

# CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

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## HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE ONE HUNDRED FIRST CONGRESS

SECOND SESSION

ON

CONFIRMATION HEARINGS ON APPOINTMENTS TO THE FEDERAL  
JUDICIARY

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MARCH 1, 7, 22, APRIL 4 AND 5, 1990

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**CONFIRMATION HEARING ON: DAVID H.  
SOUTER, SAMUEL A. ALITO, JR., JAMES F.  
McCLURE, JR., AND LAWRENCE M. McKENNA**

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**THURSDAY, APRIL 5, 1990**

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

The committee met, pursuant to notice, at 2:09 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Edward M. Kennedy presiding.

Present: Senators Kennedy, Specter, and Humphrey.

Senator KENNEDY. We will come to order.

We have some very distinguished nominees for extremely important positions, and we are going to be anticipating a vote in a very short period of time. The way that we will proceed is I will put my statement in the record. I know there are many people here, including the nominees, who would want to hear some good words, but I will put my statement in the record.

[The prepared statement of Senator Kennedy follows:]



STATEMENT OF SENATOR EDWARD M. KENNEDY  
SENATE JUDICIARY COMMITTEE NOMINATIONS HEARING  
APRIL 5, 1990

The Constitution divides between the President and the Senate the responsibility to ensure that qualified men and women are appointed to the federal courts. We have few more important responsibilities, as Senators, for the persons we confirm will determine in large measure the quality of justice in America.

Today, the Judiciary Committee conducts its 13th hearing on judicial nominations by President Bush during this Congress. By and large, the members of the committee have worked together in a spirit of bipartisan cooperation to expedite the confirmation process.

But speed is not as important in making nominations, or in confirming them, as quality is. As Justice Potter Stewart once wrote in another context, "There's more to swift justice than just swiftness." We all should bear that in mind in considering judicial nominations.

I might add that I feel right at home chairing this hearing with Senator Thurmond, the ranking Republican member of

the Committee. Ten years ago, I was chairman of the Committee, and Senator Thurmond was the ranking Republican. For six years, from 1981 to 1986, he was chairman of the Committee. Mr. Chairman, let me just say that I like you better as the ranking Republican member.

Today's nominees are fortunate to have distinguished members of the Senate here to introduce them. I look forward to the introductions and to their testimony.

Senator KENNEDY. I will ask our colleagues, if they would, who have come to introduce or present these nominees, to be good enough to come to the table. It would be the intention of the Chair to recognize Senator Humphrey, and then Senator Heinz, our other colleague, and then Senator Rudman last, and then we will go the various nominees. That is the way we will proceed.

Senator Humphrey, we are glad to have you here.

**STATEMENT OF THE HONORABLE GORDON J. HUMPHREY, A U.S.  
SENATOR FROM THE STATE OF NEW HAMPSHIRE**

Senator HUMPHREY. Thank you, Mr. Chairman. It is a very great pleasure to introduce to our colleagues a nominee to the bench whose qualifications are so superior, they speak for themselves. And since they so eloquently speak for themselves, I can be very brief.

David Souter graduated magna cum laude from Harvard, where he was a member of Phi Beta Kappa. He was awarded a Rhodes Scholarship and earned advanced degrees at Oxford University. He then obtained his law degree at Harvard Law School.

With credentials like these, David Souter could have spent his career earning millions of dollars with a blue chip law firm somewhere. Instead, he has devoted most of his career to public service, to the benefit of the people of New Hampshire.

He has worked his way from assistant attorney general to deputy attorney general, and finally was appointed to New Hampshire's top legal post, State attorney general, in 1976. In these positions, he handled the most important criminal and civil legal issues in our State with consistent excellence.

Senator Rudman, who was our attorney general when Justice Souter was deputy attorney general, can speak firsthand to the excellence of Justice Souter's performance in handling our State's legal affairs.

Justice Souter was then appointed to New Hampshire's Superior Court. There, he established an excellent record as a trial judge. His superior performance as trial judge led to his appointment in 1983 as a member of New Hampshire's highest court, the supreme court. Justice Souter's opinions demonstrate sound legal judgment, thorough scholarship, and a keen understanding of the Constitution. He is fair and he is thorough.

It is also instructive to note that Justice Souter is admired on both sides of the political spectrum in New Hampshire. Several prominent Democrats, members of the New Hampshire Bar, have enthusiastically confirmed the view that Justice Souter is an excellent choice for the Federal bench.

Mr. Chairman, Justice Souter's career demonstrates both professional excellence and proven commitment to the highest standards of public service, and therefore I join with great pleasure my colleague, Senator Rudman, in endorsing David Souter's confirmation, and urge the committee to promptly report the nomination to the floor.

Thank you, Mr. Chairman.

Senator KENNEDY. Thank you very much. We are delighted to have you here, Senator, and we are glad to have your strong words of support.

Senator HUMPHREY. Thank you.

Senator KENNEDY. Thank you very much.

Senator Heinz.

**STATEMENT OF THE HONORABLE JOHN HEINZ, A U.S. SENATOR  
FROM THE STATE OF PENNSYLVANIA**

Senator HEINZ. Mr. Chairman, thank you very much. I have a prepared statement I would like unanimous consent to place in the record.

Senator KENNEDY. It will be placed in its entirety in the record.

Senator HEINZ. Mr. Chairman, it is not often I have an opportunity to come before this committee to introduce somebody who literally has the law running and coursing through his veins, but the person I am privileged to introduce to you today, Judge James F. McClure, Jr., is indeed such a person.

He is the third of four generations of practicing lawyers from the area he hails from. His grandfather, the Honorable Harold McClure, was president judge of the 17th Judicial District from 1891 to 1911. His father practiced law in Lewisburg until his death in 1976, and his daughter, Holley McClure Kerwin, a 1979 graduate of Dickinson Law School, is also practicing law in the area.

Mr. Chairman, as you may know, Senator Specter and I have for many years maintained a judicial merit selection commission, and they are charged affirmatively with seeking out the most talented members, men and women, in each of our judicial districts in the State. The result is that we are pleased to present to the committee Jim McClure, no relation to our colleague, Jim McClure, but just as distinguished.

I could tell you that he has an excellent academic record; he does. He is a Phi Beta Kappa. He has had a distinguished career not only in law school, but on the bench. Indeed, he was first appointed to the bench through another merit selection process, that one established by Governor Thornburgh, now Attorney General of the United States Thornburgh, in 1985.

But what I would particularly commend to the attention of the committee is that Judge McClure has a tremendous record of service to his community that isn't subsumed in the jobs and professional responsibilities—and they are many—that he has held.

He is, among other things, a veteran. He has been chairman of the Lewisburg Planning Commission. He has been president of the Lewisburg School Board. He has been a member of the board of trustees of the YMCA. Clearly, he has been, and he continues to be an active contributor to his community and to this nation.

As the president judge in the 17th Judicial District, he has had the opportunity not only to try, but to rule on every conceivable kind of case, both civil and criminal. And Senator Specter and I know, indeed we are convinced, that you will agree that Judge McClure possesses the kind of experience, the approach to the law, the respect for legal traditions, the sense of justice, the kind of wisdom that we all believe should be part and parcel of being not

only nominated for, but being confirmed into this lifetime position of responsibility.

So it is with great pleasure, Mr. Chairman, that I am privileged to present President Bush's nominee for the Middle Judicial District in Pennsylvania, Judge McClure.

