Snyder in New York County Supreme Court. Defense Counsel for Mr. Rosenthal was Benjamin Brafman, Esq., Brafman & Ross, P.C., 767 Third Avenue, New York, NY 10017, (212) 750-7800.

(7) *People v. Ernesto Encarnacion, a/k/a Modesto Encarnacion, et. al.*, (Indictment number 01563/90)

This case resulted from a long-term undercover narcotics investigation of a violent cocaine trafficking organization based in the East New York section of Brooklyn. Two undercover officers made purchases of cocaine from various members of this organization headed by Encarnacion and his girlfriend who was nicknamed, "Assassin". The undercover officers had worked their way up from small, street level purchases to larger purchases. On the date of the largest purchase, members of the organization, upon Encarnacion's orders, not only robbed the undercover officers of their purchase money, but also attempted to kill them. One undercover officer was shot and forced to retire because of his injuries. All the members of the organization were arrested and successfully prosecuted. The prosecution was shared by the Office of the Special Narcotics Prosecutor, which handled the drug charges, and the Brooklyn District Attorney's Office, which handled the robbery and attempted homicide charges.

I was able to obtain the cooperation of Encarnacion's girlfriend who agreed to testify against him at trial. She could substantiate the robbery and homicide charges as well. Based upon the threat of her testimony, Encarnacion entered a guilty plea to drug charges and was sentenced to seven years to life imprisonment on July 14, 1992 by Judge Bookson (retired) in New York County Supreme Court. His judgment of conviction was affirmed on appeal without opinion. *People v. Ernesto Encarnacion, a/k/a Modesto Encarnacion*, 215 AD2d

1005 (1st Dept., 1995). Defense Counsel for Mr. Encarnacion was Mr. Joelson of the Legal Aid Society, 49 Thomas Street, New York, NY 10013, (212) 298-5000.

(8) *People v. Gilberto Osario*, Indictment Number 1863/84 Trial held in February 1986.

This case resulted from the joint investigative efforts of the New York City Police Department's Narcotics Division and the New Jersey State Police. Defendant, along with three other individuals, was involved in transporting large quantities of cocaine into Queens, New York and selling the cocaine in New Jersey. Through a confidential informant (who disappeared at the time of trial), defendant met an undercover officer and sold a kilogram of cocaine to him in New Jersey. Based on intelligence developed by the New Jersey State Police, the undercover officer and the New York City Police Department, a search warrant was obtained for the apartment where defendant was staying in Queens. Approximately fifteen pounds of cocaine were seized. Defendant was convicted after a jury trial in New York County Supreme Court of Criminal Possession of a Controlled Substance in the First Degree and Criminally Using Drug Paraphernalia in the Second Degree. The Hon. Myriam J. Altman sentenced defendant to a term of imprisonment of 25 years to life and one year, respectively, each sentence to run concurrently with the other. Judge Altman also imposed a fine of \$280,375. Judge Altman is currently an Associate Justice of the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, NY 11201, (718) 875-1300. Defendant Osario was represented by Stephen Goldenberg, Esq., 277 Broadway, New York, NY 10007, (212) 346-0600.

(9) *People v. Felix Garcia, a/k/a "España"*, (Indictment number 3676/91 and 3675/91) (Judgment of conviction by plea of guilty to felony drug charges before the Hon. Leslie Crocker Snyder in New York County Supreme Court on July 10, 1992).

This long-term undercover narcotics operation was exceptional on two grounds: (1) the resourcefulness of the New York City Police Officers in using all available intelligence and law enforcement tools and their ability to cooperate with law enforcement officials from other jurisdictions; and (2) its success in dismantling a heroin distribution organization that had taken over an entire neighborhood and was responsible for distributing heroin along the eastern seaboard of the United States. It resulted in the successful arrest, indictment and conviction of 44 individuals, including the leader of the organization, Felix Garcia, and a major importer and distributor of cocaine. Forty-three out of forty-four defendants pled guilty before trial. Only one defendant went to trial and a jury convicted him. I supervised the investigation, drafted the wiretap and search warrant applications, presented the matter to the Grand Jury and prosecuted the resulting indictments along with another prosecutor assigned to assist me when the investigation grew larger in scope.

Felix Garcia and his organization were responsible for distributing a particularly potent brand of heroin dubbed "DOA" (Dead on Arrival) in the Bushwick area of Brooklyn. They had taken over the entire neighborhood to the point where, as one officer described it, the streets were virtual drug supermarkets. The organization was notorious for its violence, killing those who tried to cheat the organization or infiltrate its turf. They sold DOA in Bushwick Park, which was renamed Maria Hernandez Park after a drug activist mom killed

by drug dealers. We had confidential information that this organization was behind this killing. This organization also distributed DOA to dealers who came in from Springfield, MA, New Jersey, Washington, DC and the Carolinas. Using police surveillance, other police intelligence, undercover drug purchases and wiretap evidence, we identified these out of state dealers and provided the information to authorities in those jurisdictions who made the arrests. We uncovered evidence relevant to the homicide of Maria Hernandez, which was turned over to the Brooklyn District Attorney's Office. At the end of the case, we returned Maria Hernandez Park to the children of Bushwick.

Another prosecutor was assigned to assist in the investigation and prosecution of this matter: Paul Lewis, currently Council for the Committee on Standards of Official Conduct, U.S. House of Representatives, Suite HT-2, The Capitol, Washington, DC 20515, (202) 225-7103. Defense Counsel for Felix Garcia was Robert Schwartz, Esq., 350 Broadway, New York, NY (212) 966-4290.

(10) *People v. Jorge Fuentes-Borda*, Indictment Number 4752/89

Based upon a tip from a confidential informant and observations by members of a narcotics task force, defendant and a companion were arrested as they tried to place a gym bag containing cocaine inside the trunk of a car. Additional cocaine was seized from an apartment the officers had observed the defendant and his companion enter and leave with the cocaine filled gym bag. Defendant moved for a *Mapp* hearing to suppress the seized evidence. Since defendant claimed that he and his companion had merely been sitting in the car when the officers approached them with guns drawn demanding the key to the apartment and to search the trunk of the car and he denied both having been in the apartment and ownership of the gym bag, I argued, as the prosecutor in the case, that neither the defendant nor his companion had standing to contest the seizures. The court (New York County Acting Supreme Court Justice Leslie Crocker Snyder) agreed and denied defendant's request for a *Mapp* hearing on the grounds that he lacked standing to contest the search and seizure. Thereafter, defendant pled guilty to drug possession charges and was sentenced by Judge Snyder to 7 years to life imprisonment.

Defendant appealed. The Appellate Division, First Department in *People v. Fuentes-Borda*, 186 AD2d 405 (1st Dept., 1992), reversed and remitted the matter for further proceedings. Despite the fact that defendant had not asserted personal standing by demonstrating a personal and legitimate expectation of privacy in the searched premises or article, the appellate court expanded the requirements for standing by permitting the defendant to establish standing by using the facts alleged by the police and the prosecution. One judge dissented holding that defendant's motion to suppress was properly denied without a hearing.

Defendant was represented by Jeremy Schneider, Esq. who was then with the Legal Aid Society, 49 Thomas Street, New York, NY 10013, (212) 298-5000. Mr. Schneider's practice is currently located at 70 Lafayette Street, New York, NY 10013, (212) 571-5500.

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.)

Note: As discussed in Question #18 above, I served as a judge from December 28, 1995 to May 17, 2002. Before that, I spent 16 years as a prosecutor. I spent fourteen of these years in the Special Investigations Bureau handling major investigations utilizing undercover officers, confidential informants, wiretaps and other forms of electronic surveillance. In most cases, defendants pled guilty because of the amount and quality of evidence generated by these investigations. I tried my last case as a prosecutor in 1989. From then on, I not only worked on investigations, but I also had more of an administrative, supervisory role, training prosecutors and overseeing their investigations. I do not have records of indicted matters or of my investigations. Most of that information was sensitive and confidential. I have exercised all due diligence to secure these records through a variety of sources, including conversations with executive personnel, former colleagues and clerks from the New York County Supreme Court, the New York County District Attorney's Office, the Office of the Special Narcotics Prosecutor for New York City, and defense attorneys, as well as electronic databases, and the 2003 New York Lawyers Diary and Manual, Bar Directory for the State of New York, Published 2002 by Skinder-Strauss Associates. My efforts have been met with limited results. I have reconstructed the following matters to the best of my ability, based upon information I was able to obtain from the sources listed above, reported cases, and upon my memory.

(1) I assisted in the drafting of a brief in opposition to a petition for a writ of certiorari before the United States Supreme Court in the matter of *Mukand Aneja, Petitioner, against Triborough Bridge and Tunnel Authority, Respondent*, Docket No. 02-880. The brief in opposition was filed on February 10, 2003. Petitioner filed a reply brief and on March 24, 2003, the United States Supreme Court denied the petition for a writ of certiorari. I reviewed the records from the courts below, drafted a portion of the brief, reviewed and edited the brief. The following is a summary of the case.

The Triborough Bridge and Tunnel Authority ("TBTA"), Respondent, hired Petitioner as an engineer and fired him nine months later for poor performance. Petitioner filed a charge of age discrimination with the Equal Employment Opportunity Commission ("EEOC") which dismissed his charge after an investigation and issued a right-to-sue letter. Ninety-three days later, Petitioner filed a *pro se* complaint in the United States District Court for the Southern District of New York alleging violations of 42 U.S.C. § 200(e), *et seq.* (Title VII), the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, and 42 U.S.C. § 1981. Neither the original complaint nor the amended complaint subsequently filed by Petitioner contained a claim of violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219.

In brief, the District Court, by a summary order, granted Respondent's motion for summary judgment and dismissed the complaint in its entirety finding that Respondent's Title VII and Age Discrimination complaints were time-barred and, with respect to the §1981 claims, he had failed to show that Respondent's reasons for discharging Petitioner were false or pretextual. The Second Circuit Court of Appeals affirmed the District Court's rulings. However, although Petitioner had not raised any claim of FLSA violations in either his original or amended complaint or on appeal from the District Court's judgment, the Circuit Court raised the issue that Petitioner may have asserted a claim of violations of the FLSA before the District Court which had not been addressed. Accordingly, it vacated the District Court's judgment to the extent that it dismissed Petitioner's potential FLSA claim and remanded the matter for further proceedings. Respondent's petition for a rehearing on the Circuit Court's FLSA ruling was denied.

On remand, the District Court granted Respondent's motion for summary judgment, holding that Petitioner worked for TBTA in a *bona fide* professional capacity and, thus, was exempt from the overtime payment requirements of FLSA. On appeal, the Second Circuit Court of Appeals affirmed the District Court's ruling and, further, rejected Petitioner's claim of retaliation. The Court of Appeals subsequently denied Petitioner's motion for a rehearing.

(2) *People v. Felipo Ragusa, Salvatore Bartolotta, et. al*, Indictment number 00006/84). This was the first complex undercover and wiretap narcotics investigation that I worked on as a Special Assistant District Attorney in the Office of the Special Narcotics Prosecutor. It began in 1982 as a simple narcotics undercover operation conducted by the New York City Police Department in Brooklyn, NY. An undercover officer made several low-level street heroin purchases and worked his way up to the supplier who was connected to the Bonnano Crime Family. Numerous eavesdropping warrants were obtained during this investigation, which crossed paths with a concurrent investigation conducted by the FBI and the United States Attorney's Office for the Southern District of NY. We joined forces and established links to other federal Organized Crime investigations throughout the United States. I was one of three state prosecutors on the case and two Assistant United States Attorneys were also assigned.

Ultimately, through wiretap, videotape, and undercover evidence, we seized a major shipment of heroin inside tires sent from Italy at Port Newark, NJ and arrested high-ranking members of the Bonnano Crime Family in late 1983. Arrests also were made in other states. Most importantly, the evidence developed during this investigation ultimately led to the "Pizza Connection" Case and was used by law enforcement authorities in Italy in their Organized Crime investigations. Bartolotta, one of the higher-level dealers, was sentenced in New York County Supreme Court by Judge Schlessinger (retired) to 15 years to life imprisonment on his plea of guilty to selling narcotics to an undercover officer. Additionally, a major cocaine supplier for that area who had been suspected of a number of homicides, including those of witnesses was convicted in State Court and sentenced to life imprisonment. He contracted for the murder of the undercover officer in this case. As a result, the undercover officer and his family were under FBI protection for over one year until the

contract was finally lifted. This case served as the basis for other joint FBI and local law enforcement task forces.

One of the Assistant United States Attorneys who worked on this case is former U. S. District Court Judge for the Southern District of New York and former FBI Director, Louis Freeh who currently is Senior Vice Chairman of MBNA America Bank, N. A., Wilmington, DE 19884-0154, (302) 432-1490. One of the Assistant District Attorneys who also worked on this case is Meggan Dodd, Counsel to the Special Investigations Bureau, Office of the Special Narcotics Prosecutor for the City of New York, 80 Centre Street, 5th floor, New York, NY 10013, (212) 815-0945. Defense Counsel for Mr. Bartolotta was Jacob Evseroff, Esq., 186 Joralemon Street, Brooklyn, NY 11201, (718) 875-0903.

(3) *People v. Andre Acosta, et. al., Indictment # 5677/88*

This long-term undercover narcotics operation utilized court-authorized eavesdropping over telephones and search warrants. I took over the investigation for the assigned prosecutor who was on long-term leave. Undercover officers infiltrated this family-run, major cocaine distribution organization based in Washington Heights. Search warrants issued, based on police observations and drug purchases, as well as wiretap evidence, resulted in significant seizures of cocaine, drug records and proceeds. I presented the evidence to the Grand Jury and obtained indictments on several individuals, including one who later cooperated with law enforcement officials against other drug dealers. Significantly, I was able to obtain a Class AI felony indictment for Criminal Possession of a Controlled Substance in the First Degree against the leader of the organization, Andre Acosta, based almost entirely on intercepted telephone conversations and police observations, without actually seizing the drugs in question. Most defendants pled guilty to felony conspiracy charges or to Class A felony charges, the latter of which resulted in life imprisonment sentences. Andre Acosta went to trial before a jury. The prosecutor originally assigned to the investigation tried the case. The defendant was convicted of Attempted Criminal Possession of a Controlled Substance in the First Degree, a Class AI felony and was sentenced to 25 years to life imprisonment. Defendant was also convicted of Conspiracy in the Second Degree and sentenced concurrently to 8 1/3 to 25 years' imprisonment.

Defendant appealed from his judgment of conviction [*People v. Andre Acosta*, 172 AD2d 103 (1st Dept., 1991)]. The Appellate Division, First Department held that there was insufficient evidence to convict defendant of the attempted possession charge and, accordingly, dismissed the attempted possession count and vacated that portion of the sentence. It otherwise affirmed defendant's judgment of conviction.

The People appealed to the Court of Appeals, which reversed the Appellate Division's ruling [*People v. Andre Acosta*, 80 NY2d 665 (1991)]. Writing for the court, Judge Judith S. Kaye held that: (1) a person who, with intent to possess cocaine, orders from a supplier, admits a courier into his home, examines the drugs and ultimately rejects them because of perceived defects in quality, has attempted to possess cocaine, and (2) the statutory renunciation defense required abandonment of the overall criminal enterprise, not just abandonment with respect to the particular quantity of cocaine. The Court of Appeals remitted the case to the Appellate Division because the Appellate Division had vacated the

conviction for legal insufficiency without using its weight-of-the-evidence review powers. The Court of Appeals also held that there was sufficient evidence to support defendant's conviction for attempted drug possession. This decision also defined when an "attempt" to commit a crime had been proven and served as the basis for rewording the jury charge used in future cases.

On the remittitur [*People v. Andre Acosta*, 197 AD2d 448 (1st Dept., 1993)], the Appellate Division held, in a memorandum decision, that there was sufficient evidence to sustain defendant's attempted possession conviction. It further held that the maximum sentence imposed by the trial court was appropriate.

Defense Counsel for Andre Acosta: Barry Mahler, 274 Madison Avenue, New York, NY 10016, (212) 889-7600

Assistant District Attorney at Trial: Amy Kaplan (now Amy Cohn), Assistant Deputy Attorney General/Senior Investigative Counsel, New York State Attorney General's Office, Organized Crime Task Force, 101 East Post Road, White Plains, NY 10601, (914) 422-8615.