[The prepared statement of Senator Heinz follows:]

M  
EMARKS OF SENATOR JOHN HEINZ  
BEFORE THE JUDICIARY COMMITTEE  
NOMINATION OF JAMES F. MCCLURE, JR.  
UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF PENNSYLVANIA

MR. CHAIRMAN, IT IS A PLEASURE TO JOIN WITH MY  
COLLEAGUE, SENATOR SPECTER TO INTRODUCE TO THE COMMITTEE  
JUDGE JAMES F. MCCLURE, JR., THE PRESIDENT'S NOMINEE TO  
BECOME UNITED STATES DISTRICT COURT JUDGE FOR THE MIDDLE  
DISTRICT OF PENNSYLVANIA.

MR. CHAIRMAN, SINCE HIS GRADUATION FROM THE UNIVERSITY  
OF PENNSYLVANIA SCHOOL OF LAW SOME 33 YEARS AGO, JIM  
MCCLURE, HAS COMPILED AN IMPRESSIVE RECORD OF EXPERIENCE IN  
THE AREAS OF CRIMINAL, CIVIL, TAX, BUSINESS, CORPORATE, AND  
BANKING LAW. THIS BROAD EXPERIENCE ENCOMPASSES BOTH THE  
PRIVATE SECTOR AS A PRACTITIONER IN A PRIVATE LAW FIRM AND  
THE PUBLIC SECTOR AS A DISTRICT ATTORNEY FOR UNION COUNTY  
PENNSYLVANIA.

MR. CHAIRMAN, ONE OF THE MOST IMPORTANT  
RESPONSIBILITIES I PERFORM AS A SENATOR IS MY CONSTITUTIONAL  
RESPONSIBILITY TO CONFIRM FEDERAL JUDICIAL NOMINEES. THIS  
IS A TASK THAT I DO NOT TAKE LIGHTLY. IN MY YEARS IN  
WASHINGTON PERFORMING THIS ROLE I HAVE FOUND THAT WHILE IT

IS EXTREMELY IMPORTANT THAT WE FIND PERSONS FOR JUDICIAL OFFICE WITH EXCEPTIONAL LEGAL OR JUDICIAL CREDENTIALS IT IS NOT THE MOST IMPORTANT CHARACTERISTIC OF A GOOD JUDGE. I POSIT TO YOU THAT THE MOST IMPORTANT CHARACTERISTIC OF A GOOD JUDGE IS THAT PERSONS'S UNDERSTANDING AND CONCERN FOR THE COMMUNITIES THEY SERVE.

MR. CHAIRMAN THIS POSITION IS A LIFETIME APPOINTMENT AND THEREFORE, GREAT WEIGHT SHOULD AND IN FACT MUST BE GIVEN TO THE CONNECTION THAT CANDIDATES HAVE TO THE COMMUNITIES THEY SERVE.

MR CHAIRMAN, JUDGE MCCLURE WAS BORN AND RAISED IN THE JUDICIALDISTRICT FOR WHICH HE WAS NOMINATED. HE HAS PRACTICED LAW IN THE DISTRICT--HE NOT ONLY UNDERSTANDS THE LAW BUT HE ALSO UNDERSTANDS THE PEOPLE OF THE MIDDLE JUDICIAL DISTICT OF PA.

MR. CHAIRMAN, JUDGE MCCLURE HAS SERVED AS PRESIDENT JUDGE OF THE COURT OF COMMON PLEAS FOR THE 17TH JUDICIAL DISTRICT OF PENNSYLVANIA. HE IS A VETERAN, HE HAS BEEN CHAIRMAN OF THE LEWISBURG PLANNING COMMISSION, PRESIDENT OF THE LEWISBURG SCHOOL BOARD AND MEMBER OF THE BOARD OF TRUSTEES OF THE YMCA. CLEARLY, HE HAS BEEN AND CONTINUES TO

BE AN ACTIVE CONTRIBUTOR TO THIS NATION AND TO HIS  
COMMUNITY.

MR. CHAIRMAN, JUDGE MCCLURE'S NOMINATION THIS AFTERNOON HAS A GREAT SIGNIFICANCE FOR THE CITIZENS OF PENNSYLVANIA. JIM IS A SEASONED, EXPERIENCED JUDGE. DURING HIS YEARS AS A DISTRICT ATTORNEY AND THEN AS PRESIDENT JUDGE OF THE COURT OF COMMON PLEAS HE HAD THE OPPORTUNITY TO NOT ONLY TRY BUT TO ALSO RULE ON NUMEROUS CIVIL AND CRIMINAL CASES. JUDGE MCCLURE KNOWS WHAT IT TAKES TO BE A GOOD JUDGE AND I BELIEVE POSSESSES THE EXPERIENCE, THE APPROACH TO THE LAW, THE SENSE OF JUSTICE, AND KIND OF WISDOM THAT I THINK WE ALL WOULD WANT TO SEE IN A JUDICIAL CANDIDATE FOR THE BENCH.

SO I URGE THIS COMMITTEE TO ACT EXPEDITIOUSLY ON HIS CONFIRMATION AS JUDGE ON THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.



Senator KENNEDY. Thank you very much. We are delighted to have your recommendation and we appreciate your taking the time to come here.

We can see the eloquence of our colleagues is going higher and higher, and we can't wait to hear Frank Lautenberg speak and then we leave the final batting position to Warren Rudman.

Senator LAUTENBERG. Mr. Chairman, I wonder—Senator Bradley is on his way. We have a vote on now and I wondered how the Chair—

Senator KENNEDY. We would like to hear from you.

Senator LAUTENBERG. Senator Bradley is on his way. Can I invite Mr. Alito to sit with me?

Senator KENNEDY. Sure, fine.

Senator LAUTENBERG. I will try to talk long enough, Mr. Chairman, until Senator Bradley—

Senator KENNEDY. That never stopped you before.

**STATEMENT OF THE HONORABLE FRANK R. LAUTENBERG, A U.S. SENATOR FROM THE STATE OF NEW JERSEY**

Senator LAUTENBERG. Thank you very much, Mr. Chairman. I appreciate your holding this hearing and review of the candidacy of Mr. Samuel Alito, Jr. I am pleased to join Senator Bradley in introducing him and to recommend him for a position on the U.S. Court of Appeals for the Third Circuit.

As you may observe, Mr. Chairman, Mr. Alito is very young, and we hope that he will have many years of service and opportunity as a young person to distinguish himself on the bench.

He is an accomplished and distinguished lawyer. He has dedicated himself to government service and he has excelled. Like Senator Bradley, he is a Princeton University graduate. I don't think he played basketball as well as Bill, but he was a member of Phi Beta Kappa. He attended Yale School where he was an editor of the law journal.

He served in the Army Reserve after law school and then worked briefly in private practice. He clerked for a distinguished judge, Judge Leonard Garth, whom he would join on the third circuit.

Sam Alito has extensive experience as an appellate litigator. He served for almost 4 years as an assistant U.S. attorney in New Jersey and went on to the prestigious office of solicitor general. He served in the Office of Legal Counsel as a deputy assistant to the Attorney General, and then returned to New Jersey as our U.S. attorney in 1987. I supported his nomination to that position.

As chief Federal prosecutor for one of the largest districts in the country, he has led the effort to fight big-time drug rings and organized crime. He has made environmental crime a high priority. He has the complete respect of the bar in our State. The ABA panel that reviewed his nomination unanimously rated him well qualified.

Mr. Chairman, it is worth noting that for virtually all of his professional career, Sam Alito has had just one client, the Government of the United States. He has represented that client with skill and integrity, and he has been a strong and effective advocate.

As a judge, he is going to have to make an important transition, and I am sure it is one he has thought about for a long time. He will have to shed the loyalties he has had to the office he led. When the law and the facts demand it, he is going to need the strength to rule against the Government. He has to be impartial, thoughtful and fair, and I believe he has the experience and the tools to be that kind of a judge. While he won't have the Government as a client, he will still serve the public, and he will serve the same cause, justice, as our adversarial system is designed to achieve it.

Mr. Chairman, I am pleased to commend Mr. Alito to you, and I thank you once again for moving expeditiously to review his nomination.

Senator KENNEDY. Mr. Alito, we are delighted to have you here. I think we will probably recess and then we will hear our other colleagues, should they be here, briefly, and then go on to the nominees.

So we will stand in recess subject to the call of the Chair.

[Recess.]

Senator KENNEDY. I am sure this is very reassuring to those who are going to serve on the judiciary, the way that this institution functions and works. In the course of our hearings today, of course, we always like to hear our colleagues and we are going to hear from—Senator Lautenberg is back. We rarely get a Senator that keeps coming back for a second appearance, but we are delighted, Frank, anyway.

Senator Bradley.

**STATEMENT OF THE HONORABLE BILL BRADLEY, A U.S.  
SENATOR FROM THE STATE OF NEW JERSEY**

Senator BRADLEY. Thank you very much, Mr. Chairman. I am pleased to introduce to the Judiciary Committee, Mr. Sam Alito, who has been nominated to fill a vacancy on the U.S. Court of Appeals for the Third Circuit.

For the past 3 years, he has served as U.S. attorney for the District of New Jersey, a post he has filled with distinction. This should come as no surprise, since that has been the mark of both his educational and professional careers.

A graduate of Princeton University and Yale Law School, Sam Alito has spent most of his 14-year legal career in public service. He clerked for one of the third district's outstanding judges, Leonard Garth. Subsequently, he joined the U.S. attorney's office for the District of New Jersey as an assistant U.S. attorney.

After 4 years in the U.S. attorney's office, he came to Washington, first in the Solicitor General's office as an assistant, then in the Attorney General's office as a deputy assistant attorney general in the Office of Legal Counsel.

As you can see, Sam Alito has extensive experience as a practitioner in the Federal court system, regularly appearing in both civil and criminal matters. During the time he has served as U.S. attorney for New Jersey, he has had a reputation of being tough, but fair. Without a lot of fanfare, without calling daily press con-

ferences, he has inspired his office with a low key sense of professionalism.

You might be interested in a comment Judge Garth, his mentor and soon to be his colleague, made about Mr. Alito. When asked to rate Sam on a scale of 1 to 10, he gave him a 16½, which is an indication of high praise from a tough reviewer. It's the way someone on the court of appeals takes liberty with the parameters of any request.

So let me tell you I am very pleased to be here to introduce him to the committee. He is also relatively young, I would say, compared to many others, which means he has an opportunity to make a contribution for a long time, and a contribution that I think will stand the test of time. And I am very pleased to be here today to back him a hundred percent.

Senator KENNEDY. Very fine. We are delighted to have you, as well as Senator Lautenberg here, and we thank you very much for coming, Senator Bradley.

I noted Senator Specter was here as a member of the committee as well.

Senator Rudman, and we will ask Justice Souter to come forward, if he would. We are glad to welcome Senator Rudman to the committee, a former State attorney general who has taken a great deal of interest in a wide variety of different matters affecting our judicial system—legal services programs and other issues as well. So we are very glad to have him as well as our other colleagues here.

Senator Rudman.

**STATEMENT OF THE HONORABLE WARREN RUDMAN, A U.S.  
SENATOR FROM THE STATE OF NEW HAMPSHIRE**

Senator RUDMAN. Mr. Chairman, thank you very much. I must tell you, Mr. Chairman, this is a very special day for me. I met David Souter some 20 years ago when I became attorney general of New Hampshire. He was then a young assistant attorney general in that office.

It took me a very short time to recognize that there was an unusual talent in that office that ought to be recognized, and it was not long before now Justice Souter became my deputy. He went onto become attorney general of New Hampshire, to serve in our trial court and presently serves in our highest court.

Senator Humphrey has told you of his extraordinary educational background, including his Rhodes Scholarship at Magdalen College at Oxford, where he received two degrees. But I am here simply to tell you of his qualifications, as someone that worked with him for a long time. I am sure the chairman will know what I mean when I tell him that one of the greatest satisfactions of serving here in the Senate is to be able to recommend people who are highly qualified for public service.

I decided a long time ago, never dreaming I would be here in the U.S. Senate, that could I do so, I would like to have this man at the highest levels of the Federal judiciary that he could attain. Thus, when my very good friend, Hugh Bownes, elected to go on senior status from the circuit, I was delighted that, by consensus in our

State, there was no question as to which person in New Hampshire should move on to the First Circuit Court of Appeals.

It is unusual, even in a State as small as New Hampshire, that by consensus everybody said if David Souter wishes to leave the New Hampshire Supreme Court, then he ought to be on the first circuit.

The chairman knows, as I know, that we in New England hold that circuit in very special and high regard. It has had a long history of excellence, and Justice Souter will add to that history of excellence.

I hope that some of your staff and some of the committee members have had a chance to look at some of the opinions that Justice Souter has written as a member of our court. They are known not only in our State, they are known in many parts of our country for their crispness, for their strength of reason, for their clarity, and for the intellectual attainment that those opinions reflect.

And so, Mr. Chairman and Senator Specter, I repeat, this is a very special day for me. Twenty years ago when I was attorney general of New Hampshire, at the beginning of that term it occurred to me that somehow, some place, I could take this then very young man, still a young man, but a very young man, and help him to achieve whatever his aspirations were.

And so that is why I chose to be last to sit here with him and to savor the moment because it has been something that has meant a great deal to me and to my colleagues in New Hampshire.

I have here something that arrived in the mail today which I will ask the chairman to place in the record—unusual for our bar association. They sent me a copy of a resolution they adopted commending Justice Souter to the committee and to the Senate, and I will give this to your clerk.

I thank you for the courtesy of appearing before this very distinguished committee today.

Senator KENNEDY. We will make that a part of the record.

[The resolution referred to follows:]



## NEW HAMPSHIRE BAR ASSOCIATION

112 PLEASANT STREET • CONCORD, NEW HAMPSHIRE 03301  
603-224-6942 • FAX: 603-224-2910

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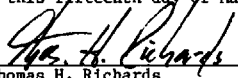
WHEREAS, David H. Souter has been a member of the New Hampshire Bar Association for twenty-four years, and

WHEREAS, he has been active within the Bar and the community and has served with distinction as New Hampshire Attorney General, as a member of the New Hampshire Superior Court bench and most recently as an Associate Justice on the New Hampshire Supreme Court bench, and

WHEREAS, throughout his legal career he has demonstrated exceptional legal knowledge and competence and outstanding judicial intellect and proficiency, and

WHEREAS, he has been nominated by President Bush to serve on the United States Court of Appeals for the First Circuit,

BE IT RESOLVED, that the New Hampshire Bar Association, on behalf of its 3,400 members, acting through its Board of Governors, unanimously and enthusiastically supports and endorses the nomination of David H. Souter and proudly commends its respected member for confirmation to the Federal Bench by the United States Senate, this fifteenth day of March 1990.

  
\_\_\_\_\_  
Thomas H. Richards  
President

Senator KENNEDY. Justice Souter, we are glad to have you here. Judge SOUTER. Thank you, Mr. Chairman.

Senator KENNEDY. Would you be kind enough to rise, please?