(4) *People v. Ernesto Encarnacion, a/k/a Modesto Encarnacion, et. al.*, (Indictment number 01563/90)

The case resulted from a long-term undercover narcotics investigation of a violent cocaine trafficking organization based in the East New York section of Brooklyn. Two undercover officers made purchases of cocaine from various members of this organization headed by Encarnacion and his girlfriend who was nicknamed, "Assassin". The undercover officers had worked their way up from small, street level purchases to larger purchases. On the date of the largest purchase, members of the organization, upon Encarnacion's orders, not only robbed the undercover officers of their purchase money, but also attempted to kill them. One undercover officer was shot and forced to retire because of his injuries. All the members of the organization were arrested and successfully prosecuted. The prosecution was shared by the Office of the Special Narcotics Prosecutor, which handled the drug charges, and the Brooklyn District Attorney's Office, which handled the robbery and attempted homicide charges. I was able to obtain the cooperation of Encarnacion's girlfriend who agreed to testify against him at trial. She could substantiate the robbery and homicide charges as well. Based upon the threat of her testimony, Encarnacion entered a guilty plea to drug charges and was sentenced to seven years to life imprisonment on July 14, 1992 by Judge Bookson (retired) in New York County Supreme Court. His judgment of conviction was affirmed on appeal without opinion. *People v. Ernesto Encarnacion, a/k/a Modesto Encarnacion*, 215 AD2d 1005 (1st Dept., 1995). Defense Counsel for Mr. Encarnacion was Mr. Joelson of the Legal Aid Society, 49 Thomas Street, New York, NY 10013, (212) 298-5000.

(5) *People v. Felix Garcia, a/k/a "Espana"*, (Indictment number 3676/91 and 3675/91) (Judgment of conviction by plea of guilty to felony drug charges before the Hon. Leslie Crocker Snyder in New York County Supreme Court on July 10, 1992).

This long-term undercover narcotics operation was exceptional on two grounds: (1) the resourcefulness of the New York City Police Officers in using all available intelligence and law enforcement tools and their ability to cooperate with law enforcement officials from other

jurisdictions; and (2) its success in dismantling a heroin distribution organization that had taken over an entire neighborhood and was responsible for distributing heroin along the eastern seaboard of the United States. It resulted in the successful arrest, indictment and conviction of 44 individuals, including the leader of the organization, Felix Garcia, and a major importer and distributor of cocaine. Forty-three out of forty-four defendants pled guilty before trial. Only one defendant went to trial and a jury convicted him. I supervised the investigation, drafted the wiretap and search warrant applications, presented the matter to the Grand Jury and prosecuted the resulting indictments along with another prosecutor assigned to assist me when the investigation grew larger in scope.

Felix Garcia and his organization were responsible for distributing a particularly potent brand of heroin dubbed "DOA" (Dead on Arrival) in the Bushwick area of Brooklyn. They had taken over the entire neighborhood to the point where, as one officer described it, the streets were virtual drug supermarkets. The organization was notorious for its violence, killing those who tried to cheat the organization or infiltrate its turf. They sold DOA in Bushwick Park, which was renamed Maria Hernandez Park after a drug activist mom killed by drug dealers. We had confidential information that this organization was behind this killing.

This organization also distributed DOA to dealers who came in from Springfield, MA, New Jersey, Washington, DC and the Carolinas. Using police surveillance, other police intelligence, undercover drug purchases and wiretap evidence, we identified these out of state dealers and provided the information to authorities in those jurisdictions who made the arrests. We uncovered evidence relevant to the homicide of Maria Hernandez, which was turned over to the Brooklyn District Attorney's Office. At the end of the case, we returned Maria Hernandez Park to the children of Bushwick.

Another prosecutor was assigned to assist in the investigation and prosecution of this matter: Paul Lewis, currently Council for the Committee on Standards of Official Conduct, U.S. House of Representatives, Suite HT-2, The Capitol, Washington, DC 20515, (202) 225-7103. Defense Counsel for Felix Garcia was Robert Schwartz, Esq., 350 Broadway, New York, NY (212) 966-4290.

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.

Deferred Compensation from the City of New York \$97,450 (Please note that I am not age eligible to collect at this time without paying a substantial penalty)

I contributed to the pension plan of the Unified Court System for seven years; however, the exact value of that contribution is not available to me at this time. I have requested the information from the Office of Court Administration. I have been informed that it will take several weeks to obtain the information. Also, please note that I am not eligible to obtain the benefits from this pension plan at this time without incurring substantial penalties.

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.

During the seven years that I have spent on the bench in lower Criminal Court and in New York State Supreme Court, I have taken the utmost care to avoid any potential conflict of interest in any matter entrusted to me. I also have zealously avoided even the appearance of any impropriety in my handling of any matter. In order to determine whether there might be any potential conflict of interest, it is necessary to know the identities of parties to any litigation, whether it is a criminal or civil matter. This also includes the identities of witnesses and counsel for either party. If I have had a prior relationship of any kind with any party or counsel, I would disclose it to both parties and, after discussion with both parties, determine if that relationship is such that it could, in any way, create the appearance of impropriety or bias my judgment in the case. If so, then I would have to recuse myself from the case. Most importantly, I will follow the guidelines of the Code of Judicial Conduct at all times.

At this time, I am not aware of any litigation or financial arrangements that are likely to present any potential conflicts of interest during my initial service as a United States District Court Judge for the Eastern District of New York, except perhaps for matters that may be handled by my current employer, the law firm of Hoguet Newman & Regal, LLP. In such case, I would recuse myself and ask that the matter be sent to another judge.

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. Not Applicable.

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 Statement.

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.

Aside from being the Republican Party and Conservative Party candidate for New York State Attorney General in 2002, I never have held a position or played a role in any political 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	\$56,150		Notes payable to banks-secured	\$49,918	
U.S. Government securities-add schedule		0	Notes payable to banks-unsecured		0
Listed securities-add schedule		0	Notes payable to relatives		0
Unlisted securities--add schedule		0	Notes payable to others		0
Accounts and notes receivable:		0	Accounts and bills due	\$3,272	
Due from relatives and friends		0	Unpaid income tax	\$6,442	
Due from others		0	Other unpaid income and interest		0
Doubtful		0	Real estate mortgages payable-add schedule		0
Real estate owned-add schedule		0	Chattel mortgages and other liens payable		0
Real estate mortgages receivable		0	Other debts-itemize:		
Autos and other personal property	\$1,540		American Express Gold Flex Pay	\$9,537	
Cash value-life insurance		0	American Express Personal Flex Pay	\$1,289	
Other assets itemize:			HSBC Mastercard	\$4,111	
NYC Deferred Compensation \$97,450 (not age eligible to collect at this time without paying a penalty)			Q Card	\$ 968	
			TOTAL:	\$15,905	
			Total liabilities	\$75,537	
			Net Worth	\$79,603	
Total Assets	\$155,140		Total liabilities and net worth	\$155,140	
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					

FD-10 Rev. 1/2001		FINANCIAL DISCLOSURE REPORT FOR NOMINEES		Report Required by the Ethics in Government Act of 1978, (5 U.S.C. App., §§101-111)	
1. Person Reporting (Last name, first, middle initial) Irizarry, Dora L.		2. Court or Organization U.S. District Court, Eastern District of New York		3. Date of Report April 29, 2003	
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time) U.S. District Judge		5. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date 4/28/03 <input type="checkbox"/> Initial <input type="checkbox"/> Annual <input type="checkbox"/> Final		6. Reporting Period 1/01/02 to 3/31/03	
7. Chambers or Office Address Hoguet Newman & Regal, LLP 10 East 40th Street, 35th Floor New York, NY 10016		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 _____			
<p><small>IMPORTANT: Review the instructions accompanying this form must be followed. Complete all parts of this form. Do not leave any part blank. Do not reportable information on any other page.</small></p>					

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

POSITION	NAME OF ORGANIZATION/ENTITY
<input type="checkbox"/> NONE (No reportable positions.)	
1 President	Association of Judges of Hispanic Heritage, Inc.
2	
3	

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

DATE	PARTIES AND TERMS
<input type="checkbox"/> NONE (No reportable agreements.)	
1 1996	NY State Unified Court System Pension fund pension upon age 65
2	NY City Deferred Compensation, payable upon age 65.
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 01/01/03	Hoguet Newman & Regal, LLP (Position: Of Counsel)	\$ 35,000
2 to 3/31/03		
11/25/02 to	Hoguet Newman & Regal, LLP (Position: Of Counsel)	\$ 56,964
12/31/02		
3 01/01/02 to	NY State Judge of the Court of Claims	\$ 53,502
5/17/02		
4 2001	NY State Judge of the Court of Claims	\$ 136,700
5		\$

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Irizarry, Dora L.	April 29, 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			\$
4			\$

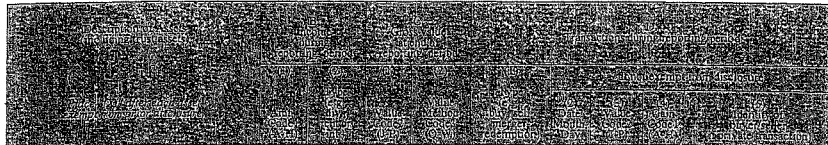
VI. LIABILITIES. *(Includes those of spouse and dependent children. See pp. 32-33 of Instructions.)*

	CREDITOR	DESCRIPTION	VALUE CODE*
<input type="checkbox"/>	NONE (No reportable liabilities.)		
1	Hudson Valley Bank	Loan	K
2			
3			
4			
5			
6			



FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Irizarry, Dora L.	April 29, 2003

VII. Page 1 INVESTMENTS and TRUSTS – income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*



	NONE (No reportable income, assets)					Exempt				
		A	int.	L	T					
1	HSBC Bank USA (accounts)	A	int.	L	T					
2	NY State Court Pension Fund	None	None	K	W					
3	NY City Deferred Compensation	None	None	L	W					
4										
5										
6										
7										
8										
9										
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11										
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15										
16										



FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Irizarry, Dora L.	April 29, 2003

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

NONE

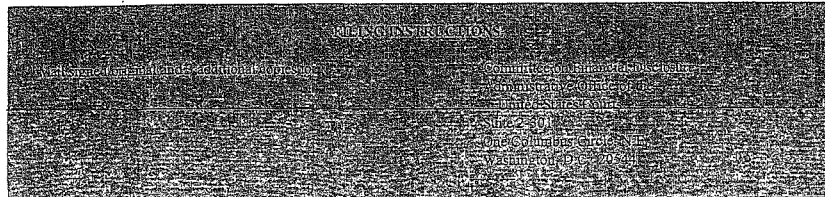
IX. CERTIFICATION.

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

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

Signature Dora L. Irizarry Date April 29, 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.)



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 became a prosecutor immediately upon graduating from law school. After 16 years as a prosecutor, I then served as a judge for approximately 7 years. As a prosecutor and judge, I was not permitted to take on any outside cases, including pro bono work. Nevertheless, I found many ways in which to serve the disadvantaged.

I believe it is important that I serve as a role model for women, Hispanics, and other minorities and disadvantaged groups to make them aware that by working hard, getting a good education, and holding on to their dreams, they too can overcome obstacles to achieve their goals. The following is just a sample of some of the ways in which I have tried to achieve this.

Since the beginning of my legal career to the present, I have participated in career panels presenting options to minority law, college and high school students. In 1979, when I became a prosecutor, few women and minorities were employed as prosecutors. District Attorneys' offices traditionally provide great litigation and administrative skills and yet, it was a career option rarely considered by women and minorities. The situation is dramatically different today. In New York City, the staffs of district attorneys' offices are more diverse and reflective of the communities they serve. I believe that by my example and my efforts to inform our youth of career alternatives, I have contributed to this change.

As a judge, I continued to participate in and organize such career panels. I organized one such panel for the Paralegal Studies Department of Bronx Community College for Law Day 1997 (date is to the best of my recollection). Many of the students were either immigrants or children of immigrants, women, and persons supporting families and studying at night. I organized another such panel in New York County Supreme Court for Law Day 1999 attended by three classes from a junior high school in the Lower East Side of Manhattan. The various administrators and the students received both programs enthusiastically.

While working in the New York County District Attorney's Office ("the DA's Office"), I participated in a variety of programs sponsored by the Community Affairs Bureau.

-- I was part of the School Tours Program. I gave students, from elementary school to college age, a tour of the DA's Office and an outline of what happens to a person from the time of arrest to trial. The students also viewed and discussed a videotaped confession and went to a courtroom to view a hearing or trial, which I then discussed with them. Such a tour could take an entire morning or afternoon.

-- I also was part of a community outreach program that sent Assistant District Attorneys to schools (from elementary to college) and community agencies or groups to discuss with them a variety of topics. Some of these topics included: how to prevent confrontations with police from escalating into violent episodes, which was particularly important with high school students from poor neighborhoods; drug cases from arrest to trial; how to avoid involvement with drug dealers and other criminals; the community's rights and duties as citizens; and how communities could work together with law enforcement to reduce crime in their neighborhoods. I went to some of the poorest and crime ridden neighborhoods in Manhattan to conduct these sessions, which generally lasted one to two hours each.

-- The DA's Office also ran a public service radio program broadcast in Spanish on Sunday evenings entitled, "Tu Derecho A Saber" ("Your Right to Know"). I taped three shows, one concerning police confrontations, one concerning the processing of a case from arrest to trial and another on drug cases. The drug cases program was very well received and aired several times.

-- My dedication to community service garnered me the "Award in Recognition and Appreciation of Outstanding Service to the People of New York County" from the Office of Robert M. Morgenthau, District Attorney of New York County, Office of Community Affairs in January 1966. (See Question #8 above).

As a judge, I continued to speak to students of all ages about the court system and how it functions and the ramifications of getting involved in illegal activity. For three years I participated in a pilot program sponsored by the Office of Court Administration's Justice Initiatives and the Government Studies Department of John Jay College of Criminal Justice, that brought persons employed in different capacities in the court system together with students who were interested in a law career. Most of these students were minorities and many were working full time jobs, raising families and studying part-time. I discussed the judge's role in the administration of justice, how to become a judge and answered any questions the students may have had about the court system. Many of these students were also involved with the Court Monitoring Program of the Fund for Modern Courts. The program was such a success that it has become a permanent part of the College's curriculum.

I have been actively involved in bar and professional associations and committees as evidenced by my response to Question # 9 above. I have served as a mentor to Latino law students. Over the years, I have participated in panels sponsored by various Latin American Law School Associations (LALSA). As recently as March 8, 2003, I participated as a

panelist and keynote speaker at a symposium sponsored by the LALSA of Columbia University School of Law entitled, "Reconceptualizing the Latino Lawyer". I also assisted the Puerto Rican Bar Association in organizing its 46th Annual Scholarship Fund Dinner held on March 27, 2002. To date, this Fund has awarded over \$200,000 in scholarships to Latino students based upon three criteria: scholastic achievement, community involvement and financial need.

As President of the Association of Judges of Hispanic Heritage, I worked together with the Office of Court Administration, the Cervantes Society, an organization of all Hispanic court employees, and various Bar Associations to increase the diversity of our courts and provide better quality service to those who use our courts. I also worked on court committees to enhance the quality of professional service provided to litigants, which established continuing legal education programs, a code of civility for attorneys and a statement of clients' rights. In Kings County Supreme Court, I worked on committees that found ways to streamline procedures for the handling of criminal cases (within the state statutory framework) and move cases to trial more quickly.

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?

To the best of my knowledge, I have never held membership in any organization that discriminates based on sex, race or religion, through either formal membership requirements or the practical implementation of membership policies.

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).

Governor George E. Pataki has established a Federal Judicial Screening Committee whose function it is to advise him with respect to the qualifications of candidates for vacancies in the federal courts or other federal offices in New York State. I appeared before the committee on January 23, 2003. The committee recommended my nomination as United States District Court Judge.

In November 2002, I was interviewed by the White House Counsel's Office. On

February 7, 2003, I interviewed with New York State Senator Charles Schumer at his request. I completed the FBI background investigation questionnaire and have been interviewed by members of the FBI.

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.

A judge must decide each case, fairly and impartially, based solely upon the facts, the Constitution, existing law and superior court rulings, without regard to personal philosophy,

public opinion or pressure from special interest groups. The lifetime appointment of federal judges is meant to assure their freedom from control by the president, congress or public opinion. The exercise of judicial independence should be the hallmark of any jurist's career. Each decision should be narrowly tailored to the facts before the court with due consideration of existing procedural rules and safeguards relating to standing, ripeness and jurisdiction. Judges' decisions should be free of dicta that could be interpreted by later litigants and special interest groups as broadening statutes or making policy, as law making is the sole province of the legislature. Judges should only rule on the factual and legal questions before them and leave to the executive and legislative branches their roles as vehicles for changes of policy and law. In cases of first impression, where there is no case law for guidance, legal rules of statutory interpretation require that the court first consider constitutional principles and the statutory provisions themselves, then consider the legislative history of the laws in question in order to follow the intent of the legislature.