Do you swear that the information you give here at the committee is the truth, the whole truth, and nothing but the truth, so help you God?

Judge SOUTER. I do.

Senator KENNEDY. Justice Souter, is there anyone that you wish to introduce here?

**TESTIMONY OF DAVID H. SOUTER, CONCORD, NH, TO BE U.S.  
COURT OF APPEALS JUDGE FOR THE FIRST CIRCUIT**

Judge SOUTER. No. Thank you, sir.

Senator KENNEDY. Are there any comments that you would like to make before I get into just a couple of questions?

Judge SOUTER. No, thank you, Mr. Chairman. I am ready for your questions.

Senator KENNEDY. You have been on the New Hampshire Supreme Court for about 7 years, and you served on the State superior court for 5 years before that. You joined or authored hundreds of opinions. There are a couple that I would like to ask you about briefly, and I understand my staff has let you know what they are.

Judge SOUTER. That is right.

Senator KENNEDY. Both deal with criminal law issues. In one, you ruled in favor of the Government, and in the other in favor of the defendant. The first is *State v. Coppola*. There you authored an opinion for the court upholding a conviction following a trial in which the trial judge refused to exclude from evidence the defendant's statement when he was questioned by the police at his home, quote, "I am not one of your country bumpkins. I grew up on the streets of Providence, Rhode Island, if you think I am going to confess to you, you are crazy."

You upheld the trial judge's ruling largely because you construed the statement as carrying with it the necessary implication that the defendant had something to confess about. The U.S. Court of Appeals for the First Circuit, the court on which you will sit if confirmed, threw out the conviction in an opinion that was rather critical of the views you expressed.

Let me read from the court's opinion:

Any refusal to speak, no matter how couched, in the face of police interrogation, raises an inference that the person being questioned probably has something to hide. Under the reasoning of the New Hampshire court, any pre-arrest invocation of the privilege, no matter how worded, could be used by the prosecutor in his case in chief because it raises an inference of guilt. Such logic ignores the teaching that the protection of the Fifth Amendment is not limited to those in custody or charged with a crime.

Do you have any response to the first circuit's criticism of your opinion?

Judge SOUTER. Well, I do. Just having heard Senator Rudman give me credit for clarity, I think the first thing I have to admit is that apparently I was not clear enough for the first circuit.

I think there are really two points that should be made about the disagreement between my court and the opinion that I authored and the opinion of the first circuit, which, by the way, was au-

thored by Judge Bownes, who is the judge who has taken senior status.

I think the first is to respond to the quotation that you just read from Judge Bownes in which he indicated that he understood the reasoning of the opinion that I had authored to be that if any statement, at least any precustodial statement, contained both exculpatory—strike that—inculpatory statements as well as an arguable invocation of fifth amendment rights, that the inculpatory statement or the inculpatory aspect of it would always prevail in the court's analysis. And if that was the first circuit's view of it, as I indicated a moment ago, apparently I wasn't as clear as I could have been.

The view which we took and which I took in writing that opinion was that the particular statement which you have quoted was essentially an inculpatory statement and was not, in its context, fairly read as a fifth amendment invocation.

I think the other thing to be said about the disagreement between the Supreme Court and the circuit on that point is that there is no disagreement on the principles applicable to the decision of the case. The first circuit made a point of indicating that, certainly, technical language usage was not necessary for a fifth amendment invocation, and that any such invocation should be read in a fashion liberal to the defendant.

The disagreement between the two courts rather came at the point at which the line should be drawn. Specifically, the defendant made the statement which you have quoted, and that was then followed in the record, as I recall, by a response by the police officer to the effect that all they wanted to do at that point was to give him Miranda warnings and ask him further questions.

And it was after that point in the colloquy that the defendant quite clearly indicated that he did not wish to speak, and any statements which he made after that point were excluded from the record. And I think that, therefore, the nub of the disagreement is that the language which you quoted is language which we read to be essentially inculpatory and not a fifth amendment invocation.

And I think where probably we have to leave the matter is that although we have agreement on basic principles, we don't have agreement on its practice, and I would have to disagree with Judge Bownes' opinion as respectfully as he disagreed with mine.

Senator KENNEDY. Well, the fifth amendment guarantee against compelled self-incrimination is one of the hallmarks of our constitutional scheme of ordered liberties; and if it is to be meaningful, juries must be forbidden to infer guilt from a defendant's refusal to talk to police.

What assurance can you give us that you will not take a crabbed view of the scope of that fundamental constitutional protection?

Judge SOUTER. Well, I think the assurance that the principle that you have just enunciated, I think, goes without saying, or should go without saying, in the mind of any judge, including mine. And the difficulty that comes, and I think that this case illustrates, is at what point is a statement which is, in the first instance, or at least in its first aspect, inculpatory devolve into a fifth amendment invocation. And we saw that point as coming later.

Senator KENNEDY. The other case presented a difficult issue. In *State v. Kolba*, you authored a unanimous opinion for the New Hampshire Supreme Court reversing a conviction of a defendant accused of aggravated rape on the ground that the trial court had excluded evidence about the victim's public behavior with men, including the defendant, in the hours before the alleged assault.

As I understand it, there was testimony that in a bar on the day the alleged rape occurred, the victim had been making suggestive advances directed at several men, including the defendant.

The New Hampshire rape shield statute barred admission of evidence of, quote, "prior consensual sexual activity between the victim and any person other than the defendant." The trial court instructed the jury that the victim's conduct with other individuals is not relevant on the issue of whether or not she gave consent to the defendant.

Your opinion threw out the rape conviction on the ground that the jury should have been permitted to consider the evidence of the victim's alleged advances toward other men on the day of the alleged assault. The opinion said that the rape shield law had to be construed in light of the defendant's constitutional right to a fair trial, and it indicated that because the victim's alleged advances has taken place in public, the defendant's interest in a fair trial had to take precedence over the victim's interest.

That ruling drew some criticism because it appeared to contradict the clear language of the rape shield law. Those laws are very important in assuring that victims of rape are not victimized a second time by the ordeal of a trial.

So if you are confirmed, will you be sensitive to the privacy interests of rape victims?

Judge SOUTER. Yes. I think historically the moment that rape shield laws were first passed, of which New Hampshire's is representative, there was an obvious tension between, on the one hand, the laudable policy of barring a rape prosecution from turning into, in effect, a prosecution of the complaining witness through embarrassing cross-examination, and on the other hand the undoubted right of a defendant under the sixth amendment both to cross-examine as part of his right to confrontation and to present proofs favorable to himself.

And the basic proposition starting, I suppose, or most recently enunciated, I suppose, in *Davis v. Alaska* are applied to these situations. There comes a point at which the testimony which, on the face, is excludable under the rape shield law becomes so relevant and so important to the issue of guilt and innocence that the statute has to yield to the constitutional interests.

This is an issue which has been litigated, or has been litigated in my own State for quite some time, and in a series of cases prior to this one a rule evolved as a general rule of thumb that the behavior of a complaining witness in the period immediately prior to the commission of the offense alleged was generally expected to be relevant and would be the subject of admissible evidence. That, in effect, is exactly the rule that we applied in this case.

As you have pointed out in summarizing the facts, the testimony was, or the testimony which was kept from the jury's consideration was that in a period of hours immediately prior to the complaining



witness' departure with the defendant, she had, in his company and in the company of other people, engaged in what was described as sexually provocative conduct.

The issue in the case, or the point upon which the prosecution really turned was on the point whether the admitted sexual relations that the parties had had were consensual or were not. The defense in the case was consent.