Senator KYL. All right. Let me just ask you one or two pro forma questions. You have dealt with these in your questionnaire to the Committee, but the question that most members want to be sure has been affirmed in oral testimony is the question of how you would approach decisionmaking and what you would base your decisions on as a judge. As you know, there has been some political contention here about confirmation of judges, and I think the first thing we always want to know or to hear from you is precisely how you would approach the issue of judging, of making decisions?

Judge IRIZARRY. Thank you for asking that question. It is an important question. I would follow the law, the case law as set forth by the United States Supreme Court and, of course, by the court of my circuit, the Second Circuit, and, of course, follow the Constitution of the United States. It is the role to follow the precedent as set forth by those courts and by the Constitution.

Senator KYL. And occasionally there are cases of first impression, or at least counsel argue that there are cases of first impression and you have to sometimes go beyond what is clear precedent. In those cases, how would you approach the decisionmaking?

Judge IRIZARRY. Well, I would certainly go to the statute. There is usually a relevant statute that is of concern, whether it's procedural or substantive. And if the meaning is not plain, then certainly I would go to the legislative history and look at what the legislative intent was, and certainly the intent of Congress should be given deference in that regard.

Senator KYL. To the extent that you can divine the intentions of 100 people who on any given day can be at least on two sides of any particular issue, good luck when you have to do that.

[Laughter.]

Senator KYL. Maybe with that I should turn to my colleague, Senator Schumer, and see if he has any questions. He probably would want rebuttal time first.

Senator SCHUMER. No rebuttal time, Mr. Chairman. And we work quite well together on many issues, and we disagree on some, as he said.

I would say that it is probably a calm day in the Senate when there are only two sides to the issue. But I have asked, of course, Judge Irizarry many questions and thoroughly reviewed her record, and I have no further questions here.

Senator KYL. Thank you. Then let me just ask one last question for you to make a comment on the record. There will be testimony, as was noted, regarding the American Bar Association's rating, and perhaps I should have mentioned that we will have in our panels—the next panel will be Thomas Hayward, Jr., Chair of the Standing Committee of the Federal Judiciary, American Bar Association—we are very happy to have him with us—and Pat Hynes, former Chair of the Standing Committee on the Federal Judiciary, American Bar Association. And then the final panel will consist of James Castro-Blanco from New York, Hon. Lewis Douglass, and Hon. Michael Pesce, who have all been previously introduced.

So let me just ask you if you would like to comment on the issue of temperance that—judicial demeanor and temperance that Senator Schumer alluded to, if you would like to say anything about that before these other panelists are called forward.

Judge IRIZARRY. Thank you, Mr. Chairman. I am grateful for the opportunity to address that issue. I'm grateful for this hearing to have that opportunity.

Like the Committee, when the ABA set forth its finding or the rating, I received the same letter that the Senate got, which was one sentence just indicating what the rating was. And, frankly, I had thought that the interview had gone rather well, so I was a bit surprised at the rating.

Let me start by just saying this, what I believe is the proper temperament of a judge, and certainly temperament is an important aspect or element to be considered in determining whether someone should be a judge or not. And temperament, proper temperament and proper demeanor should be at the forefront of any judge's thoughts anytime that he or she is in the courtroom or out of the courtroom.

I believe that a judge should have the proper respect and reverence for the law; a judge should be respectful of the dignity of all who come before him or her and respectful of their opportunity to be heard and give them that opportunity to be heard. Everyone should have their day in court. It is important for a judge to have a sense of justice and, most importantly, for a judge to be fair, understanding, and compassionate.

I believe that I have conducted myself in that manner, and certainly I have always striven to achieve all of those goals while I have been on the bench. And so I was, frankly, very surprised to hear of these allegations because during the time that I was sitting as a judge, I had never received any complaints. I have always had the utmost confidence of my superiors, who never seemed to hesitate to ask me to take over in very difficult situations, including one incident I recall in criminal court where there were 800 cases on the calendar, we had wall-to-wall people outside and inside the courtroom. This is in criminal court. And the judge who was sitting in that part had had a problem with Legal Aid, and they had stormed out in protest the day before and were refusing to handle cases. And my supervisor asked me to please step in and see if I couldn't take care of all of those people's cases. And I did. I worked it out with the attorneys. I had a meeting with everyone concerned—prosecutors and everyone from the defense panel—and we were able, thank goodness, to dispense justice efficiently and as quickly as possible and got everyone out by 6:30 in the evening.

And certainly those are very trying situations, and for anyone who has not practiced in the courts of New York State, and specifically in New York City, it's very hard to explain to you what those courts are like. They are the busiest courts in the country, particularly criminal court, where an average calendar can run 150, 200 cases a day. And you have to do that between 9:30 and 5 o'clock. You deal with maybe 50, 70 different lawyers. In Supreme Court, you can have a calendar that can run up to 100 cases, and, again, you're dealing with similar numbers of lawyers. Everyone comes with their own agenda.

As a judge, my only agenda is to make sure that the cases are handled properly, that everyone is heard. Sometimes you're dealing with litigants who are mentally ill. In the criminal term where I sat, sometimes you have defendants who are violent. And so you

have safety concerns for everyone in the courtroom, including the attorneys as well.

And so you have lawyers who come in with their own agenda. Sometimes—many times they are unprepared. They are late. Everybody is rushing off. They also have many places to be at the same time, so everyone is rushing. And very often they want to take control of the courtroom.

And so it takes a very firm and tough judge to be able to take control of the courtroom, and at the same time be mindful that you have to be fair and you have to be just and you have to be compassionate, and that the appropriate amount of time has to be taken for each case to be able to handle it properly. At times it means modulating the tone of your voice, and certainly there could be some who could mistake that as yelling or screaming. Everybody has a different opinion as to what is yelling and what is screaming. And it may be that people are unhappy with the ruling that I have made. In an adversarial system, not everyone is going to be happy with the outcome.

So I am truly sorry to know that anyone felt offended, that anyone might have been hurt by anything that I might have done in the courtroom. Certainly that was not my intention. I firmly believe that—in the 7 years that I sat on the bench, there was a mellowing-out process that I went through and gradually sort of learned what techniques kind of worked better. You learn to be a bit more patient with attorneys who are brand new, and you try to work within that framework and try to follow those kinds of high, lofty goals that I just outlined for the Committee with respect to what is appropriate judicial temperament.

Chairman HATCH. Well, thank you so much.

Senator KYL. Might I just say thank you for that answer. I think it was an explanation that needed to be on the record, and it was well put. And as I announced earlier, we will be doing some musical chairs, but you are now blessed to have the Chairman of the Judiciary Committee presiding, and thank you very much.

Judge IRIZARRY. Thank you, Senator. Good morning, Mr. Chairman.

Chairman HATCH. Good morning. We are happy to have you here, and I have no questions for you. I understand they have covered some of the questions that others may have. So with that, we welcome you to the Committee, and we will complete this hearing. Okay?

Judge IRIZARRY. Thank you very much. I thank you for this opportunity.

Chairman HATCH. Thank you so much, Judge.

Our third panel will be Thomas Z. Hayward, Jr., the Chair of the Standing Committee on the Federal Judiciary, the American Bar Association, and Pat Hynes, the former Chair of the Standing Committee on the Federal Judiciary, the American Bar Association. We will be happy to take your testimony at this time. We welcome both of you. We know that you have very difficult jobs here and that it takes a lot of your time, but it means a lot to the Bar Association and it means a lot to this Committee.

We will turn to you, Mr. Hayward, and if you could limit yourself to 5 minutes each, we would appreciate it, because I am due down at Finance as well.

STATEMENTS OF THOMAS Z. HAYWARD, JR., CHAIR, STANDING COMMITTEE ON FEDERAL JUDICIARY, AMERICAN BAR ASSOCIATION, WASHINGTON, D.C., AND PATRICIA M. HYNES, FORMER CHAIR, STANDING COMMITTEE ON FEDERAL JUDICIARY, AMERICAN BAR ASSOCIATION, WASHINGTON, D.C.

Mr. HAYWARD. Thank you, Mr. Chairman and members of the Committee. My name is Thomas Z. Hayward, Jr. I am a practicing lawyer in Chicago, and I am Chair of the American Bar Association's Standing Committee on Federal Judiciary. With me today is Patricia Hynes, a former member and past Chair of the Committee, and a circuit member for this investigation. We appear here to present the views of the association on the nomination of Dora Irizarry to be a United States District Court Judge for the Eastern District of New York. After careful investigation and consideration of her professional qualifications, a majority of our Committee is of the opinion that the nominee is not qualified for the appointment. A minority found her to be qualified.

Before discussing the specifics of this case, I would like to briefly review the committee's procedures so that you will have a clear understanding of the process the Committee followed in this investigation. A more detailed description of the committee's procedures is contained in our committee's booklet, "Standing Committee on Federal Judiciary: What It Is and How It Works."

The American Bar Standing Committee investigates and considers only the professional qualifications of a nominee: his or her competence, integrity, and judicial temperament. Ideological or political considerations are not taken into account. Our processes and procedures are carefully structured to produce a fair, thorough, and objective peer evaluation of each nominee. A number of factors are investigated, including intellectual capacity, judgment, writing and analytical ability, industry, knowledge of the law, breadth of professional experience, character, integrity, compassion, courtesy, open-mindedness, patience, freedom from bias, commitment to equal justice under the law, and general reputation in the legal community.

The investigation is ordinarily assigned to the Committee member residing in the judicial circuit in which the vacancy exists, but it may be conducted by another Committee member or former member. In the current case, Mrs. Hynes, in her capacity as a former member, was asked to undertake this investigation because the current member from the Second Circuit was already undertaking another investigation.

The starting point of an investigation is the receipt of the candidate's responses to the public portion of the Senate Judiciary Committee questionnaire. These responses provide the opportunity for the nominee to set forth his or her qualifications—professional experience, significant cases handled, major writings, and the like. The circuit member makes extensive use of the questionnaire in the investigation. In addition, the circuit member examines the legal writings of the nominee and personally conducts extensive

confidential interviews with those likely to have information regarding the integrity, professional competence, and judicial temperament of the nominee, including, where pertinent, Federal and State judges, practicing lawyers in both private and government service, legal services and public interest lawyers, representatives of professional legal organizations, and others who are in a position to evaluate the nominee's integrity, professional competence, and judicial temperament. This process provides a unique peer review aspect to our investigation.

Interviews are conducted under the assurance of confidentiality. If information adverse to the nominee is discovered, the circuit member will advise the nominee of such information if he or she can do so without breaching the promise of confidentiality. During the person interview with the nominee, the nominee is given a full opportunity to rebut the adverse information and provide any additional information bearing on it. If the nominee does not have the opportunity to rebut certain adverse information because it cannot be disclosed without breaching confidentiality, the investigator will not use that information in writing the formal report and the committee, therefore, will not consider those facts in its evaluation.

Sometimes a clear pattern emerges in the interviews, and the investigation can be briskly concluded. In other cases, such as this one, conflicting evaluations over some aspect of the nominee's professional qualifications may arise. In those instances, the circuit member takes whatever further steps are necessary to reach a fair and accurate assessment of the nominee.

Upon completion of the investigation, the circuit member then submits an informal report on the nominee to the Chair, who reviews it for thoroughness. The circuit member then prepares a formal investigative report, containing a description of the candidate's background, summaries of all interviews conducted, including the interview with the nominee, and an evaluation of the candidate's professional qualifications, which is then circulated to our entire 15-member committee, together with the nominee's completed Senate Judiciary questionnaire and copies of any other relevant materials. After careful consideration of the formal report and its enclosures, each member submits his or her vote to the Chair, rating the nominee "Well Qualified," "Qualified," or "Not Qualified."

I would like to emphasize, Mr. Chairman, that an important concern of the Committee in carrying out its function is confidentiality. The Committee seeks information on a confidential basis and assures its sources that their identities and the information they provide will not be revealed outside the committee, unless they consent to disclosure or the information is so well known in the community that it has been repeated to the Committee member by multiple sources. It is the committee's experience that only by assuring and maintaining such confidentiality can sources be persuaded to provide full and candid information. However, we are also alert to the potential for abuse of confidentiality. The substance of adverse information is shared with the nominee, who is given full opportunity to explain the matter and to provide the additional information bearing on it. And as I previously indicated, if the information cannot be shared, the information will not be used by the Committee in reaching its evaluation.

Now, turning to the investigation specifically of this nominee, Judge Irizarry was nominated on April 28, 2003. Carol Dinkins of Houston, Texas, who was then Chair of the Standing Committee, and my predecessor, assigned Mrs. Hynes to the investigation, as explained above. She began her investigation shortly after receiving the nominee's May 23, 2003, responses to the public portion of the Senate Judiciary Committee questionnaire.

On July 9th, Mrs. Hynes prepared and submitted to Chair Dinkins an informal report that presented the results of her thorough investigation, including summaries of all of her confidential interviews and a description of her interview with the nominee. On July 11th, Mrs. Hynes' formal report was transmitted to all members of the committee. Those who had questions were encouraged to contact Mrs. Hynes directly. After all Committee members had an opportunity to study the report and the attachments, they reported to the Chair their votes on the qualifications of the nominee. A majority of the Committee found the nominee "Not Qualified" and a minority found her "Qualified." This vote was reported to you on July 21, 2003.

With your indulgence, Mr. Chairman, I will now ask Mrs. Hynes to describe her investigation of the nominee.

Chairman HATCH. Thank you so much, Mr. Hayward.

Ms. Hynes, we are happy to have you here.

Ms. HYNES. Good morning, Mr. Chairman. I appreciate the opportunity to be here. My name is Patrician Hynes. I am a trial lawyer from New York, and as Mr. Hayward indicated, I am a former member of this Committee and a past Chair of this committee. With that background, I was asked to undertake the investigation of the qualifications of Dora Irizarry to be a United States District Judge for the Eastern District of New York.

During my membership on the committee, both as the Second Circuit member and as Chair, I participated in numerous investigations of potential and actual nominees to the U.S. Courts of Appeals and to the U.S. District Courts. My investigation of this nominee was conducted in the same manner as all investigations by the Standing Committee are conducted, as just explained by our Chair, Thomas Hayward.

My investigation was conducted over a two-and-a-half-month period, during May, June, and July of this year. It included approximately 70 confidential interviews, including more than 50 lawyers and 17 judges. During each conversation I inquired how the person knew, if at all, the nominee and what the person knew about the nominee's professional competence, judicial temperament, and integrity that would bear on her qualifications to serve as a United States district judge. I also inquired if they knew any reason why the nominee was not qualified to serve as a district court judge.

I made a particular effort to locate and speak to lawyers who had had trials before this nominee because this nominee was a sitting judge, and the best way to find out how a judge conducts themselves is to ask lawyers who appear before that judge. And Judge Irizarry sat in the criminal court in Brooklyn. She also sat in the Supreme Court in Brooklyn, the Supreme Court in Manhattan. For a short time at the beginning of her career as a criminal court judge, she sat in the Bronx.

In addition to the interviews, I also reviewed other materials, her questionnaire, decisions she had written. I also met privately with Judge Irizarry in her office. And during the course of our meeting, concerns that had been identified during my investigation were discussed with Judge Irizarry, and she was given an opportunity to rebut the adverse information and provide any other additional information.

The majority of the lawyers that I interviewed raised concerns about Judge Irizarry's temperament. These lawyers were both prosecutors and defense lawyers from the three different counties where she had sat as a judge, both on the criminal court and the Supreme Court, being Bronx, Manhattan, and Brooklyn. These comments by the lawyers who had appeared before Judge Irizarry all had a starkly common theme and included statements such as that Judge Irizarry was gratuitously rude, abrasive, and demeaned attorneys; that she flew off the handle in a rage for no apparent reason and would scream at attorneys; that she was impatient and did not fully listen to legal arguments and did not have a good grasp of the legal issues presented to her; and that she took offense easily, was short-tempered and volatile, and got angry when lawyers disagreed with her; that she was rigid and dismissive and did not treat lawyers with respect.

On the issue of judicial temperament, the committee's background booklet states that "in investigating judicial temperament, the Committee considers the nominee's compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias and commitment to justice under the law."

Our committee, in reviewing my report on the nominee, could not and did not discount the number of complaints about the nominee's temperament. Certainly some attorneys who appeared before her have not encountered problems, but unfortunately they do not adequately make up for the substantial number of negative comments concerning her judicial temperament. The breadth and depth of these negative comments signal a serious control issue. If the investigation had disclosed that the nominee's judicial temperament had improved over the years as she acquired more experience, the Committee would not have exhibited the same amount of concern. However, the concerned comments about Judge Irizarry's lack of judicial temperament appeared consistently until her resignation from the State bench to run for political office.