Given that fact, the complaining witness' behavior immediately prior to their departure from the public bar in question had a very high degree of significance. So that was an example of a case which is not unfamiliar to us in which the rape shield law had to yield.

Senator KENNEDY. Well, it is obvious that it does, as you stated very clearly, present some very sensitive, important privacy and constitutional kinds of issues, the way that those shield laws will be interpreted. I think sensitivity to that particular dilemma is something which is enormously important in terms of the balance of the interests, for the reasons I think you pointed out. So we welcome hearing your explanation, and also your concern.

Judge SOUTER. Thank you, sir.

Senator KENNEDY. I don't know whether Senator Specter has any questions.

[Pause.]

Senator KENNEDY. Do you plan to stay here for a few moments, and then if he does, we would ask you to come back?

Judge SOUTER. I certainly will.

Senator KENNEDY. So we will excuse you. We are glad to have you.

Judge SOUTER. Thank you, sir.

Senator KENNEDY. The second nominee, Samuel Alito, Jr., of Newark, NJ, has been nominated to be U.S. Court of Appeals Judge for the Third Circuit.

Would you stand? Do you swear the evidence that you give to the committee is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. ALITO. I do.

Senator KENNEDY. We welcome you here, Mr. Alito. I don't know if there is anyone that you want to present, if you have members of your family here.

**TESTIMONY OF SAMUEL A. ALITO, JR., NEWARK, NJ, TO BE U.S.  
COURT OF APPEALS JUDGE FOR THE THIRD CIRCUIT**

Mr. ALITO. Yes, I would like to, Mr. Chairman. My wife, Martha, is here; my son, Phillip, who is almost 4.

Senator KENNEDY. We are glad to have you.

Mr. ALITO. And my daughter, Laura, is running around someplace.

Mr. P. ALITO. And me, too.

Senator KENNEDY. And who are you? [Laughter.]

Do you want to sit up here with your daddy? Do you want to sit up here? You can sit up here; you can sit in the chair right next to him. We will question you afterwards. [Laughter.]

You will give the real information, the real story. [Laughter.]

Well, we are delighted to have you here. By the age of 40, you have already had a distinguished and varied career in Government service—assistant U.S. attorney, assistant to the Solicitor General, Deputy Assistant Attorney General in the Office of Legal Counsel, U.S. Attorney for New Jersey.

Throughout your career, your client has been the Government. But as a judge you will have to decide the claims of those who assert that they have been treated unfairly by the Government—persons seeking benefits, criminal defendants, victims of Government abuses.

If you are confirmed, will you be able to see both sides of the claims against the Government?

Mr. ALITO. I am confident that I can do that. It is correct that my client has been the U.S. Government throughout my legal career, but if I am confirmed I will make a very conscious effort to be absolutely impartial in cases involving the Government.

During one phase of my career in the Solicitor General's Office, one of the major responsibilities we had was to review cases that the Government had lost in the lower courts and decide whether an appeal should be taken. In many of those cases, I came to the conclusion that the Government had not been correct, that the adverse decision was correct, and that no further review should be taken.

So although I have been a career Government lawyer, I certainly am not under the illusion that the Government's litigation positions are always correct.

Senator KENNEDY (speaking to the nomination of Justice Souter). Thank you very much. We will look forward to supporting your nomination and expediting the Senate's consideration of it as well.

Senator RUDMAN. Thank you, Mr. Chairman.

Senator SPECTER. I concur with Senator Kennedy in this case.

Senator KENNEDY. In this case, cautiously, cautiously.

Senator RUDMAN. Thank you all very much.

Senator KENNEDY. Mr. Alito, you served for 4 years in the Office of Solicitor General, where you had the opportunity to observe at close range the Supreme Court. Based on your experience there, what qualities do you believe are most important for an appellate judge?

Mr. ALITO. I think perhaps the most important quality is open-mindedness to the arguments that are made by the litigants, to pay very close attention to the particular facts and law applicable to the case, and not to try to pigeon-hole the case or to import a judge's own view of the law into the law that should be applied to the case.

Senator KENNEDY. And what qualities make for the most effective advocacy in the Supreme Court?

Mr. ALITO. I think absolute honesty about the facts and about the law, and ability to separate the wheat from the chaff, and to get down to the essential issue that is presented by the case.

Senator KENNEDY. Well, I just join in the commendation. You have obviously had a very distinguished record, and I certainly commend you for long service in the public interest. I think it is a very commendable career and I am sure you will have a successful one as a judge.

Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Mr. Alito, I had thought you might be a little young for the third circuit when I first saw your resume, but you crossed into the promised land on April 1. On Sunday, you turned 40, so you are not as young as you used to be.

You will be joining a very, very prestigious and distinguished court, the Court of Appeals for the Third Circuit. I recollect that Judge Biggs was a little younger than you. Was he 37 when he became a third circuit judge, or maybe you don't know?

Mr. ALITO. I don't know his exact age.

Senator SPECTER. But Judge Becker and the others will regale you with all of the history of all the ages of the people. You do have a very outstanding record, and I join my colleague, Senator Kennedy, in complimenting you on that outstanding record.

Mr. ALITO. Thank you very much, Senator.

Senator SPECTER. In the absence of any large group complaining about your nomination, it appears that you will have clear sailing.

Mr. ALITO. Thank you very much.

Senator KENNEDY. What about that fellow on your left? Does he have any comment? [Laughter.]

We are glad to have you here and we will look forward to supporting you and voting for you. We are glad your family is here, too.

Mr. ALITO. Thank you very much.

Senator KENNEDY. Our third nominee is Judge James McClure, Jr., of Lewisburg, PA, who has been nominated to be U.S. district judge for the Middle District of Pennsylvania.

**STATEMENT OF THE HONORABLE ARLEN SPECTER, A U.S.  
SENATOR FROM THE STATE OF PENNSYLVANIA**

Senator SPECTER. Mr. Chairman, if I might be heard for just a moment, I could not be here when my distinguished colleague, Senator Heinz, introduced Judge McClure. A word or two might be appropriate.

Judge McClure has had a very, very distinguished record. He has served since 1984 in the Court of Common Pleas of Philadelphia for the 17th Judicial District, and before that was a practicing lawyer, and graduated from the University of Pennsylvania Law School, I am advised, fifth in his class, and is a graduate of Amherst College, Phi Beta Kappa, which is a very, very fine academic background.

He will be sitting, I hope, in a satellite court in central Pennsylvania. Senator Heinz and I have been very interested to have satellite courts which will accommodate people in the area so that litigants don't have to travel to the court, but the courts will be located around the State. We finally got one in Johnstown, PA, and are hopeful of opening one in Reading—pardon me—in Lancaster, PA. We have one in Reading now.

Judge McClure brings extraordinary qualifications to this position. His nomination hung in jeopardy for a moment when I found out he knew a man named Donald Cohan, who was my guest for lunch today, and they embraced so warmly in the dining room that I just had a momentary suspicion, but it was soon allayed.

I am very glad to see a man of Judge McClure's caliber come to the Federal bench with the experience and qualifications which he brings to this position. In conclusion, I would say that I am not unbiassed about his credentials as he comes before this committee.

Senator KENNEDY. If Mr. Cohan will give me landing rights on his pier up in Vineyard Haven, your nomination will go through much more quickly. [Laughter.]

Senator SPECTER. And this transcript will be forwarded to the Ethics Committee. [Laughter.]

Senator KENNEDY. Would you stand? Do you swear the testimony you give will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge McCLURE. I do.