The best judge in the world can have a bad day from time to time, and a judge who is smart and trying to run a tight courtroom will almost inevitably leave some of the lawyers or litigants with a bad taste from time to time. But this investigation and the information gathered goes beyond the thesis that, occasionally, with a crowded docket and stressful conditions, a judge may step over the line insofar as temperament is concerned. After careful consideration of my report, a major of the Committee was of the view that the nominee is not qualified for the position. A minority of the Committee found her to be qualified.

Our Committee takes most seriously its responsibility to conduct an independent investigation of the professional qualifications of judicial nominees. There is no bright-line litmus test as to whether a nominee is or is not qualified. Our recommendation is not the re-

sult of tallying the comments—pro and con—about a particular nominee. Rather, in making our evaluation, we draw upon our previous experience, the information and knowledge we gain about the nominee during the course of our investigation, and our independent judgment. I must stress that we apply the same standards and criteria to all nominees.

In my service on the committee—and I was a member of the Committee for 5 years and a Chair for a year—I have either conducted or reviewed literally hundreds of reports on judicial nominees. And, unfortunately, I have never before experienced such widespread and consistent negative comments about a nominee's temperament.

I thank you for allowing us to share our views with the committee.

Chairman HATCH. Well, thank you so much.

Senator Durbin, do you have any questions?

Senator DURBIN. How frequently has the ABA come to this conclusion about nominees?

Ms. HYNES. On the basis of temperament, Senator?

Senator DURBIN. Yes.

Ms. HYNES. I have not gone back and done a history. I would say infrequently. That I can say for certain.

Senator DURBIN. Mr. Hayward, do you know?

Mr. HAYWARD. Yes, Senator. Contemplating that question, I went back and checked, and it has been most infrequent. It goes all the way back to before President Reagan was in office as President of the United States.

Senator DURBIN. That was the only other example you could find?

Mr. HAYWARD. Yes, sir. There has been nothing since then.

Senator DURBIN. I am wondering, Ms. Hynes. I found in my experience, having run for political office and practiced law, that full-time lawyers sometimes look down their noses at people who get involved in political life, do not think they are real lawyers. Did you notice in any of the reactions to Judge Irizarry perhaps that feeling because she had chosen to be a political candidate?

Ms. HYNES. Not at all, Senator. The comments that were made by lawyers who appeared before her, these were lawyers who had appeared before us long before she obviously resigned from the bench. No one made any comment to me about her resignation to run for office.

Senator DURBIN. Did you try to screen out political bias because she had been a declared Republican candidate for Attorney General from her critics?

Ms. HYNES. Senator, I did not in my interviews discern any concern with politics. There was no discussion of politics at all. It was simply for the lawyers—they were lawyers who were interviewed because they had dealt with appeals from Judge Irizarry, and they were lawyers who appeared before her. Of the lawyers who appeared before her, the temperament was the issue that was discussed and volunteered from the get-go. In terms of my placing a call, I did a lot of work to locate trials and lawyers on both sides, prosecution and defense. And when I would call and say, "I am calling on behalf of the ABA about Judge Irizarry," the first com-

ments that were made by the majority of the attorneys that I interviewed who had appeared before her were discussions of her temperament.

Senator DURBIN. I am sorry I was not here earlier, and this may have been touched on. Did you look into whether any formal complaints had been filed against her while she served as judge?

Ms. HYNES. It is a requirement of our Committee that the nominee provide to us a waiver whereby we can then inquire into the various grievance committees of any jurisdictions where a nominee may have been sitting. I did that, and what came back is their form letter that said there is nothing in the public files that indicates any, you know, complaints against this nominee.

Senator DURBIN. So how do you balance that between what appears to be overwhelming and compelling evidence against her on temperament, and yet when it comes to the actual evidence of complaints filed, the file is empty?

Ms. HYNES. Senator, quite frankly, my take on that is that lawyers do not view the grievance Committee procedure as a vehicle—or may not view it as a vehicle to discuss a judge's temperament. But it was certainly a situation where there was—her reputation was widely known as someone who had a temperament issue.

Senator DURBIN. Well, I might say, Mr. Chairman, I think we look at each nominee—at least I do—on three levels: integrity, honesty, the question of legal skills, and I think equally important is the question of temperament. It is virtually impossible for us to judge in a snapshot experience with a nominee what their temperament is. And this is a matter of concern. I am glad that we held this hearing because, as Mr. Hayward has indicated, this is an extraordinary finding. I am going to look at it very carefully.

Thank you.

Chairman HATCH. Well, thank you so much, Senator.

I thank you both for your time and your effort to be here and for your assistance to this Committee not just today but through the years. We appreciate it.

Mr. HAYWARD. Thank you, Mr. Chairman. On behalf of all members of the committee, we thank you for those comments.

Chairman HATCH. Thank you so much.

Ms. HYNES. Thank you, Senator.

Chairman HATCH. Thank you for being here.

[The prepared statement of Mr. Hayward and Ms. Hynes appears as a submission for the record.]

Chairman HATCH. We will now turn to our fourth panel: James F. Castro-Blanco, Esq., immediate past president of the Puerto Rican Bar Association, from Shearman and Sterling in New York; Hon. Lewis L. Douglass, Justice, New York State Supreme Court, Chair of the Franklin H. Williams Commission on Minorities; and Hon. Michael L. Pesce, Presiding Justice, Appellate Term, New York State Supreme Court.

We are very honored to have the three of you here, and we look forward to hearing your testimony. We will start with you, Mr. Castro-Blanco.

**STATEMENT OF JAMES F. CASTRO-BLANCO, IMMEDIATE PAST
PRESIDENT, PUERTO RICAN BAR ASSOCIATION, NEW YORK,
NEW YORK**

Mr. CASTRO-BLANCO. Thank you, Mr. Chairman.

Chairman Hatch and members of the United States Senate Committee on the Judiciary, thank you very much for giving me this opportunity to testify supporting the nomination of Judge Dora L. Irizarry to the position of United States District Court Judge for the Eastern District of New York. My recommendation is based upon my own experiences working with Judge Irizarry as well as numerous conversations I have had with many members of the legal community. As a former Assistant United States Attorney in the Eastern District of New York, I have had the opportunity to practice before some of the most outstanding jurists in the Nation. Judge Irizarry would be an excellent addition to that court. Her wisdom, compassion, integrity, and love of the law will enable her to be an extraordinary district court judge. I am confident that she will serve with distinction.

I have the honor to serve on the New York City Mayor's Advisory Committee on the Judiciary. In that role, I have reviewed many judicial applications and interviewed many candidates. The most important qualities I look for in a candidate are integrity, proper judicial demeanor, knowledge of the law, and a sense of compassion. Judge Irizarry possesses all of these qualities in abundance.

During my tenure as president of the Puerto Rican Bar Association, I worked extensively with Judge Irizarry to increase opportunities for Hispanic attorneys and to provide scholarship money for Hispanic law students. Her efforts in this regard have been recognized by the Hispanic legal and business communities. Her honors and awards, while too numerous to list, evidence her service to the community and the esteem in which she is held.

Earlier this year, the Board of Directors of the Puerto Rican Bar Association voted to approve Judge Irizarry's nomination to the district court. That decision was based upon the board's review of Judge Irizarry's record and reputation. Additionally, prior to the vote, members of the board who have appeared before Judge Irizarry discussed the judge's ability to effectively and respectfully run her courtroom. The board agreed that she possesses the intellect and judicial demeanor to be an outstanding district court judge.

My practice as a trial lawyer has been conducted solely in the Federal courts. As a result, I have not had the opportunity to appear before Judge Irizarry. My interactions with Judge Irizarry have taken place through many community service-related activities. Judge Irizarry and I have served as panelists on law school forums. We have been speakers at Bar Association functions and have worked closely organizing events honoring prominent individuals who have made a positive impact on our community.

I have observed Judge Irizarry interact with many individuals in a variety of forums. Some of those individuals have challenged her views on a variety of issues in a very confrontational manner. She has always maintained her poise in such situations and treated people respectfully even when that courtesy was not returned. In

my opinion, her demeanor on all occasions during which I have observed her has been professional and measured.

Judge Irizarry's career epitomizes the American dream. From her humble beginnings in Puerto Rico and the projects of the South Bronx, using her intellect and perseverance, she graduated from Yale University and Columbia School of Law. Forsaking a highly paid Wall Street career, she served as an assistant district attorney and then as a judge of the New York City Criminal Court and New York State Court of Claims. During her career as a public servant, she continued to be a community leader, mentor, and role model.

Judge Irizarry's generosity of spirit and fine character are apparent from her interactions with all the people she encounters. Her reputation among practitioners is that of a fair and no-nonsense judge. She had led the kind of multidimensional life that will allow her to mete out justice in a thoughtful and fair way. It is my belief that Dora L. Irizarry possesses all the qualities necessary to be an extraordinary district judge. In short, her judgment, intellect, and character set her apart. I am honored to have been given the opportunity to speak in support of her nomination, and I thank you.

Additionally, just one note. There is in New York State a Commission on Judicial Conduct where attorneys can freely lodge complaints against any judge.

[The prepared statement of Mr. Castro-Blanco appears as a submission for the record.]

Chairman HATCH. Well, thank you. We appreciate having your testimony.

Justice Douglass, honored to have you here. I look forward to hearing from you.

STATEMENT OF HON. LEWIS L. DOUGLASS, JUSTICE, NEW YORK STATE SUPREME COURT, AND CHAIR, NEW YORK STATE COMMISSION ON MINORITIES

Justice DOUGLASS. Thank you. I have with me my grandson, E.J., because it is not every day that you can see your grandfather testify before a United States Senate Committee.

Chairman HATCH. We welcome you, E.J. You are sitting straight up. You are someday going to be a judge yourself, I can just tell.

Justice DOUGLASS. I am a Justice of the Supreme Court in New York, and I am also chairperson of the New York Commission on Minorities. That is a commission consisting of 21 judges and lawyers appointed by the chief judge to develop programs to improve the opportunities for minorities in our system and to improve the perception of fairness in the system. We hold meetings throughout the State and maintain an ongoing dialogue with minority Bar Associations and develop training programs on the issues of diversity for judges.

I met Judge Irizarry about 10 years ago, when we both were judges appointed by the Governor to sit on a court called the Court of Claims. Our assignments had nothing to do with claims. It was an appointed court created to handle the overload of felony prosecutions. We were all appointed to the Court of Claims and then immediately assigned to the Supreme Court to handle major felony prosecutions.

Judge Irizarry steadily gained a reputation among lawyers as a superb judge. She did expect everyone who appeared before her to adhere to the rules and to perform in a way that enhanced the dignity of the court. She was, nevertheless, fair and evenhanded.

Like many of us who grew up in inner cities, she believed that when a person is found guilty, after a fair trial, it is important that government, through the courts, make a strong statement that criminal behavior is unacceptable and that social circumstances are not an excuse for crime. In short, she had a reputation as a tough but fair judge. While presiding over these felony prosecutions, she took on young lawyers as interns and became active in Bar Association activities and eventually became president of the Hispanic Judges Association. And I know that you know of her excellent academic background.

Let me turn to what I think is particularly unique and important. We have done remarkable things in this country in the past 50 years since the Supreme Court outlawed segregation and moved us to a more opened society. Judge Irizarry's appointment would be another confirmation of that achievement. In the mid-1960's, her father worked as an electrician at the Federal Building in lower Manhattan which housed the Federal court. At that time, like other minorities, he worked on Federal projects because minorities were not then readily admitted into the unions. He, of course, admired Federal judges, as we all did, and still do. The idea that his daughter would someday stand before a Committee of the Congress for consideration for appointment as a Federal judge would have at that time been viewed as pure fantasy. But here we are considering the appointment of Dora, now having graduated from Yale and Columbia and having served as a State judge.

I tell you, it makes me feel good not only to endorse her because of her scholarship and reputation as a State judge, and because she is one of the nicest people I know, but it makes me feel good because it shows that all the struggles, all the demonstrations, all the tears were all worthwhile, and we can be proud of the system of government under which we now live.

[The prepared statement of Justice Douglass appears as a submission for the record.]

Chairman HATCH. Thank you so much, Justice Douglass.

We will turn to you, Justice Pesce.

STATEMENT OF HON. MICHAEL L. PESCE, PRESIDING JUSTICE, APPELLATE TERM, NEW YORK STATE SUPREME COURT, SECOND AND ELEVENTH DISTRICTS

Justice PESCE. Thank you, Mr. Chairman, for the opportunity, and if I may, if I can digress a bit, rather than read the statement which I submitted, I should address myself directly to the one issue that appears to have arisen regarding Dora's—as I call her—qualifications to sit as a Federal district judge, and that is the issue of temperament.

Senator Durbin, you asked a very interesting question of Pat Hynes, and the question was: Were there any complaints and official reports made by attorneys about Judge Irizarry's behavior while on the bench, or temperament? And she did not have an answer to that. I have an answer to that because I was her imme-

ciate supervisor, and I would be the one who would receive such an official complaint, and the answer to that is no.

In addition, I did receive complaints about Dora Irizarry about how she ran the courtroom. I was her supervising judge, and I was the first person—I guess the first target of lawyers who complained.

The Brooklyn bench that was part of the Second Judicial District with Richmond County, Staten Island, is the largest single administrative judicial district in the country. It had 116 judges when I was a supervising judge and the administrator. It had employees of over 1,000 people. It had 12,000 felony indictments. It had 52,000 civil filings and other matters that it handled. The volume was tremendous. I think E.J. would describe it as being “humongous.”

Half of the judges sat in Criminal. In the criminal parts, there were six judges who handled the bulk of the indictments, would prepare the cases for trial. I can assure you that in my career as a judge, I never encountered two lawyers who were willing to go forward with any case to trial. They always found ways to delay, to postpone. My statement has some reference to that.

In order to effectively run those six parts that had all of the 12,000 felony indictments, you had to be tough, capital T, capital O—and the rest you know. And unless you are tough, you are not getting anything done. And unless you are tough, what happens is that the lawyers take over the courtroom. They run your calendar.

The stress and the pressure are tremendous. I used to do that type of work. I used to fly off the handle. I used to be rude. I used to get angry at lawyers. That was part of the nature of the work that was done. It was not fun. It was the worst time that I ever spent on the bench. I am sure Dora feels the same way. I put her there. And I would not put her there unless I knew she could do the job, I knew that she could be tough. That was part of the job description. If she could not do it, she would have been out. I never even once received a complaint from the district attorney of Kings County, who happens to be a friend, and he would be more than happy to confide in me socially or especially professionally that he was having problems with Dora Irizarry. He was not. Staff assistants were, perhaps. Assistant district attorneys were. Not once did I receive a phone call from the head of the Legal Aid Society, which represents the substantial bulk of attorneys who represent indigents in criminal matters, who was also a friend, who could easily have confided in me. But Legal Aid attorneys certainly did complain to me, as did assistant district attorneys. And in many cases, they were exaggerated, but in many cases, I realized that it was part of the work that took place in the part that Dora Irizarry had.

From that part, she went on to Manhattan, and she went, I think, to heaven, because in Manhattan she did trials and that was easy.

I did receive complaints from attorneys. I would receive complaints about other judges. It does not justify the judge sometimes flying off the handle. But judges are human beings. We are imperfect human beings. And she will probably continue to be an imperfect human being. But as a human being and as a judge, she is ab-

solutely one of the best I have ever known, one of the best I have ever supervised.

And I think my statement ends by saying that the common description by attorneys about Dora Irizarry was that she is trying to run the courtroom as if it was the Federal bench. And I said, well, that is very appropriate for the nomination.

So one thing that really surprised me is that—I am sorry Pat Hynes did leave. I have known Pat Hynes a long time. I was never called by the American Bar Association regarding the impression of temperament, and that kind of surprised me. The New York Bar Association called. Other groups called. But Pat Hynes never called me. And I know her well, and she knows me. And I was kind of surprised that she was even here to speak about the temperament.

I would be glad to take questions.

Chairman HATCH. Well, thank you so much. I would point out that it is not an easy job for the Bar Association people, and, you know, it takes a lot of their time, and it is all volunteer.

But the testimony of you three is very important to me, and I personally appreciate you taking the time to be down here. So your time has not been wasted.

Senator Durbin, I will turn to you.

Senator DURBIN. Thank you, Mr. Chairman, and thank you all for your testimony.

I might ask the two judges who are here: How common is it that official complaints are filed by attorneys against judges? Either one of you.

Justice DOUGLASS. I do not think that it is common for official complaints, but it is common for lawyers to go to the administrative judge and say, "I want to tell you something off the record." And Mike can speak to when that happens. But when lawyers are unhappy, they do not hesitate to go to the supervising judge or administrative judge or to see them at a coffee shop and say, "You know, Judge So-and-so is not treating me right." That is very common.

Senator DURBIN. I would think that perhaps the point made by Ms. Hynes earlier is one that I can recall from my own practice. I was in a small town. But if you decide that you are going to go to war with a judge, you better never plan on going back to his courtroom. And I think that is a restraint from some official complaints.

Justice DOUGLASS. They could always speak to the administrative judge kind of off the record.

Senator DURBIN. Right. But the point that she made in her testimony was that she spoke to—had 70 interviews, 50 lawyers and 17 judges, and said the overwhelming majority came to the same conclusion about the temperament of the nominee. And the point that I think is equally important is that it appeared that it was not just a matter of her taking command of a courtroom early in her career and establishing her reputation, but that these incidents appeared to take place throughout her career on the bench. That to me is a troubling situation.

I would say that I am an Illinois lawyer, a downstate lawyer, which is not in the big leagues of Chicago law practice when I was in private practice. And I know that New York lawyers are not

known as being docile or deferential by nature. But it seems to me that some very serious charges have been raised here that go beyond whether she was controlling her docket. It is a question of how she controlled it and whether or not she would bring those same characteristics to the Federal bench.

Judge Pesce, you say with some pride that you were tough, rude, angry, and flew off the handle. Maybe that is the way you do business in New York. I do not know. But I would say that if nominees to the Federal bench came to us and said, "We are going to be tough, rude, angry, and fly off the handle to get things done," they would have a tough time before this Committee.

Justice PESCE. Yes, Senator, that should be taken along with the other statement I made that we are not perfect human beings. You fly off the handle. You are rude when you are faced with over 100 felony indictments. I looked at some of the numbers, and I think 1 year Dora had 8,230-something appearances in 1 year, which means that there were 8,232 different attorneys who appeared before her on cases throughout the year. And when you have hundreds of appearances in 1 day, it is tough.

I do not expect the Federal dockets to have that kind of volume because it is impossible, and I would be the first to admit that it is almost impossible to handle those circumstances. And with those circumstances and those conditions and not being a perfect individual, you will find the occasion when you are rude, ruder than you want to be. But also, if you are rude in one instance, that attorney will not forget it because he is sitting in the courtroom and he sees you as a judge go through 85 cases, and everything is fine. And on the 86th case, the attorney stands up and he is hit a bit by the judge in a way that he does not particularly like, he is going to remember that.

Senator DURBIN. I do not question that. I can still remember how judges treated me, and it has been over 20 years since I have been in the courtroom.

Justice PESCE. And how judges treated me when I was an attorney.

Senator DURBIN. Sure. We do not forget those things. But let me just say to you, I still am struck by Mr. Hayward's statement that the ABA could not find a similar case involving temperament where they found a person not qualified in over 20 years. They had to go back to the Reagan administration—before the Reagan administration to find a similar case. So it appeared that what came out in this interview process was very extraordinary, and we have many Federal judicial nominees who have had State court experience in very trying circumstances who come to us aspiring to the Federal bench. So it appears that it was a very unusual finding as a result of their interview process.

Justice PESCE. I dare say—and I may be out on a limb on this one, having part of my statement describe what Brooklyn and Staten Island are like as the humongous judicial district, the largest in the Nation—is that I am sure you have had nominees who have come from similar courts. But I can assure you—I invite you to visit—that the manner in which Brooklyn, Kings County, runs because of the volume, sheer volume, is unparalleled, not even in Manhattan, New York county, not even in the Bronx, which is

Bronx County, not even in Queens. Not even L.A., which is the second largest judicial unit. Kings County is quite a place to be.

And, again, I have to repeat that if the problem were as serious as Pat Hynes found it to be, Dora Irizarry would not have lasted in that part. I would have replaced her. The district attorney of Kings County would have spoken out loud.

Senator DURBIN. So you did not receive any informal complaints about her demeanor in the courtroom?

Justice PESCE. I did receive informal complaints from attorneys who would meet me socially at meetings and say, "She's trying to run the courtroom like it's a Federal bench," which means strict adherence to her rules. And while you may tell the attorney once that this is the way I want things done, in a State court that attorney does not seem to pay attention.

Senator DURBIN. Did they bring to your attention some of the things that came out in the interviews—throwing objects at attorneys in the courtroom, things like that?

Justice PESCE. That never came to my attention.

Senator DURBIN. Were you aware of that, Justice Douglass?

Justice DOUGLASS. No, I never heard that until this moment.

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

Chairman HATCH. Thank you, Senator.

We will make all of your full written statements part of the record. I want to thank everybody who has appeared here today. Judge Irizarry, we are very happy to have you here, and we will try to move with expedition on your nomination. And we appreciate the efforts that everybody has made, especially you Supreme Court Justices. That means a lot to us, and we just want to wish you continued good fortune on the bench and your good work there, because what you do is extremely important.

With that, we will recess until further notice.

[Whereupon, at 11:09 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

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QUESTIONS AND ANSWERS

Dora L. Irizarry
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(home) 212-505-8572 (office) 212-689-8803

October 12, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Hatch:

Enclosed are my responses to the follow-up questions submitted to me by Senator Richard Durbin.

I want to thank the Senate Judiciary Committee for granting me the confirmation hearing held on October 1, 2003 and for providing all interested parties and me the opportunity to be heard concerning my nomination for United States District Court Judge for the Eastern District of New York.

Very truly yours,



CC: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

**Dora L. Irizarry's Responses to Senator Richard Durbin's
Follow-up Questions
October 12, 2003**

1. In a staff briefing prior to your confirmation hearing, American Bar Association (ABA) representative Thomas Hayward, Jr. informed staff members who work for Senators Hatch and Leahy that lawyers told the ABA that you had occasionally thrown objects at them. Have you, in fact, thrown objects at lawyers (or other individuals) in your courtroom? If so, what objects have you thrown and what were the circumstances?

I have never thrown objects at attorneys or other individuals in my courtroom. There was one instance, during the first few months of my tenure as a Court of Claims judge sitting in Kings County Supreme Court, Criminal Term, approximately six years ago, when I gently tossed a pen to an attorney who came to court completely unprepared. If I may put that situation in context as follows:

The criminal case had been pending for a long time. Defendant, who had an extensive criminal history, had been incarcerated the entire time. Defense counsel had missed a number of appearances and often appeared in court late. The case was ready to be sent out to trial. The prosecutor was extending a final plea offer that he would withdraw once the matter was sent out to trial. In light of the defendant's extensive criminal history and the strength of the prosecutor's case, I believed it important that defense counsel convey the plea offer to his client.

Defense counsel appeared in court near the close of my calendar call. He indicated that he had not discussed the offer with his client. I directed counsel to go into the holding cell to speak to his client. In the meantime, I finished the call of my calendar for the day. I then asked defense counsel to return to the courtroom. He indicated that his client was interested in accepting the prosecutor's offer. As we commenced with the plea allocution, defense counsel informed the court that he did not have some necessary paperwork on the case. Between the court and the prosecutor, we provided the necessary papers to counsel. Defendant was required to sign certain papers. Counsel indicated to the court that he also did not have a pen. At that point, I said to counsel, "Here, use mine." I gently tossed him my pen. Counsel made no effort to take it and the pen fell on his lap. We then finished with the matter at hand.

At no time did I pitch the pen at him or hurl it at him with any intent to hit him. In retrospect, it would have been more prudent to ask one of the court officers to hand counsel a pen.

After the incident, I met with counsel's supervisors. I explained the details as set forth above. I also indicated to them, as stated above, that I believed, in retrospect, it would have been better to have asked a court officer to hand counsel a pen. Never again was there any such incident in my courtroom.

2. Do you have any reason to believe that the ABA was biased against your nomination or did not make a good faith attempt to report on what it discovered in conducting interviews about your nomination?

I have no reason to believe that the ABA was biased against my nomination or that the ABA did not make a good faith attempt to report what it discovered in conducting interviews about my nomination. However, while I believe that they made a good faith effort to speak to individuals who had contact with me while I was a judge, they did not contact several individuals who know of my character both on and off the bench. Significantly, they did not contact the Honorable Michael L. Pesce, Presiding Justice of the Appellate Term, New York State Supreme Court, 2nd and 11th Judicial Districts, and my former Administrative Judge while I served in Brooklyn Supreme Court. He testified on my behalf at my Senate Confirmation Hearing on October 1, 2003. Moreover, others who were either listed on my Senate Judiciary Committee Questionnaire or whose names were provided as references to the ABA, were not contacted. These included, James F. Castro-Blanco, Esq., immediate past President of the Puerto Rican Bar Association, and a member of the New York City Mayor's Committee on the Judiciary (who also testified at my Senate Confirmation Hearing); Hon. Francois Rivera, Justice of the New York State Supreme Court, Kings County (who submitted a letter to the Senate Judiciary Committee on my behalf and who was prepared to testify on my behalf before the Committee); Telesforo DelValle, Jr., former President of the Puerto Rican Bar Association, former President of the New York Region Hispanic National Bar Association, former Vice-President of the New York State Criminal Trial Lawyers Association, and a member of the Committee on the Judiciary of the Association of the Bar of the City of New York (who submitted a letter to the Senate Judiciary Committee on my behalf and who was prepared to testify on my behalf before the Committee); Hon. Bridget Brennan, Special Narcotics Prosecutor for the City of New York; and Assistant United States Attorney Matthew Biben, Southern District of New York.

In addition, the statement provided by the ABA to the Senate Judiciary Committee did not include certain positive information it had obtained concerning my judicial demeanor. For instance, it failed to indicate that no complaints have ever been filed against me by any attorney with the New York State Commission on Judicial Conduct or with the Disciplinary Committees of the First and Second Departments of New York State. There are thousands of attorneys and hundreds of judges in New York City alone. Lawyers throughout New York State file many complaints against judges yearly. Accordingly, I respectfully submit that the absence of any complaints filed against me by attorneys was a significant fact that should have been included in the ABA's statement to the Senate Judiciary Committee.

Although the ABA representative did indicate to me during my interview that concerns had been raised concerning my judicial temperament, she also informed me that, most, if not all, attorneys contacted by the ABA reported that, during jury proceedings, I was very fair to all parties, treated defense attorneys and prosecutors with respect and courtesy, never demeaned any attorney before the jury and showed concern for the comfort and welfare of jurors and witnesses. This positive information concerning my judicial demeanor was also omitted from the ABA's statement to the Senate Judiciary Committee.

3. A June 18, 2003 *New York Law Journal* article reported that the Judiciary Committee of the Association of the Bar of the City of New York voted that you were unqualified to be a federal district court judge for the Eastern District of New York. The article indicates that the Committee has 45 members, that a nominee can appeal the vote if at least 4 Committee members support the nominee, and that there was not such support in your case.

A. Did the New York City bar association provide any explanation as to why it voted you to be unqualified? If so, what was it?

The actual rating given by the Association of the Bar for the City of New York (ABCNY) was "not approved." The rating was incorrectly reported in the news article cited above. I was informed that the ABCNY had made such a finding based upon their perception that I lacked familiarity with federal civil and criminal procedure, federal practice generally, as well as some reports that I lacked appropriate judicial temperament as a state judge and a lack of interest in the law.

I would note that, during my interview with the ABA representative, I did discuss with her my experience as a Special Assistant United States Attorney in the Southern District of New York as well as my extensive work in Title III type investigations while I was a prosecutor assigned to the New York City Special Narcotics Prosecutor's Office. I also discussed with her my work on numerous committees within the state court system focusing on continuing legal education for attorneys and judges and other issues concerning the fair administration of justice in the courts. Moreover, I discussed with the ABA representative the steps I have taken to familiarize myself with federal practice, what areas I felt I would need to work on in particular, and most significantly, the fact that I have developed skill sets as a state judge which are transferable to federal court. I have an exceptionally low appellate reversal rate and have demonstrated my ability to follow the law and administer justice fairly to all. It is noteworthy that the ABA's statement to the Senate Judiciary Committee describing the basis for my rating does not take issue with my legal abilities.

B. Did you attempt to appeal the New York City bar association's determination? If not, why not?

Despite the fact that I was provided the opportunity by the ABCNY to ask for a rehearing, I declined to do so. I did not ask for a rehearing because the bar association rating considered by the Senate Judiciary Committee is that of the American Bar Association (ABA) and not that of the Association of the Bar of the City of New York. Most importantly, based upon the tone of my interview with the ABCNY, it was apparent to me that their decision was not based solely on my qualifications. As indicated by one of the letters submitted by the Hon. Lewis L. Douglass, Justice of the Supreme Court of the State of New York, Kings County and Chair of the Unified Court System's Franklin H. Williams Commission on Minorities, there has been a pattern of the ABCNY disproportionately rejecting female minority judicial candidates. A copy of that letter is attached hereto.

I also respectfully draw the Committee's attention to the letter submitted to the Committee by the Asian American Bar Association of New York (Asian American Bar). The Judicial Screening Panel of the Asian American Bar was provided with the same materials I provided to the ABCNY and ABA. Its members concluded that I have the requisite qualifications for the federal bench. Additionally, it found no merit to the issue regarding judicial temperament. A copy of that letter is attached hereto.



Franklin H. Williams
Judicial Commission on Minorities
360 Adams Street, Room 459
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June 20, 2003

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Hon. Ariel E. Belan
Christopher E. Chang, Esq.
Hon. William J. Davis
William H. Etheridge
Telle C. Fernandez
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Robert M. Reeves
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Hon. Charles J. Tejeda
Hon. Troy E. Webber
Hon. Charles L. Willis
Hon. Douglas S. Wong

To: American Bar Association

RE: Dora Irizarry

This letter is written to support the appointment of Dora Irizarry as a Federal District Court Judge.

As Chairperson of the New York State Judicial Commission on Minorities and because Dora served as President of the Hispanic Judges Association in New York, I have worked closely with her on a variety of legal issues particularly those of importance in the minority legal community.

To say I was stunned to learn that the Association of the Bar of the City of New York had found her "not qualified" would be an understatement. Throughout her tenure as a judge she has enjoyed a superb reputation among lawyers for her scholarship and her temperament in the courtroom as confirmed by her popularity among lawyers who actually practice in the courtroom.

Although I do not have precise statistics, I believe there is a pattern in the Judiciary Committee of the Association of the Bar to disproportionately reject female minority candidates. Your support of Dora would be a significant step in ending that troubling practice.

If necessary and appropriate, I would be prepared to testify publicly in the support of Dora's appointment.

There can be absolutely no doubt about her qualifications for appointment as a Federal District Judge.

Very truly yours,

Jayce Y. Hartsfield, Esq.
Executive Director

Linda Lane
Secretary


ASIAN AMERICAN BAR ASSOCIATION OF NEW YORK

website: www.aabany.org

September 29, 2003

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Yang Chen
 Constantine & Partners

Pui Chi Cheng
 Law Office of Pui Chi Cheng

Terri Ann Mooney
 King & Spalding LLP

VIA FACSIMILE

The Honorable Orrin D. Hatch
 United States Senator
 Chairman
 U.S. Senate Judiciary Committee
 104 Hart Office Building
 Washington, D.C. 20510

Re: Nomination of Dora Irizarry to Judge for the
 United States District Court for the Eastern
 District of New York

Dear Senator Hatch:

The Asian American Bar Association of New York ("AABANY") respectfully submits this letter regarding the nomination of Dora Irizarry to become a Judge of the United States District Court for the Eastern District of New York. The Asian American Bar Association is a professional membership organization of attorneys concerned with issues that affect the Asian American Community. Founded in 1989, AABANY seeks not only to advocate for the legal interests of Asian American and other minority communities, but also to diversify the federal, state, and local judiciary. A diverse judiciary promotes the trust and confidence that the community has for the judicial system.

AABANY has an active Judicial Screening Panel. It is a non-partisan Panel that examines qualifications of judicial candidates. The Panel seeks to determine whether the candidates possess the requisite qualifications for judicial office, such as integrity, impartiality, intellectual ability, knowledge of the law, industriousness, and judicial demeanor and temperament. The Panel extensively reviews the background and qualifications of candidates. The Panel interviews each candidate, reviews his or her writings, investigates the candidate's background, and interviews judges and lawyers familiar with candidates. At the end of this process, the Panel issues a finding of "Approved" or "Not Approved" based completely on merit. AABANY's Panel does not endorse any candidates.