Senator KENNEDY. Would you like to introduce members of your family?

**TESTIMONY OF JAMES F. McCLURE, JR., LEWISBURG, PA, TO BE  
U.S. DISTRICT COURT JUDGE FOR THE MIDDLE DISTRICT OF  
PENNSYLVANIA**

Judge McCLURE. Mr. Chairman, I have my wife, Betty Lou, and my daughter, Holley Kerwin, who is an attorney, and her husband, Terry Kerwin, who is also an attorney from Harrisburg; and my court administrator-secretary, Kathy McLaughlin, and her husband, Barry.

Senator KENNEDY. We are delighted to welcome all of you. Thank you for coming.

Judge McClure, in your decision in *Fink v. Packard Press Corporation*, you ruled against a libel claim of a former judge who had been reported by a local newspaper to have, quote, "attempted to perform exorcism in his chambers on a juvenile appearing before him in a delinquency hearing." You held that a libel claim could not be made out against a public official based on such a statement.

And your opinion was quite eloquent in stating your reasons, and I quote, "An unfortunate but unavoidable side effect of the commitment to preserving and encouraging free and open, public debate is that public officials who are harmed by a reporter's error have no remedy in the judicial system." Many of us on this committee can testify to the accuracy and the wisdom of that observation.

But, seriously, would you explain your views on the proper balance to be struck between protecting the individual's reputation, including public officials, from false statements and respecting journalists' as well as other individuals' first amendment rights?

Judge McCLURE. Well, it is a very difficult area, as you realize. In this particular case, the standard that has been set by the U.S. Supreme Court with respect to the first amendment bar, if you will, to libel actions is to protect the free flow of ideas from the press.

And in this case, there must be actual malice shown, even though the statement as printed was incorrect, and in this case I granted summary judgment in favor of the defendants because there was absolutely nothing in the record which would have indicated or provided any evidence to a jury sufficient for them to find

## I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)  
Samuel A. Alito, Jr.
2. Address: List current place of residence and office address(es).  
Home: 14 Seymour Street  
Caldwell, New Jersey 07006  
Office: 970 Broad Street  
Newark, New Jersey 07102
3. Date and place of birth.  
April 1, 1950. 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. Martha-Ann Bomgardner Alito. Librarian.  
Not currently employed.
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.  
1968-1972: Princeton University, A.B. 1972  
1972-1975: Yale Law School, 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.  
January - June 1976: Law clerk, law firm of Warren, Goldberg & Berman, Trenton, New Jersey.  
July 1976 - August 1977: Law clerk, Hon. Leonard I. Garth, U.S. Court of Appeals for the Third Circuit.  
November 1977 - August 1981: Assistant U.S. Attorney, District of New Jersey.  
August 1981 - December 1985: Assistant to the Solicitor General.  
December 1985 - March 1987: Deputy Assistant Attorney General, Office of Legal Counsel.

March 1987 - present: United States Attorney for the District of New Jersey.

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.

I was commissioned as a second lieutenant in the Army upon graduation from college in 1972. After law school, I was on active duty for training from September to December 1975. I was in the Army Reserves from 1972 to 1980, when I was honorably discharged as a captain. My serial number was 149-42-4878.

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

A number of Department of Justice Awards.

Yale Law School: Awards for best moot court argument and best contribution to Yale Law Journal.

Princeton University: Phi beta kappa; selected Scholar of Woodrow Wilson School of Public and International Affairs; McConnell Foundation Scholarship for summer thesis research.

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

Member of Lawyers' Advisory Committee for the United States District Court for the District of New Jersey from 1987 to present.

Association of the Federal Bar of New Jersey, member of the Advisory Board from 1988 to present.

New Jersey State Bar Association, member of Executive Board of Federal Practice and Procedures Committee from 1988 to 1989.

American Bar Association.

Federalist Society for Law and Public Policy Studies.

Advisory Board, Vera Institute of Justice Federal Sentencing Reporter from 1988 to present.

National Environmental Enforcement Council.

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 organization engaged in lobbying.

Other organizations:

Yale Law School Alumni Association of New Jersey.

Princeton Alumni Council Careers Committee.

Princeton Alumni Association of Essex County, N.J.

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

U.S. Court of Appeals for the District of Columbia Circuit, 1987.

New York courts, 1982.

U.S. Court of Appeals for the Second Circuit, 1981.

U.S. Supreme Court, 1979.

U.S. Court of Appeals for the Third Circuit, 1976.

U.S. District Court for the District of New Jersey, 1975.

New Jersey courts, 1975.

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.

"Racketeering Made Simple(r)", in The RICO Racket (copy enclosed).

Documents and the Privilege against Self-Incrimination, 48 U.Pitt.L. Rev. 27 (1986).

Equal Protection and Classifications Based on Family Membership, 80 Dickinson L.Rev. 410 (1976).

The "Released Time" Cases Revisited: A Study of Group Decisionmaking by the Supreme Court, 83 Yale L.J. 1202 (1974).

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

Excellent. May 23, 1989.

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:

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.

1987 - present. U.S. Attorney for District of New Jersey. Appointed.

1985 - 1987. Deputy Assistant Attorney General, Office of Legal Counsel. Appointed.

1981 - 1985. Assistant to the Solicitor General. Appointed.

1977- 1981. Assistant U.S. Attorney. Appointed.

17. Legal Career:

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



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

January - June 1976: Law clerk, law firm of Warren, Goldberg & Berman, Trenton, New Jersey. Supervisor: David J. Goldberg, Esq., Cohen Shapiro Polisher Shiekman & Cohen, 997 Lenox Drive, Lawrenceville, New Jersey 08648, (609) 895-1600.

July 1976 - August 1977: Law clerk, Hon. Leonard I. Garth, U.S. Court of Appeals for the Third Circuit, U.S. Courthouse and Post Office Building, Newark, New Jersey 07102, (201) 645-6521.

November 1977 - August 1981: Assistant U.S. Attorney, 970 Broad Street, Newark, New Jersey 07102. Supervisor: Honorable Maryanne T. Barry, U.S. Courthouse and Post Office Building, Newark, New Jersey 07102, (201) 645-2133.

August 1981 - December 1985: Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530. Supervisor: Rex E. Lee, President of Brigham Young University, Provo, Utah 84602, (801) 378-2521; Professor Charles Fried, Harvard Law School, Cambridge, Massachusetts 02138, (617) 495-3100.

December 1985 - March 1987: Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, Washington, D.C. 20530. Supervisor: Charles J. Cooper, Esq., McGuire, Woods, Battle & Boothe, 1627 I Street, N.W., Suite 1000, Washington, D.C. 10530, (202) 857-1700.

March 1987 - present: United States Attorney for the District of New Jersey, 970 Broad Street, Newark, New Jersey 07102.

- 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?

1976 -1977 - As law clerk, legal research and writing for Judge Leonard I. Garth, U.S. Court of Appeals for the Third Circuit.

1977 - 1981 - As Assistant United States Attorney, criminal litigation for government.

1981 - 1985 - As Assistant to the Solicitor General, civil and criminal litigation for government and federal agencies in U.S. Supreme Court.

1985 - 1987 - As Deputy Assistant Attorney General in the Office of Legal Counsel, providing legal advice for the Justice Department and other executive agencies.

1987 - present - As United States Attorney for the District of New Jersey, civil and criminal litigation for government.

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

All "clients" have been federal agencies. With the exception of time spent as an Assistant United States Attorney doing principally criminal work, my practice has been highly diversified.

- 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.