With respect to Dora Irizarry, the Panel performed its review and can

Lai-Sun Yee
New York City Office
of Emergency Management

Diana C. Yu
New York University

Koranth Yoon
Holland & Knight LLP

June 26, 2003, came to a finding of "Approved." In arriving at that finding, the Panel examined whether she possessed the requisite qualifications for judicial office. AABANY's Panel was fully aware that Dora Irisarry's temperament was placed in issue. However, after a thorough investigation, the Panel found that such issue was raised by a disgruntled litigant who embarked on a smear campaign to undermine Dora Irisarry's appointment. It is unknown whether the other bar associations who reviewed Dora Irisarry's qualifications had such information when they made their recommendations.

AABANY has submitted this letter in the hopes that it will assist the United States Senate in arriving at a decision on whether Dora Irisarry should be confirmed as a Judge for the United States District Court for the Eastern District of New York. If AABANY can be of any further assistance, please feel free to contact the undersigned who is AABANY's President-Elect and Chair of the Judicial Screening Panel.

Respectfully Submitted,

Andrew T. Hahn, Sr.



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EIGHTH CIRCUIT
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AMERICAN BAR ASSOCIATION

Standing Committee on
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October 16, 2003

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

Dear Senator Hatch:

Please find enclosed our responses to follow-up questions posed by Senator Durbin regarding the ABA Committee's evaluation of the nomination of Dora Irizarry to the District Court for the Eastern District of New York.

Thank you for the opportunity to testify at Ms. Irizarry's confirmation hearing.

Sincerely,

Thomas Z. Hayward, Jr.

cc with enclosures: Honorable Patrick Leahy ✓
Honorable Richard Durbin

**Response of the ABA Standing Committee on Federal Judiciary
to
Follow-Up Questions from Sen. Dick Durbin
Dora Irizarry Confirmation Hearing**

October 16, 2003

Questions for Patricia Hynes

1. Ms. Hynes, you were the ABA representative who conducted the investigation of Dora Irizarry. At Judge Irizarry's hearing, the Judiciary Committee received testimony from Judge Michael Pesce of the New York State Supreme Court after it heard your testimony. You apparently left the hearing after you testified. Judge Pesce made the following comments:

“So one thing that really surprised me is that – I am sorry Pat Hynes did leave. I have known Pat Hynes a long time. I was never called by the American Bar Association regarding the impression [sic] of temperament, and that kind of surprised me. The New York Bar Association called. But Pat Hynes never called me. And I know her well, and she knows me. And I was kind of surprised that she was even here to speak about the temperament.”

- A. What is your response to these comments of Judge Pesce?**
- B. Why didn't you call Judge Pesce as part of your investigation of Judge Irizarry?**

It is important to understand that the ABA committee's process and procedures are carefully structured to produce a fair, thorough and objective peer evaluation of each nominee. We reach out to a wide variety of members of the legal community, especially to those we identify as having first-hand experience with the nominee. A normal investigation includes approximately 40 personal interviews. In this particular case, I widened my outreach and, in the end, conducted more than 70 confidential interviews, including interviews with 17 judges, some of whom had supervisory responsibility for Judge Irizarry during her tenure on the bench. I made every effort to reach out to a diverse and representative group of lawyers and judges who could provide honest assessments of Judge Irizarry's professional qualifications based on their personal interactions with her in her judicial capacity. I am confident that during the course of my 70 interviews, I spoke with people who had interacted with her in her judicial function from every perspective, including supervisory roles.

I made a special effort to locate and speak to lawyers who had trials before this nominee. For a nominee who already is or has recently been a sitting judge, one of the best ways to

find out how that nominee conducts herself on a day-to-day basis and whether she has the requisite judicial temperament is to speak to lawyers who have appeared before her in court. It bears repeating that it was most unusual that the majority of lawyers interviewed raised concerns about Judge Irizarry's judicial temperament.

2. Judge Pesce supervised Judge Irizarry during the 18 months when she was a judge in the Kings County Supreme Court in Brooklyn. At last week's hearing, Judge Pesce suggested that Judge Irizarry's treatment of lawyers was justified because this court has such a large volume of cases. What is your response to this point? How if at all did you factor the case volume issue into your analysis of Judge Irizarry's temperament?

The importance of judicial temperament to the fair administration of justice cannot be overstated. Of course, the best judge in the world occasionally can have a bad day; a judge who is smart and trying to run a tight courtroom will almost inevitably leave some of the lawyers or litigants disgruntled from time to time. But the information gathered about the nominee's judicial temperament during the course of this investigation went well beyond the thesis that, occasionally, with a crowded docket and stressful conditions, she may have stepped over the line insofar as temperament is concerned. Our investigation uncovered consistent concerns about her temperament throughout her judicial career.

3. You testified that "the concerned comments about Judge Irizarry's lack of judicial temperament appeared consistently until her resignation from the State bench."

- A. Was the number of complaints about her temperament consistent across all five courts on which Judge Irizarry served, or was there a higher percentage of complaints about Judge Irizarry's temperament when was a judge on the Kings County Supreme Court in Brooklyn?**
- B. Judge Irizarry testified that "in the 7 years that I sat on the bench, there was a mellowing-out process that I went through and gradually sort of learned what techniques kind of worked better." Is this testimony in any way consistent with the findings of your investigation? Why or why not?**

As I stated in my testimony:

The majority of the lawyers interviewed raised concerns about Judge Irizarry's judicial temperament. These lawyers were both prosecutors and defense lawyers from three different counties – Bronx, Manhattan and Brooklyn – all counties where Judge Irizarry sat as a judge from late 1995 to May 2002.....

If the investigation had disclosed that the nominee's judicial temperament had improved over the years as she acquired more experience, the Committee would

not have exhibited the same amount of concern. However, the concerned comments about her lack of judicial temperament appear consistently until her resignation from the state bench to run for political office.

4. In a staff briefing prior to last week's confirmation hearing, ABA representative Thomas Hayward, Jr. informed staff members who work for Senators Hatch and Leahy that lawyers who appeared before Judge Irizarry told the ABA that she had occasionally thrown objects at them. Presumably, Mr. Hayward's comments were based on discussions with or reports from you, since you conducted the investigation. How many instances were there in which Judge Irizarry reportedly threw objects? What objects did she reportedly throw and at whom did she throw them?

In a telephone conversation, prior to the hearings, Senate staff specifically asked Chairman Hayward if he had heard of a reported incident in which Judge Irizarry had thrown a pen at an attorney. He acknowledged that he had. In fact, several people who were interviewed had knowledge of the incident and reported that Judge Irizarry had thrown a pen from the bench in a fit of anger at an attorney appearing before her. This is the only incident involving the throwing of an object of which we are aware.

5. You testified that you conducted interviews with more than 50 lawyers and with 17 judges, and that a majority of the lawyers raised concerns about Judge Irizarry's temperament. Did any judges raise such concerns? If so, please provide such details as you can share about what they told you.

I believe my answer to the first question covers this subject.

Question for Thomas Hayward, Jr.

1. You are the chair of the ABA's Standing Committee on Federal Judiciary. At the Dora Irizarry hearing last week, you testified that the ABA hadn't given a nominee a rating of Not Qualified based on judicial temperament concerns since before the Reagan presidency. Please provide additional details. Specifically, who was the last nominee who received such a rating? Was that nominee confirmed by the Senate? How many nominees have received such a rating in the history of the judicial confirmation process? Were any of them confirmed by the Senate?

A review of our records from the Nixon Administration to the present (1969- 2003) indicates that the Standing Committee has cited judicial temperament only one other time as a basis for a "not qualified" rating in a written statement or during a personal appearance before the Senate Judiciary Committee. According to the ABA's written statement submitted to the Senate Judiciary Committee on September 29, 1983, Sherman Unger, who was nominated to the Court of Appeals for the Federal Circuit, was found "not qualified" on two grounds -- because he "lacked the personal integrity and judicial

temperament expected of a federal judge.” (p. 10). The nominee died during the confirmation process.

As you well know, from 1953 through 2000, the Standing Committee on Federal Judiciary investigated the professional qualifications of potential nominees at the request of the President. The results of these preliminary investigations, which were conducted to assist the President in nominating candidates with stellar professional qualifications, were shared only with the Administration. There may have been situations where the Standing Committee confidentially advised the Administration that its preliminary investigation revealed significant concerns over the judicial temperament of a candidate who subsequently was not nominated by the President.

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SUBMISSIONS FOR THE RECORD



**Office of the
Special Narcotics Prosecutor
for the City of New York**

Bridget G. Brennan, Special Narcotics Prosecutor

80 CENTRE STREET, SIXTH FLOOR
NEW YORK, NY 10013
212-815-0400, GEN.
212-815-0440, FAX

October 10, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing on behalf of Dora Irizarry, who has been nominated to serve as a federal judge in the Eastern District of New York.

I first met Ms. Irizarry in 1992 when I was appointed as head of the Special Investigations Bureau of the Office of the New York City Special Narcotics Prosecutor. Ms. Irizarry was a senior assistant district attorney in the bureau, which specializes in high-level investigations targeting sophisticated narcotics organizations. To put the work of the bureau in perspective, for the past decade, it has obtained more wiretap orders annually than any other state or federal prosecutorial office in the country.

As a Senior Supervising and Investigating Attorney, Ms. Irizarry worked closely with members of local, state and federal agencies, including the Federal Bureau of Investigation, the Drug Enforcement Administration, and United States Attorney offices around the country. Ms. Irizarry was widely regarded as thoughtful, patient and easy to work with. As a senior legal staff member, Ms. Irizarry supervised junior assistant district attorneys, specifically reviewing wiretap applications and overseeing complex litigation. Because of her wealth of experience, legal acumen and painstaking attention to detail, she was often asked to mediate conflicts among investigatory agencies.

During my tenure as her supervisor, I developed great confidence in Ms. Irizarry's analytical abilities and her legal judgment. She left our office in 1995 for the New York City Criminal Court bench.

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I believe Dora Irizarry is thoughtful, intelligent and has a sound sense of justice. She offers a perspective based upon a background and experience unique among judicial nominees, and I believe the country would be well served to have Ms. Irizarry on the federal bench.

Sincerely,

Bridget G. Brennan
Special Narcotics Prosecutor
for the City of New York

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Office of Legal Policy
Attention: Assistant Attorney General Daniel J. Bryant

Senator Charles Schumer
Senate Committee on the Judiciary
313 Hart Senate Building
Washington, D.C. 20510

United States Senate Committee on the Judiciary
October 1, 2003 Testimony of James F. Castro-Blanco Esq.
Re: Judicial Nomination of Dora L. Irizarry

Chairman Hatch, and members of the United States Senate Committee on the Judiciary, thank you for giving me this opportunity to offer testimony supporting the nomination of Judge Dora L. Irizarry to the position of United States District Court Judge for the Eastern District of New York. My recommendation is based upon my own experiences working with Judge Irizarry as well as numerous conversations I have had with many members of the legal community. As a former Assistant United States Attorney in the Eastern District of New York, I have had the opportunity to practice before some of the most outstanding jurists in the nation. Judge Irizarry would be an excellent addition to that Court. Her wisdom, compassion, integrity and love of the law will enable her to be an extraordinary District Court Judge. I am confident that she will serve with distinction.

I have the honor to serve on the New York City Mayor's Advisory Committee on the Judiciary. In that role, I have reviewed many judicial applications and interviewed many candidates. The most important qualities I look for in a candidate are integrity, proper judicial demeanor, knowledge of the law and a sense of compassion. Judge Irizarry possesses all these qualities in abundance.

During my tenure as President of the Puerto Rican Bar Association, I worked extensively with Judge Irizarry to increase opportunities for Hispanic attorneys and to provide scholarship money for Hispanic law students. Her efforts in this regard have been recognized by the Hispanic legal and business communities. Her honors and awards, while too numerous to list, evidence her service to her community and the esteem in which she is held.

Earlier this year, the Board of Directors of the Puerto Rican Bar Association voted to approve Judge Irizarry's nomination to the District Court. That decision was based upon the Board's review of Judge Irizarry's record and reputation. Additionally, prior to the vote, members of the Board who have appeared before Judge Irizarry discussed the Judge's ability to effectively and respectfully run her courtroom. The Board agreed that she possesses the intellect and judicial demeanor to be an outstanding District Court Judge.

My practice as a trial lawyer has been conducted solely in the federal courts. As a result, I have not had the opportunity to appear before Judge Irizarry. My interactions with Judge Irizarry have taken place through many community service related activities. Judge Irizarry and I have served as panelists at law school forums. We have been speakers at Bar Association functions and we have worked closely organizing events honoring prominent individuals who have made a positive impact on our community.

I have observed Judge Irizarry interact with many individuals in a variety of forums. Some of those individuals have challenged her views on a variety of issues in a confrontational manner. She has always maintained her poise in such situations and treated people respectfully even when that courtesy was not returned. In my opinion, her demeanor on all occasions during which I have observed her has been professional and measured.

Judge Irizarry's career epitomizes the American dream. From her humble beginnings in Puerto Rico and the projects of the South Bronx, using her intellect and perseverance, she graduated from Yale University and Columbia University School of Law. Forsaking a highly paid Wall Street career, she served as an Assistant District Attorney and then as a Judge of the New York City Criminal Court and New York State Court of Claims. During her career as a public servant, she continued to be a community leader, mentor and role model.

Judge Irizarry's generosity of spirit and fine character are apparent from her interactions with all people whom she encounters. Her reputation among practitioners is that of a fair and no-nonsense judge. She has led the kind of multi-dimensional life that will allow her to mete out justice in a thoughtful and fair way. It is my belief that Dora L. Irizarry possesses all the qualities necessary to be an extraordinary District Court Judge. In short, her judgment, intellect and character set her apart. I am honored to have been given the opportunity to speak in support of Judge Irizarry's nomination.

Thank You

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James F. Castro-Blanco Esq.
85 Windsor Terrace
Yonkers, New York 10701
(917) 757-7663

September 28, 2003

Honorable Orrin G. Hatch
Chairman, Senate Committee on the Judiciary
Dirksen Office Building, Room 224
Washington D.C. 20510

Re: Judicial Nomination of Dora L. Irizarry

To the Senate Committee on the Judiciary,

I am writing to recommend the appointment of Dora L. Irizarry to the position of United States District Court Judge for the Eastern District of New York. As a former Assistant United States Attorney in the Eastern District of New York, I have had the opportunity to practice before some of the most outstanding jurists in the nation. Judge Irizarry would be an excellent addition to that Court. Her wisdom, compassion, integrity and love of the law will enable her to be an extraordinary District Court Judge. I am confident that she will serve with distinction.

During my tenure as President of the Puerto Rican Bar Association, I worked extensively with Judge Irizarry to increase opportunities for Hispanic attorneys and to provide scholarship money for Hispanic law students. Her efforts in this regard have been recognized by the Hispanic legal and business communities. Her honors and awards, while too numerous to list, evidence her service to her community and the esteem in which she is held.

I have the honor to serve on the New York City Mayor's Advisory Committee on the Judiciary. In that role, I have reviewed many judicial applications and interviewed many candidates. The most important qualities I look for in a candidate are integrity, proper judicial demeanor, knowledge of the law and a sense of compassion. Judge Irizarry possesses all these qualities in abundance.

Judge Irizarry's career epitomizes the American dream. From her humble beginnings in Puerto Rico and the projects of the South Bronx, using her intellect and perseverance, she graduated from Yale University and Columbia University School of Law. Forsaking a highly paid Wall Street career, she served as an Assistant District

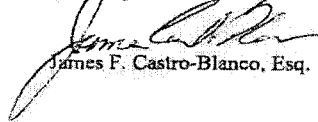
attorney and then as a Judge of the New York City Criminal Court and New York State Court of Claims. During her career as a public servant, she continued to be a community leader, mentor and role model.

Judge Irizarry's generosity of spirit and fine character are apparent from her interactions with all people whom she encounters. Her reputation among practitioners is that of a fair and no-nonsense judge. She has led the kind of multi-dimensional life that will allow her to mete out justice in a thoughtful and fair way. It is my belief that Dora L. Irizarry possesses all the qualities necessary to be an extraordinary District Court Judge. In short, her judgment, intellect and character set her apart.

While accolades regarding her career as a jurist may be plentiful, what distinguishes Judge Irizarry is her ability to use her gifts to make a positive impact on the people she meets. While many others are happy to bask in the spotlight, Judge Irizarry uses spotlight opportunities to light the way for others. Earlier in the year, at one of the occasions at which Judge Irizarry was honored by the Hispanic community, a young woman tentatively approached her and asked if the Judge had a moment to discuss the young woman's interest in attending law school. Judge Irizarry replied that she would be pleased to speak with her. Like many public figures, Judge Irizarry is often asked to give her time. It is easy to give lip service to these requests. Later that week, I called Judge Irizarry to seek her counsel. I was informed that she was in a meeting and would turn my call shortly. Some days later, a colleague told me that at the time I had called, Judge Irizarry was spending the better part of her afternoon meeting with that same young woman and encouraging her to become a lawyer. When I asked the Judge about that meeting, she told me that she had to meet with the woman because she saw so much potential despite the fact that the woman was unsure whether she had the requisite talents to succeed in the legal profession. That woman is taking the Law School Admission Test next Saturday. Judge Irizarry told me that those kinds of meetings are some of the most important work she does.

I am pleased to submit this letter in support of Judge Irizarry's nomination. It is based upon my own experiences working with Judge Irizarry as well as numerous conversations I have had with many members of the legal community. Please feel free to contact me if I may provide additional information that will assist the committee in its deliberations.

Sincerely,



James F. Castro-Blanco, Esq.

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**Statement of
Lewis L. Douglass
Chairperson of the
New York State Commission on Minorities
in support of the appointment of
Dora L. Irizarry
for
District Judge of Eastern District of New York**

I am Lewis L. Douglass, a Justice of the New York State Supreme Court.

I am also the Chairperson of the New York State Commission on Minorities, a Commission consisting of 21 lawyers and judges appointed by the Chief Judge to develop programs to improve opportunities for minorities and to improve the perception of fairness on a part of minorities in the New York Court system. We hold hearings throughout the State and maintain an ongoing liaison with minority Bar Associations and develop training programs for State judges on issues of diversity.

I met Judge Irizarry about 10 years ago, when we both were judges appointed by the Governor to sit on a court called the Court of Claims. Our assignments had nothing to do with claims. It was an appointed Court created to handle the overload of felony prosecutions,

we were all appointed to the Court of Claims and then immediately assigned to the Supreme Court to handle major felony prosecutions.

Judge Irizarry steadily gained a reputation among lawyers as a superb judge. She did expect all who appeared before her to adhere to the rules and to perform in a way that enhanced the dignity of the Court. She was, nevertheless, fair and even handed.

Like many of us who grew up in inner cities, she believed that when a person is found guilty, after a fair trial, it is important that government, through the Courts, make a strong statement that criminal behavior is unacceptable . . . and that social circumstances are not an excuse for crime. In short, she had a reputation as a tough but fair judge. While presiding over these felony cases, she took on young lawyers as interns and became very active in Bar Associations activities eventually becoming President of the Hispanic Judges Association.

I am sure you are aware of her excellent academic background, having graduated from Yale and Columbia Law school.

Let me, however, turn to what I think is a particularly unique and important point. We have done remarkable things in this country in the

past 50 years since the Supreme Court outlawed segregation and moved

us to a more opened society. Judge Irizarry's appointment would be another confirmation of that achievement. In the mid 1960's, her father worked as an electrician at the federal building in lower Manhattan which housed the Federal Court. At that time, like other minorities, he worked in the federal projects because minorities were not then readily admitted into the Unions. He of course admired Federal Judges, as we all did. The idea that his daughter would some day stand before a Committee of the Congress for consideration for appointment as a Federal Judge, would have been pure fantasy. But here we are considering the appointment of Dora, now having graduated from Yale and Columbia and having served as a State Court judge.

I tell you it makes me feel great not only to endorse her because of her scholarship and reputation as a State Judge . . . and because she is one of the nicest people I know . . . but it makes me feel good because it shows that all the struggles, all the demonstration and all the tears where all worthwhile . . . and we can be proud of the system of government under which we live.

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News Release
JUDICIARY COMMITTEE

United States Senate • Senator Orrin Hatch, Chairman

October 1, 2003

Contact: Margarita Tapia, 202/224-5225

**Statement of Chairman Orrin G. Hatch
Before the United States Senate Committee on the Judiciary
On the Nomination of**

**DORA L. IRIZARRY FOR THE
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK**

I am pleased to welcome to the Committee this morning Judge Dora Irizarry, whom President Bush has nominated to fill a vacancy on the United States District Court for the Eastern District of New York.

Judge Irizarry comes to us with an impressive record of academic achievement and public service. She is a *cum laude* graduate of Yale University and a graduate of Columbia University School of Law. She has spent the great bulk of her career in public service, including 16 years as an assistant district attorney prosecuting complex narcotics cases. In 1995, then-Mayor Rudolph Giuliani appointed her to the New York City Criminal Court. Two years later, she was elevated by Governor George Pataki to the New York Court of Claims, where she served as an acting justice on the New York Supreme Court. After seven years of service as a judge, she left the bench in 2002 to campaign as the Republican candidate for state Attorney General. She is currently in private practice with the New York law firm of Hoguet Newman & Regal.

Despite these accomplishments, a majority of the American Bar Association Standing Committee on the Federal Judiciary returned a rating of Not Qualified for Judge Irizarry. In such instances, it has been the practice of this Committee to invite representatives of the ABA to explain the basis for the rating. We accordingly will hear from Tom Hayward, chair of the ABA Standing Committee, and Patricia Hynes, a former chair of the Standing Committee who conducted the evaluation that led to Judge Irizarry's rating. I welcome them on behalf of the Committee.

We will also hear from three distinguished members of the New York legal community who will attest to Judge Irizarry's fitness for the federal bench: Her legal aptitude and experience, her integrity, and, most notably, her judicial temperament. It is my understanding that concerns pertaining to temperament served as the basis for the ABA's rating. But I expect that these witnesses' testimony will more than dispel any lingering questions about Judge Irizarry's temperament. I am thus pleased that the Committee will hear from two of Judge Irizarry's former colleagues on the New York Supreme Court: Justice Michael Pesce, the presiding justice, and Justice Lewis Douglass, the Chair of the New York State Commission on

Minorities. We will also hear from James Castro-Blanco, immediate past president of the Puerto Rico Bar Association. It is a great testament to Judge Irizarry that each one of these extremely busy gentlemen were eager to come to Washington on relatively short notice to testify on her behalf. They have put the weight of their admirable reputations behind Judge Irizarry's nomination, and I firmly believe that speaks volumes about her qualifications for the federal bench – more so than the anonymous musings of her detractors that contributed to the ABA's rating.

In addition to the testimony of our three New York witnesses, the Committee has received strong letters in support of Judge Irizarry's nomination, which I will submit for the record. Since we will not hear from these witnesses in person, I would like to take a moment to share with you their views on Judge Irizarry.

New York Supreme Court Justice Francois Rivera found it "rather peculiar" that the ABA did not contact him in connection with its evaluation of Judge Irizarry, especially since she had listed him as a reference. Justice Rivera writes that he "had the pleasure of working with [Judge Irizarry] as a colleague and had the benefit of her keen legal mind on many issues for which I sought her counsel. Had the American Bar Association contacted me, I would have highly recommended Judge Irizarry for the position of United States District Court Judge."

Another letter is from Barry Kamins, from the law firm of Flamhaft Levy Kamins Hirsch & Rendeiro. Mr. Kamins has chaired numerous bar association committees relating to criminal law and justice. He says that in that role he has spoken to "scores of prosecutors and defense attorneys who have tried cases before Judge Irizarry, appeared in her court, negotiated plea bargains and handled various criminal proceedings over which she has presided. She has earned a reputation among other attorneys as a fair, hard-working jurist who is knowledgeable on the law and whose decisions are well-reasoned." Mr. Kamins characterizes Judge Irizarry as "a judge who was aggressive when appropriate and compassionate when the facts required it."

Yet another letter is from Andrew Hahn, Sr., president-elect of the Asian American Bar Association of New York and chair of its Judicial Screening Panel, which examines the qualifications of nominees to determine if they possess the requisite integrity, intellectual ability and judicial temperament — much in the same way as the ABA does. At the end of its selection process, the panel issues a finding of Not Approved or Approved, based solely on merit. Mr. Hahn says that, after a thorough investigation, the panel issued a finding of Approve for Judge Irizarry. Significantly, the panel found that the issue pertaining to her temperament "was raised by a disgruntled litigant who embarked on a smear campaign to undermine [her] appointment. It is unknown whether the other bar associations who reviewed Dora Irizarry's qualifications had such information when they made their recommendations."

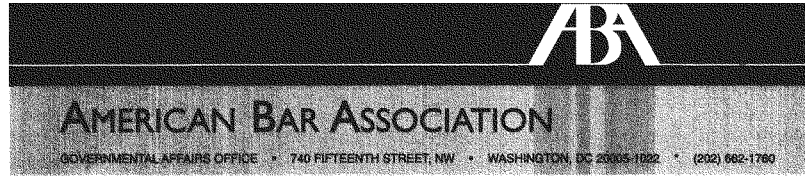
Finally, Judge Sterling Johnson, Jr., a United States District Judge for the Eastern District of New York, was unable to be here today to testify in support of Judge Irizarry's nomination due to a scheduling conflict. He worked with Judge Irizarry when she served on his staff at the Office of the Special Narcotics Prosecutor for the City of New York. During their 10-year working relationship, Judge Johnson described her as "an excellent prosecutor" who was able to diplomatically coordinate competing law enforcement interests – which is no small task, as

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anyone who has ever worked as a prosecutor on multi-agency cases knows. He “enthusiastically endorse[s]” her nomination without reservation, and looks forward to working with her as a colleague.

In addition to all of these supporters, Judge Irizarry has a very effective advocate in her corner: The senior senator from New York, Senator Schumer. I will now turn to him for his introduction of Judge Irizarry.

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STATEMENTS OF
THOMAS Z. HAYWARD, JR.
and
PATRICIA M. HYNES
ON BEHALF OF THE
STANDING COMMITTEE ON FEDERAL JUDICIARY
of the
AMERICAN BAR ASSOCIATION
concerning the
NOMINATION OF DORA L. IRIZARRY
TO BE JUDGE OF THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK
before the
COMMITTEE OF THE JUDICIARY
UNITED STATES SENATE

OCTOBER 1, 2003

STATEMENT OF THOMAS Z. HAYWARD, JR.

Mr. Chairman and Members of the Committee:

My name is Thomas Z. Hayward, Jr. I am a practicing lawyer in Chicago, and I am the Chair of the American Bar Association's Standing Committee on Federal Judiciary. With me today is Patricia M. Hynes, a former member and past Chair of the Committee, and circuit member for this investigation. We appear here to present the views of the Association on the nomination of Dora L. Irizarry to be a U.S. District Court judge for the Eastern District of New York. After careful investigation and consideration of her professional qualifications, a majority of our Committee is of the opinion that the nominee is "Not Qualified" for the appointment. A minority found her to be "Qualified."

I. PROCEDURES FOLLOWED BY THE STANDING COMMITTEE

Before discussing the specifics of this case, I would like to review briefly the Committee's procedures so that you will have a clear understanding of the process the Committee followed in this investigation. A more detailed description of the Committee's procedures is contained in the Committee's booklet, *Standing Committee on Federal Judiciary: What It Is and How It Works* (April 2002).

The ABA Standing Committee investigates and considers only the professional qualifications of a nominee: his or her competence, integrity and judicial temperament. Ideological or political considerations are not taken into account. Our processes and procedures are carefully structured to produce a fair, thorough and objective peer evaluation of each nominee. A number of factors are investigated, including intellectual capacity, judgment, writing and analytical ability,

industry, knowledge of the law, breadth of professional experience, character, integrity, compassion, courtesy, open-mindedness, patience, freedom from bias, commitment to equal justice under the law, and general reputation in the legal community.

The investigation is ordinarily assigned to the committee member residing in the judicial circuit in which the vacancy exists, but it may be conducted by another committee member or former member. In the current case, Mrs. Hynes, in her capacity as a former member, was asked to undertake this investigation because the current member from the Second Circuit was already undertaking another investigation.

The starting point of an investigation is the receipt of the candidate's responses to the public portion of the Senate Judiciary Committee questionnaire. These responses provide the opportunity for the nominee to set forth his or her qualifications -- professional experience, significant cases handled, major writings, and the like. The circuit member makes extensive use of the questionnaire in the investigation. In addition, the circuit member examines the legal writings of the nominee and personally conducts extensive confidential interviews with those likely to have information regarding the integrity, professional competence, and judicial temperament of the nominee, including, where pertinent, federal and state judges, practicing lawyers in both private and government service, legal services and public interest lawyers, representatives of professional legal organizations and others who are in a position to evaluate the nominee's integrity, professional competence and judicial temperament. This process provides a unique "peer review" aspect to our investigation.

Interviews are conducted under an assurance of confidentiality. If information adverse to the nominee is discovered, the circuit member will advise the nominee of such information if he or she can do so without breaching the promise of confidentiality. During the personal interview with the nominee, the nominee is given a full opportunity to rebut the adverse information and provide any additional information bearing on it. If the nominee does not have the opportunity to rebut certain adverse information because it cannot be disclosed without breaching confidentiality, the investigator will not use that information in writing the formal report and the Committee, therefore, will not consider those facts in its evaluation.

Sometimes a clear pattern emerges in the interviews, and the investigation can be briskly concluded. In other cases, such as this one, conflicting evaluations over some aspect of the nominee's professional qualifications may arise. In those instances, the circuit member takes whatever further steps are necessary to reach a fair and accurate assessment of the nominee.

Upon completion of the investigation, the circuit member then submits an informal report on the nominee to the Chair, who reviews it for thoroughness. The circuit member then prepares the formal investigative report, containing a description of the candidate's background, summaries of all interviews conducted (including the interview with the nominee) and an evaluation of the candidate's professional qualifications, which is circulated to the entire 15-member committee, together with the nominee's completed Senate Judiciary Committee questionnaire and copies of any other relevant materials. After careful consideration of the formal report and its enclosures, each member submits his or her vote to the Chair, rating the nominee "Well Qualified," "Qualified," or "Not Qualified."

I would like to emphasize that an important concern of the Committee in carrying out its function is confidentiality. The Committee seeks information on a confidential basis and assures its sources that their identities and the information they provide will not be revealed outside of the Committee, unless they consent to disclosure or the information is so well known in the community that it has been repeated to the committee member by multiple sources. It is the Committee's experience that only by assuring and maintaining such confidentiality can sources be persuaded to provide full and candid information. However, we are also alert to the potential for abuse of confidentiality. The substance of adverse information is shared with the nominee, who is given full opportunity to explain the matter and to provide any additional information bearing on it. If the information cannot be shared, the information will not be used by the Committee in reaching its evaluation.

II. THE INVESTIGATION OF THE NOMINEE

Ms. Irizarry was nominated on April 28, 2003. Carol Dinkins of Houston, Texas, who was then chair of the Standing Committee, assigned Mrs. Hynes to the investigation, as explained above. She began her investigation shortly after receiving the nominee's May 23, 2003 responses to the public portion of the Senate Judiciary Committee questionnaire.

On July 9, 2003, Mrs. Hynes prepared and submitted to Chair Dinkins an informal report that presented the results of her thorough investigation, including summaries of all of her confidential interviews and a description of her interview with the nominee. On July 11, 2003, Mrs. Hynes' formal report was transmitted to all of the members of the Committee. Those who had questions

were encouraged to contact Mrs. Hynes directly. After all Committee members had an opportunity to study the report and all the attachments, they reported to the chair their votes on the qualifications of the nominee.. A majority of the Committee found the nominee "Not Qualified" and a minority found her "Qualified." The vote was reported to you on July 21, 2003.

I will now ask Mrs. Hynes to describe her investigation of the nominee.

STATEMENT OF PATRICIA M. HYNES

Mr. Chairman and Members of the Committee:

My name is Patricia M. Hynes. I am a trial lawyer from the State of New York and, as Mr. Hayward indicated, I am a former member and past chair of the Committee. With that background, I was asked to undertake the investigation of the qualifications of Dora L. Irizarry to be a United States District Judge. During my membership on the Committee, both as the Second Circuit member and as Chair, I participated in numerous investigations of potential and actual nominees to the U.S. Courts of Appeals and the U.S. District Courts. My investigation of the nominee was conducted in the same manner all investigations by the Standing Committee are conducted, as Thomas Hayward just explained to you.