With the exception of the period when I was in the Office of Legal Counsel (Dec. 1985 - March 1987), I have appeared in court regularly.

2. What percentage of these appearances was in:

- (a) federal courts;
- (b) state courts of record;
- (c) other courts.

All federal.

3. What percentage of your litigation was:

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

About evenly divided between civil and criminal.

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

As United States Attorney (March 1987 to present), I personally served as lead counsel in two criminal cases tried to verdict or judgment, including one involving an attempted terrorist bombing (United States v. Kikumura) in which a verdict of guilty on all counts was reached on stipulated facts following extensive pretrial hearings. This verdict was followed by a detailed factual hearing at which the nature and circumstances of the offenses were proved for purposes of sentencing. In addition, as United States Attorney, I have personally participated in court proceedings or in major trial decisions in more than one dozen cases prosecuted by the office, as well as reviewing in detail the proposed charges and evidence in all major cases prosecuted by the office. During this time, I also personally argued four appeals, three criminal and one civil.

As an Assistant to the Solicitor General, I argued 12 Supreme Court cases, wrote merits briefs or petitions for certiorari in about 50 cases, and was responsible for briefs in opposition to certiorari petitions in more than 200 cases.

As an Assistant United States Attorney, I was associate counsel in a lengthy espionage trial, United States v. Enger, and assisted with other significant trials and investigations. During this time, I also argued more than 20 cases and briefed more than 75 cases in the Third Circuit.

5. What percentage of these trials was:

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

All trials except Kikumura were 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 or 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) Oregon v. Kennedy, 456 U.S. 667 (1982).

Issue was whether the Double Jeopardy Clause prohibits retrial of a criminal defendant who successfully moves for a mistrial on the basis of prosecutorial error that was not intended to provoke the mistrial request. Issue was important because a rule of law prohibiting retrial on these grounds would have substantially impaired society's right to secure a resolution of criminal charges and would have created grave practical

problems for judicial administration.

I was principally responsible for drafting the government's brief as amicus curiae, and I argued the case in the Supreme Court on March 29, 1982.

The Supreme Court sustained our position.

Other counsel were

-Hon. David Frohnmayer, Attorney General of Oregon, Department of Justice, Salem, Oregon 97310, (503) 378-4400.

-Donald C. Walker, Esq., 2302 Lloyd Center, Portland, Oregon, (503) 282-2577.

- (2) Russello v. United States, 464 U.S. 16 (1983).

Issue was whether racketeering profits and proceeds are subject to forfeiture under the RICO statute.

Issue was highly important because forfeiture of illegal profits and proceeds is an important weapon in efforts to combat organized criminal activity.

I was principally responsible for drafting the government's brief, and I argued the case in the Supreme Court on October 5, 1983.

The Supreme Court unanimously sustained our position.

Opposing counsel was Ronald A. Dion, Esq., 18305 Biscayne Boulevard, North Miami Beach, Florida.

- (3) United States v. Villamonte-Marquez, 462 U.S. 579 (1983).

Issue was whether the Fourth Amendment permits Customs officers to board vessels on inland waters for the purpose of inspecting the vessels' documents without a reasonable suspicion of a violation of law.

Issue was important because authority to conduct such boardings was needed to combat drug importation and other crimes.

I was principally responsible for drafting the government's brief, and I argued the case in the Supreme Court on February 23, 1983.

Opposing counsel was Richard P. Ieyoub, Esq., 625 Cleveland Street, Lake Charles, Louisiana, (318) 439-6383.

- (4) United States v. Weber Aircraft Corp., 465 U.S. 792 (1984).

Issue was whether confidential statements made by witnesses in an Air Force air crash safety investigation were protected from disclosure under the Freedom of Information Act.

The Air Force believed that this issue had important implications for safety and readiness.

I was principally responsible for drafting the government's certiorari petition and brief, and I argued the case in the Supreme Court on March 30, 1984.

Our position was unanimously upheld.

Opposing counsel was Jacques E. Soiret, Esq., Kirtland & Packard, 626 Wilshire Boulevard, 6th Floor, Los Angeles, California 90017, (213) 624-0931.

- (5) United States v. Doe, 465 U.S. 605 (1984).

Issues were (1) whether the Fifth Amendment privilege against self-incrimination may be properly invoked by a sole proprietor in response to a subpoena for preexisting business records and (2) whether a person may properly resist compliance with a subpoena duces tecum on the ground that the act of production would be self-incriminating, despite the availability of use immunity with respect to the act of production.

Issues were important in investigations of complex criminal activity.

I was principally responsible for drafting the government's certiorari petition and brief, and I argued the case in the Supreme Court on December 7, 1983.

Our position substantially prevailed, although the Court held that statutory, not informal, immunity was needed.

Opposing counsel was Richard T. Philips, Esq., Stryker, Tams & Dill, 33 Washington Street, Newark, New Jersey 07102, (201) 624-9300.

- (6) Community Television of Southern California v. Gottfried, 459 U.S. 498 (1983).

Issue was whether the Federal Communications Commission, in a broadcast licensing proceeding concerning a public television station, must make an independent assessment of the station's compliance with Section 504 of the Rehabilitation Act (prohibiting handicap discrimination) even through enforcement of that provision is committed to other federal agencies.

Issue was important to ensure that the congressionally mandated scheme for enforcement of the Rehabilitation Act was followed.

I was principally responsible for drafting the FCC's certiorari petition and briefs, and I argued the case in the Supreme Court on October 12, 1982.

Our position was sustained.

Other counsel were:

-Edgar F. Czarra, Jr., Esq., (for Community Television), Covington and Burling, 1201 Pennsylvania Avenue, N.W., Washington, D.C. 20044, (202) 662-6000.

-Charles M. Firestone, Esq., (for Gottfried) Mitchell, Silberberg & Knupp, 11377 West Olympic Boulevard, Los Angeles, California 90064, (213) 312-2000.

- (7) Federal Communications Commission v. League of Women Voters of California, 468 U.S. 364 (1984).

Whether 47 U.S.C. 399, which prohibited "editorializing" by public broadcasting stations that received grants from the Corporation for Public Broadcasting, violated the First Amendment.

The case was significant because it involved the constitutionality of an Act of Congress and an important First Amendment issue. I was

substantially responsible for drafting the government's brief, and I argued the case in the Supreme Court on January 16, 1984.

The statute was struck down by a vote of five to four. In 1979, the Attorney General had refused to defend the statute, concluding that no reasonable arguments could be advanced to support it. Following appearance by U.S. Senate counsel to defend the statute, the Justice Department undertook the defense.

Opposing counsel was Frederic D. Woocher, Esq., 3580 Wilshire Boulevard, Suite 800, Los Angeles, California 90010, (213) 736-2261.

- (8) Chemical Mfrs. Ass'n. v. Natural Resources Defense Council, 470 U.S. 116 (1985).

Issue was whether the Clean Water Act bars the Environmental Protection Agency (EPA) from granting variances for toxic pollutants to plants having fundamentally different factors from those considered by EPA in establishing national standards.

Issue was important because the lower court decision prohibiting such variances threatened to interfere with the EPA's longstanding plan for implementing the Clean Water Act, to imperil the existing categorical standards, and to delay the promulgation of new pretreatment standards.

I was principally responsible for drafting the certiorari petition and briefs for the EPA, and I argued the case in the Supreme Court on November 6, 1984.

The Supreme Court sustained our position.

Other counsel were:

-Frances Dubrowski, Esq., (for the NRDC), 1350 New York Avenue, N.W., Washington, D.C. 20005, (202) 783-7800.

-Theodore L. Garrett, Esq., (for the CMMA), Covington & Burling, 1201 Pennsylvania Avenue, N.W., Washington, D.C. 20044, (202) 662-6000.



(9) Atkins v. Parker, 472 U.S. 115 (1985).

Issue was whether the notice given to food stamp recipients in connection with a congressional amendment of eligibility requirements violated due process.  
The case involved an important due process issue.

I argued the case in the Supreme Court on November 27, 1984, on behalf of Agriculture Secretary Block.

Our position was upheld.

Other counsel were:

-Ellen L. Janos, Esq. (for Massachusetts), Gaston & Snow, One Federal Square, Boston, Mass. 02110, (617) 426-4600.

-Steven A. Hitov, Esq. (for Parker et al.), 192 Willow Street, Roxbury, MA. 02032, (617) 325-6417.

(10) United States v. Inadi, 475 U.S. 387 (1986).

Chief issue was whether the Confrontation Clause bars the prosecution from introducing statements falling within the co-conspirator exception to the hearsay rule unless the prosecution establishes that the declarant is unavailable to testify at trial.

This issue was of great practical significance in criminal trials.

I was substantially responsible for drafting the government's briefs.

Our position was upheld.

Opposing counsel was Holly Maguigan, Esq., 1420 Walnut Street, Philadelphia, Pennsylvania, (215) 387-5286.

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.)

One of the important responsibilities of the Solicitor General is to decide whether the government should appeal adverse district court and court of appeals cases. In many cases, the Solicitor General refuses to authorize further review despite the objection of the litigating division or agency. As an Assistant to the Solicitor General, I analyzed and wrote extensive recommendations regarding whether further review should be sought in over 200 such cases.

In the Office of Legal Counsel, I assisted in providing legal advice to the Justice Department and other executive agencies on a very broad range of difficult legal issues, on many of which there was sharp division between government agencies. I wrote or supervised the preparation of approximately 50 such memoranda.

I have regularly served as an instructor for the New Jersey Institute for Continuing Legal Education on topics relating to federal criminal practice.

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 would adhere to the applicable standards for disqualifications, including Canon 3C of the Code of Judicial Conduct, 18 U.S.C. 207, and related regulations. I would adhere to Canon 5 to minimize the risk of future conflicts.

I do not believe that conflicts of interest relating to my financial interests are likely to arise. I would, however, disqualify myself from any cases involving the Vanguard companies, the brokerage firm of Smith Barney, or the First Federal Savings & Loan of Rochester, New York.

I would disqualify myself from any case involving my sister's law firm, Carpenter, Bennett & Morrissey, of Newark, New Jersey.

I would disqualify myself from any case in which I participated or that was under my supervision in the United States Attorney's Office or in any prior position.

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.)

Copies of my financial disclosure reports filed in 1989 and 1988 are attached.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

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.

## 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.

Because I have been a Department of Justice attorney for virtually my entire professional career, I have been restricted by federal regulation (28 C.F.R. 45.735-9) with respect to outside pro bono work. I believe, however, that employment as a government attorney is a form of public service.

While in law school, I worked one summer for the New Jersey Public Defender in Trenton.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

I have never belonged to any such organization.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

To my knowledge, there is no selection commission in New Jersey.

I believe that I was recommended to the Justice Department by attorneys familiar with my work. I also personally discussed my interest in a judgeship with Department officials. I was interviewed by officials from the Department of Justice, and I completed documents for the Federal Bureau of Investigation and the American Bar Association.

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 such discussion occurred.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Under our constitutional system, the federal judiciary has critical responsibilities, including the preservation of individual rights, which it must not hesitate to discharge despite popular or academic criticism. In fulfilling these responsibilities in cases properly brought in the federal courts, the judiciary should make appropriate use of sanctioned remedies.

At the same time, however, the judiciary should be careful not to usurp the rightful powers of the other branches of the federal government or those of the states and their subdivisions, for ultimately the separation and distribution of government powers is one of the most important safeguards of freedom under our Constitution. One of the ways in which the Constitution seeks to confine federal courts to their proper sphere is by limiting their jurisdiction and by restricting the judicial power to actual "cases" and "controversies" (Art. III, sec. 2). Accordingly, as the Supreme Court has pointed out, federal courts must faithfully respect the limits of their jurisdiction and must heed the doctrines of standing and ripeness, which are rooted in vital Article III concerns.

While courts should use all proper judicial remedies to correct violations of law, the courts must ensure that they do not step over the line into the fields of lawmaking or governmental administration, where the judiciary generally lacks both authority and expertise. Courts are well suited to decide the particular cases that come before them, but they cannot match the ability of legislative bodies to gather facts or frame comprehensive rules of law regulating complex activities. Similarly, courts cannot equal the resources or expertise generally employed by executive agencies in administering large governmental facilities or programs for extended periods of time.

In sum, our system of government works best when the federal judiciary -- and indeed, all three branches -- resist the temptation to extend their powers beyond their intended spheres.

**AFFIDAVIT**

I, SAMUEL A. ALITO, JR., do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

Feb. 21, 1990

(DATE)

Samuel A. Alito, Jr.

(NAME)

Elvira Sisto

(NOTARY)

**ELVIRA SISTO**  
NOTARY PUBLIC OF NEW JERSEY  
My Commission Expires Dec. 7, 1991



**FINANCIAL STATEMENT**  
**NET WORTH**

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

ASSETS			LIABILITIES		
Cash on hand and in banks	13,000	00	Notes payable to banks—secured	--	--
U.S. Government securities—odd schedule	40,300	00	Notes payable to banks—unsecured	--	--
Listed securities—odd schedule	20,200	00	Notes payable to relatives	--	--
Unlisted securities—odd 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—odd schedule	202,400	00
Real estate owned—odd schedule	305,000	00	Chattel mortgages and other liens payable	--	--
Real estate mortgages receivable	--	--	Other debts—itemize:	--	--
Autos and other personal property	35,000	00			
Cash value—life insurance					
Other assets—itemize:	97,300	00			
(schedule attached)					
<b>Total assets</b>	<b>510,800</b>	<b>00</b>	<b>Total liabilities</b>	<b>202,400</b>	<b>00</b>
			<b>Net worth</b>	<b>308,400</b>	<b>00</b>
			<b>Total liabilities and net worth</b>		
CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, cosigner or guarantor	--	--	Are any assets pledged? (Add schedule.)	No	
On leases or contracts	--	--	Are you defendant in any suits or legal actions?	Yes*	
Legal Claims	--	--	Have you ever taken bankruptcy?	No	
Provision for Federal Income Tax	--	--			
Other special debt	--	--			

\*Solely in my official capacity as U.S. Attorney

SCHEDULES

U.S. Govt. Securities Series EE Bonds	\$ 40,300.
Listed securities	
N.J. Health Care Facilities Bonds	\$ 10,100.
N.J. Housing Finance Authority Bonds	10,100.
Real estate	
Residence at 14 Seymour Street Caldwell, N.J.	\$ 305,000.
Other assets	
Tax Exempt Sec. Trust Series 108	\$ 13,700.
Vanguard Municipal Bond Funds	
Money Market	\$ 34,300.
Intermediate Term	\$ 4,700.
Insured Long Term	\$ 17,100.
Vanguard Wellington Mutual Fund	\$ 20,100.
Vanguard Star Fund	\$ 5,500.
National Liquid Reserves Cash Portfolio	\$ 1,900.
Real estate mortgage	
On residence; held by First Federal Savings and Loan of Rochester, N.Y.	\$ 202,400.