My investigation was conducted during May, June and July of this year. It included approximately 70 confidential interviews, including those of 50 lawyers and 17 judges. During each conversation I inquired how the person knew, if at all, the nominee and what the person knew about the nominee's professional competence, judicial temperament and integrity that would bear on her qualifications to serve as a United States District Judge. I also inquired if they knew any reason why the nominee was not qualified to so serve. I made a particular effort to locate and speak to lawyers who had had trials before the nominee. In addition to these interviews, I reviewed other pertinent materials, including writing samples the nominee selected, such as legal opinions she had written. I also met privately with the nominee in her office in New York. During the course of our meeting, concerns that had been identified during my

investigation were discussed and the nominee was given an opportunity to rebut the adverse information and provide any other additional information.

The majority of the lawyers interviewed raised concerns about Judge Irizarry's judicial temperament. These lawyers were both prosecutors and defense lawyers from three different counties -- Bronx, Manhattan and Brooklyn -- all counties where Judge Irizarry sat as a judge from late 1995 to May 2002. These comments all had a starkly common theme and included statements that Judge Irizarry was gratuitously rude and abrasive and demeaned attorneys; that she flew off the handle in a rage for no apparent reason and screamed at attorneys; that she was impatient and did not fully listen to attorneys' legal arguments, and did not have a good grasp of the legal issues presented to her; that she took offense easily, was short tempered and volatile, and got angry when lawyers disagreed with her; that she was rigid and dismissive and did not treat lawyers with respect.

On the issue of judicial temperament, the Committee's background booklet states that "in investigating judicial temperament, the Committee considers the nominee's compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias and commitment to justice under the law."

Our Committee, in reviewing my report on the nominee, could not discount the number of complaints about the nominee's temperament. Certainly some attorneys who appeared before her have not encountered problems, but unfortunately they do not adequately make up for the substantial number of negative comments concerning her judicial temperament. The breadth and

depth of these negative comments signal a serious control problem. If the investigation had disclosed that the nominee's judicial temperament had improved over the years as she acquired more experience, the Committee would not have exhibited the same amount of concern. However, the concerned comments about her lack of judicial temperament appear consistently until her resignation from the state bench to run for political office.

The best judge in the world can have a bad day from time to time, and a judge who is smart and trying to run a tight courtroom will almost inevitably leave some of the lawyers or litigants with a bad taste from time to time. But this investigation and the information gathered go well beyond the thesis that, occasionally, with a crowded docket and stressful conditions, a judge may step over the line insofar as temperament is concerned. After careful consideration of my report, a majority of the Committee was of the view that Ms. Irizarry is not qualified for the position. A minority of the Committee found her to be qualified.

Our Committee takes most seriously its responsibility to conduct an independent examination of the professional qualifications of judicial nominees. There is no bright-line litmus test as to whether a nominee is or is not qualified. Our recommendation is not the result of tallying the comments - pro and con - about a particular nominee. Rather, in making our evaluation, we draw upon our previous experience, the information and knowledge we gain about the nominee during the course of our investigation, and our independent judgment. I must stress that we apply the same standards and criteria impartially to all nominees.

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In my service on the Committee, I have either conducted or reviewed literally hundreds of reports on judicial nominees. I have never before experienced such widespread and consistent negative comments about a nominee's temperament.

Thank you for inviting us to share our views.

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U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693

VERMONT

**Statement of Chairman Patrick Leahy
on the Nomination of Dora Irizarry to the
United States District Court for the
Eastern District of New York
October 1, 2003**

Today, the Judiciary Committee is holding its 18th judicial nomination hearing this year. The Republican-led Senate has held more hearings in less than 10 months for more judicial nominees of President George W. Bush than they held for judicial nominees of President Clinton in 1999 and 2000 combined. The rapid pace at which the Republican Senate has moved for a Republican President is also shown by the fact that 160 judicial nominees of this President have been confirmed so far, including 60 this year. The number of confirmations in less than 10 months this year is greater than the number of confirmations allowed by Republicans for President Clinton in the 12 full months of 1995, 1996, 1997, 1999, or 2000 and far in excess of the Republican average of 37 a year.

Today, the Senate Judiciary Committee will hear from a district court nominee with the consent of both of the Senators from her home-state of New York. I would like to thank the senior Senator from New York, Senator Schumer, for serving as the Ranking Member at the hearing today. On behalf of the Democratic minority, I worked with Chairman Hatch to allow this hearing to be scheduled on less notice than required under Senate rules. This is one of a series of accommodations Democrats have made, usually without receiving acknowledgment or credit. In so doing, however, I apologize for any inconvenience to the nominee or other witnesses appearing here today for the short preparation time they were accorded in this expedited process.

This is a hearing on this nomination in light of the unfavorable recommendation of the American Bar Association Standing Committee on Federal Judiciary (ABA). This is an appropriate course of action, and will allow the Committee time to focus on the testimony of the nominee, Judge Dora Irizarry, the ABA representatives and the witnesses speaking in support of her qualifications.

Judge Irizarry is the 23rd judicial nominee of this President to receive a partial or majority rating of "Not Qualified" from the ABA Committee that conducts a peer evaluation of judicial nominees. When the ABA advises us that even a minority of the members of its review committee consider a nominee to be "Not Qualified," that is cause for concern. I know that the ABA representatives take their work very seriously. When they suggest that a nominee may not

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have the temperament, experience or integrity to be entrusted with a lifetime position on the federal courts, that is a matter of concern.

The Democratic Members of this Committee look very closely at the peer review ratings provided by the ABA. Nevertheless, we consider the views of the ABA an important but not a dispositive piece of information as part of our evaluation. We may not always agree with the recommendation. In 2001, this Committee and the Senate proceeded to confirm another nominee with a "Not Qualified" rating from the ABA and during the course of this administration we have proceeded favorably on a number of nominees with partial "Not Qualified" ratings.

Alternatively, we may believe strongly that there are other factors that are critical considerations for these lifetime positions in the federal judiciary beyond a favorable ABA rating. For example, in the judgment of some Members of the Senate, some of this President's judicial nominees do not have records that demonstrate that they will be fair judges and instead their backgrounds suggest precisely the opposite: that they were chosen with the hope that they would prejudice areas of constitutional law in order to move the law in a certain direction in tune with the political views of the right wing of the Republican party.

There have been times, as mentioned by Senator Reid, earlier this year, when serious doubts have been raised about the fairness of the ABA's rating and the impartiality of the ABA representative charged with recommending a rating to his or her peers. The serious conflict of interest of Fred Fielding in his evaluation of the nomination of Miguel Estrada was very troubling to many Senators. While serving on the ABA Committee that evaluates judicial nominees, Mr. Fielding also served on the Bush-Cheney Transition Team, served as clearance counsel for President George W. Bush in some of his top executive branch appointments, accepted a lucrative appointment from President Bush to work on trade disputes, and co-founded the Committee for Justice, which has since been running attack ads against those who oppose any of President Bush's judicial nominees.

In comparing Mr. Fielding's evaluation of President Bush's judicial nominees with the ratings given President Clinton's judicial nominees with similar experience, it is notable that during Mr. Fielding's tenure on the Committee every single one of President Bush's judicial nominees for D.C. courts received a "Well Qualified" rating, while Clinton nominees did not. Similarly, Mr. Fielding's rating of Mr. Estrada was markedly higher than the ratings of other Bush nominees with similar litigation credentials, like Judge Jeffrey Sutton. Additionally, it is hard to imagine a lawyer giving Mr. Fielding a candid, negative review of any nominee of this President, given Mr. Fielding's trusted role advising this President and serving in the White House Counsel's office of other Republican presidents.

I understand that recently the new President of the ABA, the Honorable Dennis Archer, and the Chair of the ABA Standing Committee, Thomas Hayward, Jr., have taken steps to address these kinds of concerns. I thank them for taking these concerns seriously and to heart.

I do not have any concerns about the impartiality of the ABA member, Pat Hynes, who conducted the interviews in connection with the nomination of Judge Irizarry. Ms. Hynes, who is Of Counsel at Milberg Weiss, chaired the ABA Standing Committee during the beginning of the Bush administration and also served as the ABA's Second Circuit representative from 1995 to 2000. She clerked on the Eastern District of New York for Chief Judge Zavatt and also worked as a federal prosecutor for 15 years. She has served as the Chair of the Federal Courts Committee of the Association of the Bar of the City of New York, Vice President of the Federal Bar Council, as a member of the Planning and Program Committee for the Judicial Conference of the Second Circuit, and as a member of Mayor Giuliani's Advisory Committee on the Judiciary. She is currently Chair of the Merit Selection Panel for Magistrate Judges for the Southern District of New York and serves on the Second Circuit Court of Appeals Rules Committee. She was chosen as a Fellow of the American College of Trial Lawyers and has been named one of the Top 50 Women Litigators in the United States and one of the 50 Most Influential Women Lawyers in America. I welcome her testimony today.

I would also like to welcome the current Chairman of the ABA's Standing Committee, Tom Hayward. Mr. Hayward is a partner at Bell, Boyd & Lloyd in Chicago, and is a corporate and real estate lawyer. He is the past president of the Chicago Bar Association, where he was General Chairman of the Committee on the Evaluation of Judicial Candidates and a founding member of the Young Lawyers Section. He has served as a member of the ABA House of Delegates since 1984 and has served on the ABA Board of Governors since 1998. Among other public service, he is the director of the Chicago Area Foundation for Legal Services and the Chicago Bar Foundation and is the Vice Chairman of the Board of Trustees at Northwestern University. I look forward to his testimony.

The Senate Judiciary Committee's practice has been to invite the ABA's testimony in connection with a nomination when a circuit or district court nominee has earned a majority or unanimous rating of "Not Qualified." In providing such testimony, I know that the ABA takes pains to preserve the confidentiality of the attorneys and judges they interview as part of their review. I do wish the ABA would provide similar information, informally or formally, about other ratings they provide. Before President Bush ejected the ABA from the process of providing an informal rating before a nomination was made, the fact that temperament or ethics concerns were raised was conveyed, and sometimes past White Houses chose not to proceed after making further inquiry into such concerns. Additionally, when the ABA was involved in the process before nomination, I am confident that members of the legal community were more candid before a judicial candidate was given the imprimatur of the President.

I understand that in connection with the nomination of Judge Irizarry, the ABA heard a number of candid assessments from the lawyers and judges Ms. Hynes interviewed, some very positive and some troubling in the area of judicial temperament. Members of this Committee and of the Senate will, through our hearing, have the opportunity to form their own impressions and make their own determinations in this regard.

Judge Irizarry, who was born in Puerto Rico, is an attorney with the New York firm of Hoguet, Newman & Regal. A 1979 graduate of Columbia Law School, she was appointed to the Bronx County Criminal Court in 1996, and then served on the New York County Criminal Court, on the New York Supreme Court (which, despite its name, is a trial level court) in New York County and Kings County, and on the New York Court of Claims. She served as a judge until May 2002, when she resigned to run an unsuccessful campaign for State Attorney General against Eliot Spitzer. As I mentioned, based on concerns about temperament, a majority of the ABA committee found her to be "Not Qualified" for a federal judgeship and a minority voted to find her "Qualified." The New York City Bar Association's Judiciary Committee also found Judge Irizarry to be unqualified for a position on the federal bench, citing a lack of federal experience and complaints about her judicial temperament. I look forward to hearing her testimony addressing the concerns that have been raised about her nomination.

The Justice Department has asked a number of Judge Irizarry's colleagues and supporters to testify on her behalf. I am very pleased to welcome Judge Lewis L. Douglass, who serves on the New York Supreme Court, and who is a chair of the Franklin H. Williams Commission on Minorities, Presiding Judge Michael L. Pesce, who serves on the Appellate Term of the New York Supreme Court for the Second and Eleventh Districts, and James F. Castro-Blanco, a partner with Shearman and Sterling in New York and the Immediate Past President of the Puerto Rican Bar Association.

I look forward to hearing the perspectives of Judge Irizarry's judicial colleagues, as well as from the Puerto Rican Bar Association. The Puerto Rican Bar supports Judge Irizarry's confirmation and also supported, among others, the confirmation of President Clinton's nomination of Judge Sonia Sotomayor to serve on the Court of Appeals for the Second Circuit. I appreciate the bipartisan approach that the Puerto Rican Bar Association has taken to the nomination process, just as I have appreciated learning the views of other leaders of the Puerto Rican legal community, such as the Puerto Rican Legal Defense and Education Fund, which took a courageous and important stand against the nomination of Miguel Estrada to the D.C. Circuit. I look forward to hearing your views on the nomination of Judge Irizarry.

We are honored to have such distinguished witnesses appearing before the Senate Judiciary Committee today.

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CHAMBERS OF
STERLING JOHNSON, JR.
JUDGE

United States District Court
Eastern District of New York
225 Cadman Place East
Brooklyn, New York 11201

September 29, 2003

Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

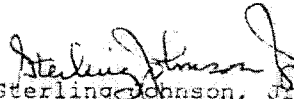
I write this letter in support of Dora Irizarry's nomination to be a Judge of the United States District Court.

I have known Dora since 1981 when she became an Assistant District Attorney on my staff at the Special Narcotics Prosecutor's Office for New York City. She served with me until 1991, when I was appointed to the bench after being nominated by President Bush. During the ten years that Dora served with me she was an excellent prosecutor. She wrote well, was a superb trial attorney and got along with members of the bar and bench. Her strength, however, was being able to bring competing law enforcement interests together. I am reminded of a very significant case on which my office worked with the FBI and DEA. The case spanned several states and involved a couple of foreign countries. Dora, as the lead prosecutor on the case, kept the law enforcement agencies cooperating with each other, and the investigation was a huge success. Because of the jurisdictional problems it was decided that the case would best be tried in Federal court. Dora was cross-designated as a Special Assistant United States Attorney and tried the case successfully with an Assistant United States Attorney in the Southern District of New York. Dora's work on this case exemplified for me her diplomacy and skillfulness.

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Without reservation I enthusiastically endorse her candidacy and look forward to working with her as a colleague.

Sincerely,


Sterling Johnson, Jr.
Senior United States
District Judge

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Appellate Term
Supreme Court of the State of New York
2nd and 11th Judicial Districts

MICHAEL L. PESCE
PRESIDING JUSTICE

SUPREME COURT CHAMBERS
360 ADAMS STREET
BROOKLYN, N.Y. 11201-3712
(718) 643-7078

September 26, 2003

Hon. Orrin G. Hatch
Chairman, Senate Committee on the Judiciary
Dirksen Senate Office Building, Room 224
Washington, DC 20510

Dear Senator Hatch:

My knowledge of Judge Dora Irizarry is based on the eighteen months during which she sat in Kings County (Brooklyn, NY). At that time I was the Administrative Judge of the 2nd Judicial District (Brooklyn & Staten Island, NYC) and Judge Irizarry was under my immediate supervision. She sat in the Supreme Court, Criminal Term, in a Calendar/Trial Part.

The Supreme Court of the State of New York is the primary trial court for the state. Serious (felony) offenses and civil matters of substantial nature comprise the large majority of cases filed with the Court.

In addition to the direct knowledge I obtained of Judge Irizarry, I was intimately knowledgeable of her performance when she was in other jurisdictions by virtue of the continuous communications I had with administrative judges of the other jurisdictions.

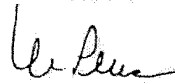
Judge Irizarry's performance while in Kings County was exceptional, both in trial and calendar work. This is based on the feedback received from both the defense attorneys and the prosecutors. As a result of that success, I transferred Judge Irizarry to a Calendar Part. Of the nearly 48 court parts in the Criminal Term, only six were Calendar Parts. Such parts were very demanding and sometimes described as stressful. Very few judges were capable of managing these parts effectively. Judge Irizarry was one of them. I too worked in a Calendar part. In twenty-three years as a Judge, the five years in a Calendar part were the most difficult. The judge in such a part is constantly "confronting" attorneys who routinely present issues oftentimes intended to delay the conclusion of the case. If a judge in such a part is not firm in temperament, it ultimately results in the attorneys managing the court's calendar! This may not have made Judge Irizarry likeable with members of the Bar, but it was vital and necessary to the success of the Calendar Part.

Her cooperation with colleagues was outstanding, considering that it involved a bench of over 100 judges. That too was not an easy task, but it was critical to her success as a Calendar Judge. Given Judge Irizarry's success in her "judge" work, I engaged her in "extra judicial" work. I appointed her to work with other judges on a number of projects which I initiated in the Judicial District.

Judge Irizarry is knowledgeable of the law. She displayed an excellent work ethic and correct demeanor as a judge. She was strict but very even-handed and objective in the cases she handled and in the operation of her courtroom. I strongly recommend her for Judge of the Eastern District.

In closing, I thought it would be of some interest for you to know that a prevalent complaint attorneys would express about Judge Irizarry was that she "...tries to run the courtroom like it's the Federal Court". As it is said, I rest my case!

Very truly yours,



Michael L. Pesce

MLP/ks